their homes under the Master Plan. Therefore, even if these Petitioners do not own property within the City, their proximity to the proposed development is sufficient to establish a beneficial interest in obtaining a writ of mandamus reinstating the City's August 23-24 decision denying Red Hawk's Application.

iii. Petitioners Have Taxpayer Standing To Challenge Illegal Action

The Respondents further argue that the remaining Petitioners lack taxpayer standing because these Petitioners will "suffer no more detriment than any of their fellow taxpayers who travel the Pyramid Highway or visit the Lazy 5 Park." See Motion to Dismiss at page 13, lines 6-7.[5] However, the Petitioners need not show any special injury for taxpayer standing because of the type of relief they seek. Rather, all taxpaying citizens have standing to challenge a municipality's abuse of its discretionary powers or arbitrary and capricious acts that are in violation of state law. See City of Las Vegas v. Cragin Indus., Inc., 86 Nev. 933, 939, 478 P.2d 585, 589 (1970), disapproved on other grounds by Sand Valley Assocs. v. Sky Ranch Estate Owners, 117 Nev. 948, 35 P.3d 964 (2001); see also Blanding v. City of Las Vegas, 52 Nev. 52, 75-76, 280 P. 644, 650 (1929); State of Nevada v. Gracey, 11 Nev. 223, 229-30 (1876). Because the Petitioners seek the faithful execution of the laws of this State and the abatement of unauthorized and illegal conduct, they have taxpayer standing to challenge the City's actions.

The Nevada Supreme Court explained this basis for taxpayer standing in City of Las Vegas v. Cragin Industries, Inc. 86 Nev. at 938, 478 P.2d at 589. In Cragin, the City of Las Vegas had an ordinance that required all electrical circuits to be placed underground. Id. Despite the requirements of this ordinance, the City of Las Vegas and Nevada Power Company entered into an agreement known as the "Joint Ownership Agreement", pursuant to which the parties "agreed that the power company would install extensions upon the top of the steel light poles and string electric wires therefrom." See id. at 936, 478 P.2d at 587. Cragin Industries filed suit on behalf of itself and all

[5] This argument seems to suggest that because all citizens will suffer injury as a result of the City's decision to approve the Settlement, no particular citizen will suffer particularized injury to create standing. This argument is obviously flawed because the City cannot justify its illegal conduct by claiming the illegal conduct will negatively impact everyone equally. If it could, nobody would ever have standing to challenge unauthorized government conduct, and such a result would fly in the face of well-settled law conferring standing on all taxpaying citizens when illegal conduct occurs. See Cragin Industries, 86 Nev. at 938, 478 P.2d at 589.

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taxpayers of the City of Las Vegas, seeking a permanent injunction against the City of Las Vegas and Nevada Power Company, prohibiting the placement of electrical wires above ground pursuant to the Joint Ownership Agreement. See id. The district court entered summary judgment in favor of Cragin Industries, (i) declaring the Joint Ownership Agreement null and void, and (ii) permanently enjoining the City of Las Vegas and Nevada Power Company from constructing or maintaining above-ground electrical power lines. See id.

On appeal, the Supreme Court of Nevada affirmed the district court's decision, concluding that the "trial court correctly found that the *agreement* between the city and the power company was null, void and against public policy and reached the proper result when it enjoined them from placing and maintaining overhead electric power lines." Id. at 938, 478 P.2d at 589 (emphasis added). Most importantly, the Court noted that it did not even have to consider whether Cragin Industries had shown special irreparable injury separate and distinct from the injuries sustained by the general public and all Las Vegas taxpayers. See id. at 938, 589. In fact, the Court never once mentioned, let alone discussed, who Cragin Industries was or how the Joint Ownership Agreement affected it, if at all. See id. Instead, the Court concluded that "*any citizen* of the city of Las Vegas would have had standing to seek injunctive relief, inasmuch as the relief sought is the abatement of unauthorized conduct" that arose out of a written agreement between the City of Las Vegas and a private party that violated a local ordinance. Id. at 939, 478 at 589. This unambiguous statement from the Supreme Court of Nevada regarding taxpayer standing controls this case and mandates the conclusion that the above named Petitioners have standing to prosecute this Petition and challenge the validity of the Settlement.

Here, the Petitioners above, like the plaintiff in Cragin Industries, allege that the City's approval of the Settlement violates Nevada law because, among other things, the Settlement contravenes the Master Plan. Thus, this case falls squarely under the holding of Cragin Industries, and taxpayer standing exists. In fact, the Petitioners, again just like the plaintiff in Cragin Industries, seek a ruling that a settlement between a municipality and a private party is null and void because the Settlement cannot be reconciled with the legal requirements of this State and the City's own ordinances. Moreover, the Petitioners are in the same position as the plaintiff in Cragin Industries in the sense that the Petitioners' initiation of the instant lawsuit was the only just, speedy and effective

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remedy available to it. Accordingly, the Petitioners have standing to prosecute this Petition because al taxpaying citizens have standing in situations, such as the one presented here, where a municipality has abused its discretionary powers or acted arbitrarily and capriciously in violation of a state or local law. See Cragin Indus., 86 Nev. at 939, 478 P.2d at 589.

Further, and as the Respondents concede, the Supreme Court has consistently refused to construe taxpayer standing narrowly. See State of Nevada v. Gracey, 11 Nev. 223 (1876). In State of Nevada v. Gracey, a Storey County taxpayer filed suit, seeking a writ of mandamus to compel the performance of certain legal duties by a government official. Id. at 224. The defendants argued that the taxpayer did not have standing to seek mandamus because the taxpayer had not shown an interest in the subject matter of the litigation separate and distinct from the interests of all other Storey County citizens. See id. at 227. The Court noted that other jurisdictions had adopted the position the defendants advocated with respect to taxpayer standing, but expressly rejected the narrow interpretation of taxpayer standing adopted in those jurisdictions. See id. at 229-30. In doing so, the Court followed decisions from other jurisdictions, including Illinois, New York and Ohio, and concluded that where a public right is involved and the object of a mandamus petition is the faithful execution of local laws, the petitioner need not show any legal or special interest in the result of the case; "it being sufficient if he shows that he is interested, as a citizen, *in having the laws executed and the [public] right enforced.*" Id. at 230 (emphasis added). The Court accordingly held that taxpayer standing existed because the plaintiff was manifestly interested, purely as a taxpaying citizen of Storey County, in having local and state laws enforced according to their terms. Id.

At issue in this case is the City's unlawful approval of the Settlement that allows Red Hawk to proceed with the development of a non-restricted gaming establishment at Tierra del Sol, without requiring an amendment to the Master Plan. Thus, the relief the Petitioners seek is the faithful execution of the laws of this State and the abatement of unauthorized and/or illegal conduct. The Petitioners also seek to compel the City to reinstate its original August 23-24 vote denying Red Hawk's Application. Under these circumstances, the rights at issue are public, rather than private, and the Nevada Supreme Court has made clear that the Petitioners, as taxpayers, have standing to enforce those public rights.

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d. The Statute of Limitations Does Not Bar the Petition for Judicial Review

In a last ditch effort to dismiss this case and avoid addressing the merits (or lack thereof) of the City's conduct, the Respondents argue that the Petitioners cannot seek judicial review of the September 20, 2006 meeting of the City Council, during which the Council expressly voted to approve its Settlement with Red Hawk, because, according to the Respondents, this vote did not constitute an "action" by the City Council. See Motion to Dismiss at page 17, lines 8-11. Instead, the Respondents argue that the Petitioners should have sought judicial review from the City's August 23-24, 2006 vote denying Red Hawk's Application, and therefore, the current petition is untimely.

Although the Respondents astutely observe that "Petitioners will undoubtedly claim that they had no reason to petition for review from the August 23-24, 2006 vote," they nevertheless attempt to argue that the August 23-24 vote denying the Application was the only "action" taken by the City from which Petitioners could seek judicial review. However, because the Petitioners had no reason to contest a vote by the City Council that was based on substantial evidence and correctly interpreted the law to deny the Application, the Petitioners are not seeking "a second bite at the apple" in this case as the Respondents allege. *See* Motion to Dismiss at page 17, lines 16-17 (emphasis added). Rather, the City only took action adverse to the Petitioners and contrary to the laws of this State on September 20, 2006, after being compelled by the Attorney General to correct an obvious violation of Nevada's Open Meeting Laws. Accordingly, the only action that could justify the instant lawsuit was the action taken by the City on September 20, 2006, necessarily defeating the Respondents' statute of limitations defense.

To be sure, the Respondents claim that the September 20 meeting was perfunctory, but the Respondents fail to explain how a meeting resulting in a close three to two vote can be characterized as perfunctory. The Respondents also conveniently fail to address the fact that the City could have voted against the Settlement on September 20, 2006, negating the Settlement altogether. Thus, the City's meeting on September 20, 2006 was anything but perfunctory because it was the precise moment when the City took official action to approve the Settlement, triggering the applicable statute of limitations for this case. The instant lawsuit was thereafter timely filed on October 6, 2006 to challenge the City's September 20 decision to approve the Settlement.

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Chapter 241 of the Nevada Revised Statutes confirms the foregoing conclusion. NRS 241.015(2)(a)(1) defines a "meeting" as "[t]he gathering of members of a public body at which a quorum is present 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(1) defines "action," in relevant part, as "(a) [a] decision made by a majority of the members present during a meeting of a public body;" or "(b) [a] commitment or promise made by a majority of the members present during a meeting of a public body." Interpreting these provisions of Nevada's Open Meeting Law, the Nevada Supreme Court reasoned that "[t]he present law merely requires that a quorum of a board, even when attorney-client business is being conducted, must hold open meetings. Although this requirement might create some measure of frustration or inconvenience in the parties' legal dealings, it is certainly not the kind of arrangement that can be said to destroy the relationship and make it impossible for a public body to receive the legal advice necessary to carry out the public business." McKay v. Board of County Com'rs of Douglas County, 103 Nev. 490, 746 P.2d 124, 127 (1987). The events that occurred during the public meeting on September 20, 2006 satisfy the statutory definitions of "meeting" and "action" under NRS Chapter 241, and therefore, it is beyond dispute that the City's decision to approve the Settlement independently triggered the statute of limitations for any claims challenging that decision.

The Respondents also argue that the September 1, 2006 meeting between the City and its counsel was merely an attorney-client session excluded from the statutory definition of "meeting." Another disingenuous argument Respondents make is that "*it cannot be known what was discussed* during the session." *See* Motion to Dismiss at page 15, n.4. It is not too much of a stretch to determine what type of advice the Sparks city attorney gave to the City based on the resulting signing of the Settlement. Therefore, while the City might have received information from the city attorney during this meeting on September 1, what the Respondents blatantly ignore is the resulting action taken after that meeting to officially approve the Settlement on September 20, 2006, giving rise to this lawsuit.

Moreover, because the September 1 meeting was such an obvious violation of the Open Meeting Law, the Attorney General immediately reprimanded the City for the potential violation and

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demanded that the City hold a public meeting. Therefore, the Petitioners did not have to complain about a violation of the Open Meeting Law because the Attorney General did so in a timely fashion pursuant to NRS 241.037(3). As a result, the subsequent September 20, 2006 meeting was not merely perfunctory, but rather mandated by Nevada law. The City Council had to openly approve the Settlement and thereby openly reverse its previous decision denying Red Hawk's Application. The Petitioners have therefore correctly sought timely review of the City's September 20, 2006 decision to approve the Settlement and proceed with approval of the Application.

IV. Conclusion

The Respondents' motion to dismiss constitutes nothing more than a series of inherently inconsistent arguments. For example, the Respondents argue that the Petitioners do not have standing to challenge the City's decision to enter into the Settlement; yet, the Respondents argue that the Petitioners should have intervened in the lawsuit Red Hawk filed against the City in order to prevent the Settlement, which would have necessarily required standing and an interest in the Settlement. Similarly, the Respondents argue that the Petitioners cannot assert standing under NRS Chapter 278 because this case involves the City's authority to settle a lawsuit; yet, the Respondents maintain that judicial review under NRS Chapter 278 is the Petitioners' exclusive remedy because this case involves a land use decision. Finally, the Respondents argue that this lawsuit constitutes an impermissible collateral attack on the Settlement approved by Judge Adams, but later claim that this lawsuit is untimely because it relates back to the City's August 23-24, 2006 decision denying the Application.

The foregoing inconsistencies demonstrate that the Respondents' motion to dismiss is a baseless attempt to avoid the merits of this case. Indeed, the motion fails to acknowledge the series of events that admittedly resulted in this lawsuit – the City's decision to deny the Application on August 23-24, 2006 because the Application conflicts with the Master Plan and the City's subsequent decision to approve the Settlement on September 20, 2006, which requires the City to approve the Application without regard to the Master Plan. While it is certainly understandable that the Respondents would like to avoid defending the City's conduct in this regard, their scattered attempt to dismiss this lawsuit at this stage of the proceedings fails. Accordingly, this Court should deny the Respondents' motion to dismiss and allow this case to proceed on the merits.

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For all the foregoing reasons, the Petitioners respectfully request that this Court deny Respondents' Motion to Dismiss Petitioners' Petition for Judicial Review, Writ of Certiorari, and Writ of Mandamus.

DATED this 22nd day of March, 2007.

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PROOF OF SERVICE VIA HAND DELIVERY

I, Liz Ford, declare:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Hale Lane Peek Dennison and Howard. My business address is 5441 Kietzke Lane, Second Floor, Tenth Floor, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

I am readily familiar with Hale Lane Peek Dennison and Howard's practice for collection and delivery of its hand-deliveries. Such practice in the ordinary course of business provides for the delivery of all hand-deliveries on the same day requested.

On March 22, 2007, I caused the foregoing **OPPOSITION TO MOTION TO DISMISS PETITIONERS' PETITION FOR JUDICIAL REVIEW, WRIT OF CERTIORARI, AND WRIT OF MANDAMUS** to be hand-delivered by providing a true and correct copy to Hale Lane Peek Dennison and Howard's runners with instructions to hand-deliver the same to:

Chester H. Adams, Esq.
Sparks City Attorney
David C. Creekman, Esq.
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Attorneys for Red Hawk Land Company

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on March 22, 2007.

Liz Ford

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **Opposition to Motion to Dismis Petitioners' Petition for Judicial Review, Writ of Certiorari, and Writ of Mandamus** filed in District Court Case No. **CV06-02410** does not contain the social security number of any person.

DATED this 22nd day of March, 2007.

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Senior Planner Tim Thompson, in response to a question about whether a transfer could be accomplished without a Master Plan amendment, stated "[p]ossibly yes. In the case of [another planned development known as] the Foothills, . . ., there was no Master Plan Amendment associated with the Foothills; we simply moved land uses around that were within those areas." Id. at page 12. However, Senior Planner Thompson acknowledged that the transfers were done "solely within the Foothills development" and that to his knowledge, "we have never done a transfer like this [from one PD to another]. This is definitely the first time." Id.

The Planning Commission voted four to three, against Staff's recommendation, and denied the Application. The Planning Commission denied the Application because it found that the Application was inconsistent with the Master Plan, and that the Application did not further the interests of the City. The Planning Commission presented the Application with a recommendation for denial to the City Council at a special meeting held August 23, 2006.

At that meeting, the Council Members adopted the Planning Commission's recommendation and voted three to two against the Application. In doing so, the City noted that the Application (i.e, the transfer of a non-restricted gaming use from Wingfield Springs to the GC Tierra del Sol property) was inconsistent with the Master Plan and could not accordingly be approved. Councilwoman Moss also questioned how the gaming entitlement could be moved pursuant to section 3.08(d) of the Development Agreement when Tierra del Sol was not within the City at the time the Development Agreement was made. She stated that if other sections of the Development Agreement were "frozen in time," then the phrase "within the City" should also be frozen in time. Councilwoman Moss further commented that according to the Regional Planning Commission, major changes to Wingfield Springs would require further review by the City and the Regional Planning Commission. Therefore, it was her understanding that Redhawk's Application would have to first be reviewed and approved by the Regional Planning Commission, which had not occurred. See **Exhibit 10**, DVD of Aug. 23, 2006, Sparks City Council Meeting.

After a motion was made, the City, as noted above, adopted the Planning Commission's recommendation and voted three to two against the Application. Councilmember Mayer voted no because he did not believe the City intended to allow Redhawk (as the successor to Loeb) to move

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gaming outside of Wingfield Springs under the Development Agreement; Councilmember Salerno voted no because he believed the City's infrastructure was not prepared to support Redhawk's project at Tierra del Sol; and Councilmember Moss voted no because she did not think that Tierra del Sol was the right location for a hotel casino.

e. Redhawk's Lawsuit and The City's Approval of The Settlement.

On August 25, 2006, only two days following the City's decision, Redhawk filed a complaint against the City alleging, among other things, breach of the Development Agreement and damages in excess of $100 million. See **Exhibit 11**, Redhawk's Complaint. The City Attorney, Chet Adams, responding to the lawsuit, believed the City Council did a good job of documenting their reasoning for the vote. See **Exhibit 12**, Court battle is likely after Lazy 8 rejected, Reno Gazette Journal, Aug. 25, 2006. Adams was quoted as saying that the City has "a considerable amount of discretion when it comes to land use, issues of public safety and health and welfare. They are vested with the authority to make those decisions as long as they are supported by the record." Id. "When asked if the council made a rational, reasonable decision, Adams said, 'they certainly believed they did.'" Id.

Adams further said, however, that: "'I believe the City Council has put me in a difficult situation because they have gone against our legal advice and that will obviously complicate the defense of this matter in court.'" See **Exhibit 13**, Developer sues Sparks over Lazy 8, Reno Gazette Journal, Aug. 26, 2006. Adams went on to add: "I will say that the complaint is very well written and that it appears at least at first reading to be meritorious." Id. Despite the City Attorney's comments, petitioner Nugget had sent numerous letters, through its undersigned counsel, to the Planning Commission and the City demonstrating that Redhawk's Application could be denied under Nevada law. See **Exhibit 14**, Hale Lane Letters to Planning Commission.

Less than one week later, on September 1, 2006, the City Attorney and the Council members met and allegedly discussed the City's denial of the Application and Redhawk's resulting lawsuit. This meeting resulted in the signing of a Stipulation, Judgment and Order by the City Attorney, the Deputy City Attorney, and two of Redhawk's attorneys, Stephen Mollath, Esq. and Leif Reid, Esq.

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Judge Brent Adams approved the Settlement that same day.[7] See **Exhibit 15**, Sept. 1, 2006, Stipulation, Judgment and Order. After announcing the Settlement, Mayor Martini commented: "'At the beginning of the week, Chet Adams advised me that he could not defend the city against the lawsuit.'" See **Exhibit 16**, Angela Mann, Lazy 8 Casino given green light, Daily Sparks Tribune.

On September 7, 2006, the Nevada Attorney General's office sent a letter to the City Attorney, stating that the September 1, 2006, meeting was conducted in violation of Nevada's Open Meeting Law and that if the City did not hold a public hearing to have a public vote on the Settlement, the Attorney General's office would file suit against the City. See **Exhibit 17**, Attorney General's Letter. In response to the letter, City Attorney Adams stated: "'You've seen how my clients are running and hiding to save their political futures here . . . If we go before a city council vote now, who knows what these people will vote for.'" See **Exhibit 18**, Sparks faces lawsuit over Lazy 8, Reno Gazette Journal, Sept. 7, 2006. Publicly, the City Attorney stated that he would not consider a public hearing on the Settlement, but on September 7, 2006, the City announced a special meeting to be held September 20, 2006, to review the Settlement publicly.

On September 20, 2006, the City Council did, in fact, meet publicly to discuss and vote on the Settlement. At that meeting, City Attorney Adams responded to the Attorney General's allegations regarding the potential violation of the Open Meeting Law by stating that he believed the September 1, 2006, meeting with the City was a privileged attorney-client session. After Councilmember Mayer made a motion to appoint outside legal counsel to review the issue and report back to the City, City Attorney Adams was "at a loss" as to why Mayer suggested hiring another lawyer and found the request "disingenuous at best." See **Exhibit 19**, Lazy 8 casino settlement approved, Reno Gazette Journal, Sept. 21, 2006. Councilmember Schmitt responded that he did not think the City Charter authorized the City to hire outside legal counsel and councilmember Mayer's motion was voted down 3-2.

Instead of delaying a decision on how to proceed, a motion was made to settle the lawsuit with Redhawk. Councilmember Moss, who originally voted against Redhawk's Application, voted to

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[7] Settlement discussions between Red Hawk and the City of Sparks has already been conducted earlier in the week and a settlement was reached during the parties settlement conference with the Honorable Brent Adams on August 31, 2006, subject to approval of the Sparks City Council

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approve the Settlement. She expressed that although she would "like to dig in [her] heels," she did not feel like she could go on with the lawsuit because the City Attorney had ultimately recommended the Settlement. Councilmember Schmitt stated that only a judge could discern the intent of the Development Agreement. Schmitt also said he had received some personal, outside legal advice on the matter, stating that a friend of his told him the City's "case is weak." See **Exhibit 20**, DVD of Sept. 20, 2006, Sparks City Council meeting. Councilmember Carrigan voted to settle the lawsuit because the City Attorney had told the council "eight different times" that the City cannot win. Councilmembers Mayer and Salerno stood by their original decisions and voted against the Settlement. The City therefore approved the Settlement by a three to two vote. See id.

Just over a week later, Councilman Ron Schmitt expressed doubts about the City's decision to approve the Settlement. Councilman Schmitt was quoted as saying, "I don't want a whole hearing on the Lazy 8 again, but the question is, 'Are we doing the right thing?'" Schmitt also expressed concern that the City was "receiving advice from the city attorney that [he was] increasingly uncomfortable with." See **Exhibit 21**, Schmitt wants Lazy 8 revisited, Reno Gazette Journal, Sept. 29, 2006.

As it now stands, the Settlement allows Redhawk to "transfer" an alleged tourist commercial zone and non-restricted gaming use from Wingfield Springs to Tierra del Sol, despite the City's determination on August 23, 2006 that non-restricted gaming at Tierra del Sol is incompatible with the Master Plan.

STATEMENT OF THE ISSUE PRESENTED

Whether the City abused its discretion and acted arbitrarily and capriciously when it approved the Settlement, thereby allowing Redhawk to proceed with its Application in violation of the Master Plan and applicable State law.

STATEMENT OF RELIEF SOUGHT

The Petitioners respectfully request that this Court grant this Petition for Judicial Review, void the Settlement, and order the City to reinstate its August 23/24, 2006 decision, denying Redhawk's Application.

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STATEMENTS OF REASONS WHY JUDICIAL REVIEW SHOULD BE GRANTED

1. The City abused its discretion and acted arbitrarily and capriciously when it approved the Settlement because (a) allowing tourist commercial zoning and nonrestricted gaming at Tierra del Sol, when such a use is not allowed in that development, is a complete disregard and violation of the Master Plan, (b) the City had already designated the location for a small tourist commercial node under the NSSOI Plan within Wingfield Springs, (c) the Application is not a density bonus exception to Master Plan conformance, and (d) the Development Agreement provides no basis for a finding of Master Plan conformance and a transfer of a so-called unused development right.

2. The Petitioners have no plain, speedy, or adequate remedy in the ordinary course of the law, other than through the instant petition.

POINTS AND AUTHORITIES IN SUPPORT OF VERIFIED PETITION

I. Standard For Seeking Judicial Review.

A petition for an extraordinary writ, such as certiorari and mandamus, is the proper procedural avenue for seeking judicial review of a city's actions to determine whether the city abused its discretionary powers or acted arbitrarily and capriciously in violation of state law. See, e.g., Washington v. Clark County Liquor & Gaming Licensing Bd., 100 Nev. 425, 428, 683 P.2d 31, 33-34 (1984); Board of Comm'rs of the City of Las Vegas v. Dayton Dev. Co., 91 Nev. 71, 75, 530 P.2d 1187, 1189 (1975) (writ of mandamus "available to correct a manifest abuse of discretion by the governing body"); see also County of Clark v. Atlantic Seafoods, Inc., 96 Nev. 608, 611, 615 P.2d 233, 235 (1980) ("Mandamus is an appropriate remedy when discretion is exercised arbitrarily or capriciously."). In general, an extraordinary writ may issue only when, as is the case here, there is no plain, speedy, and adequate remedy at law; however, if, as is also the case here, circumstances reveal urgency or strong necessity, a court may grant extraordinary relief. See Jeep Corp. v. District Court, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (citing Shelton v. District Court, 64 Nev. 487, 185 P.2d 320 (1947).) The Petitioners have no plain, speedy, or adequate remedy in the ordinary course of the law, other than through the instant Petition, and therefore, this Petition is the proper procedural avenue for seeking judicial review of the City's actions with respect to the Settlement and Application.

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II. The Petitioners Have Standing To File This Petition.[8]

a. The Following Petitioners Have An Interest in the Outcome of Litigation

Due to their proximity to the proposed hotel casino development at Tierra del Sol, Petitioners Adams, Clement, Grieve, Hendricks and Maher have a beneficial interest in obtaining a writ of mandamus reinstating the City's August 23, 2006 decision, denying Redhawk's Application. "Standing is the legal right to set judicial machinery in motion." Secretary of State v. Nevada State Legislature, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) (quoting Smith v. Snyder, 839 A.2d 589, 594 (Conn. 2004)). "To establish standing in a mandamus proceeding, the petitioner must demonstrate a 'beneficial interest' in obtaining writ relief." Id. at 460-61, 93 P.3d at 749; see also State v. State Bank & Trust Co., 37 Nev. 55, 139 P. 505, 512 (1914) ("The cases holding that a party, in order to be entitled to have any affirmative relief in an action or to have the right of appeal, must have a beneficial interest are numerous and without conflict."). In Secretary of State v. Nevada State Legislature, the Nevada Supreme Court stated that "'[t]o demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." 120 Nev. at 461, 93 P.3d at 749 (quoting Lindelli v. Town of San Anselmo, 4 Cal.Rptr.3d 453, 461 (Cal. App. 4th 2003)). "Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." Id. (quoting Waste Management v. County of Alameda, 94 Cal.Rptr.2d 740, 747 (Cal. App. 4th 2000)).

The above named Petitioners live in residential communities on the opposite side of the Pyramid Highway, directly facing the proposed hotel/casino project at Tierra del Sol. These Petitioners will suffer all of the consequences that accompany the development of a hotel/casino that is practically in their backyard. In fact, as a result of the City's unlawful actions in approving the Settlement, these Petitioners will be subjected to a hotel/casino that is not permitted near their homes. Accordingly, these Petitioners will gain a direct benefit from this Court's issuance of a writ of mandamus reinstating the City's August 23/24, 2006 decision, and are bound to suffer a direct

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[8] All petitioners are aggrieved persons within the meaning of NRS 278.3195(4) and the Sparks Municipal Code and would have the right to appeal a decision of the Sparks City Council on any land use matter and because this action of the Sparks City Council overturns a valid land use decision by the Sparks City Council, these petitioners have standing.

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detriment if this Court declines to do so.

b. The Following Petitioners, as Taxpaying Citizens, Have Standing to File This Petition

Additionally, Petitioners Ryan and Bryan Boren, Ian and Cassandra Grieve, Joseph and Rose Marie Donohue, and Eugene and Kathryn Trabitz, and the Sparks Nugget have standing to prosecute this petition because all taxpaying citizens have standing in situations, such as this one, where a municipality has abused its discretionary powers or acted arbitrary and capriciously in violation of state law. See City of Las Vegas v. Cragin Indus., Inc., 86 Nev. 933, 939, 478 P.2d 585, 589 (1970), disapproved on other grounds by Sand Valley Assocs. v. Sky Ranch Estate Owners, 117 Nev. 948, 35 P.3d 964 (2001); see also Blanding v. City of Las Vegas, 52 Nev. 52, 75-76, 280 P. 644, 650 (1929); State of Nevada v. Gracey, 11 Nev. 223, 229-30 (1876). In City of Las Vegas v. Cragin Industries, Inc., 86 Nev. 933, 939, 478 P.2d 585, 589 (1970), disapproved on other grounds by Sandy Valley Assocs. v. Sky Ranch Estate Owners, 117 Nev. 948, 35 P.3d 964 (2001), the Supreme Court of Nevada concluded that "*any citizen* of the city of Las Vegas would have had standing to seek injunctive relief, inasmuch as the relief sought is the abatement of unauthorized conduct" that arose out of a written agreement between the City of Las Vegas and a private party that violated a local ordinance. This unambiguous statement from the Supreme Court of Nevada regarding taxpayer standing controls this case and mandates the conclusion that the above named Petitioners have standing to prosecute this Petition and challenge the validity of the Settlement. The facts and holding of Cragin Industries are as follows:

The City of Las Vegas had an ordinance that required all electrical circuits to be placed underground. See id. at 938, 478 P.2d at 589. Despite the requirements of this ordinance, the City of Las Vegas and Nevada Power Company entered into an agreement known as the "Joint Ownership Agreement", pursuant to which the parties "agreed that the power company would install extensions upon the top of the steel light poles and string electric wires therefrom." See id. at 936, 478 P.2d at 587. Cragin Industries filed suit on behalf of itself and all taxpayers of the City of Las Vegas, seeking a permanent injunction against the City of Las Vegas and Nevada Power Company, prohibiting the placement of electrical wires above ground pursuant to the Joint Ownership Agreement. See id. The

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district court entered summary judgment in favor of Cragin Industries, (i) declaring the Joint Ownership Agreement null and void, and (ii) permanently enjoining the City of Las Vegas and Nevada Power Company from constructing or maintaining above-ground electrical power lines. See id. On appeal, the Supreme Court of Nevada affirmed the district court's decision, concluding that the "trial court correctly found that the *agreement* between the city and the power company was null, void and against public policy and reached the proper result when it enjoined them from placing and maintaining overhead electric power lines". Id. at 938, 478 P.2d at 589 (emphasis added).

The Court, in reaching this conclusion, noted that it did not even have to consider whether Cragin Industries had shown special irreparable injury separate and distinct from the injuries sustained by the general public and all Las Vegas taxpayers. See id. at 938, 589. In fact, the Court never once mentioned, let alone discussed, who Cragin Industries was or how the Joint Ownership Agreement affected it, if at all. See id. Instead, the Court held, as discussed above, that any taxpayer would have had standing to bring the lawsuit Cragin Industries had brought because "*the relief sought [was] the abatement of unauthorized conduct.*" See id. at 939, 589 (emphasis added). The Court then went on to note that Cragin Industries' complaint for injunctive relief "was the only just, speedy and effective remedy available to [it]." Id.

Here, the Petitioners above, like the plaintiff in Cragin Industries, have specifically alleged herein that the City's approval of the Settlement violates Nevada law because, among other things, the Settlement contravenes the Master Plan. Thus, this case falls squarely under the holding of Cragin Industries, and taxpayer standing exists. In fact, the Petitioners, again just like the plaintiff in Cragin Industries, seek a ruling that a settlement between a municipality and a private party is null and void because the settlement cannot be reconciled with the legal requirements of this State and the City's own ordinances. Moreover, the Petitioners are in the same position as the plaintiff in Cragin Industries in the sense that the Petitioners' initiation of the instant lawsuit was the only just, speedy and effective remedy available to it. Accordingly, the Petitioners have standing to prosecute this Petition because all taxpaying citizens have standing in situations, such as the one presented here, where a municipality has abused its discretionary powers or acted arbitrarily and capriciously in violation of a state or local law. See Cragin Indus., 86 Nev. at 939, 478 P.2d at 589.

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The decision in Cragin Industries does not stand alone as the only support for the conclusion that the above named Petitioners, as taxpayers, have standing in this case. Dating back to 1876, the Supreme Court of Nevada has refused to construe taxpayer standing narrowly, see State of Nevada v. Gracey, 11 Nev. 223 (1876), and has, consistent with the holding in Cragin Industries, refused to do so since that time. The history of taxpayer standing in the State of Nevada is accordingly discussed more fully below, starting with the Court's 1876 decision in Gracey.

In Gracey, a Storey County taxpayer filed suit, seeking a writ of mandamus to compel the performance of certain legal duties by a government official. See Gracey, 11 Nev. at 224. The defendants argued that the taxpayer did not have standing to seek mandamus because the taxpayer had not shown an interest in the subject matter of the litigation separate and distinct from the interests of all other Storey County citizens. See id. at 227. The Court noted that other jurisdictions had adopted the position the defendants advocated with respect to taxpayer standing, but expressly rejected the narrow interpretation of taxpayer standing adopted in those jurisdictions. See id. at 229-30. In doing so, the Court followed decisions from other jurisdictions, including Illinois, New York and Ohio, and concluded that where a public right is involved and the object of a mandamus petition is the faithful execution of local laws, the petitioner need not show any legal or special interest in the result of the case; "it being sufficient if he shows that he is interested, as a citizen, *in having the laws executed and the [public] right enforced.*" Id. at 230 (emphasis added). The Court accordingly held that taxpayer standing existed because the plaintiff was manifestly interested, purely as a taxpaying citizen of Storey County, in having local and state laws enforced according to their terms.

In reaching this conclusion, the Court relied upon the Supreme Court of Illinois's decision in County Commissioners of Pike County v. State of Illinois, 11 Ill. 202, 1849 WL 4277 (1849). In that case, a taxpayer sued county officials, seeking a writ of mandamus ordering county officials to spend public funds in accordance with a state statute. See id. 1849 WL 4277 at * 4. The Supreme Court of Illinois held that the taxpayer had standing to prosecute the action. The court explained: "Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced, must become the relator. . . . But where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in

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the result. *It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.*" Id. (emphasis added).

The relief the above named Petitioners seek in this case is no different than the relief sought in both Gracey and Pike County.[9] At issue in this case is the City's unlawful approval of the Settlement that allows Redhawk to proceed with the development of a non-restricted gaming establishment at Tierra del Sol, without requiring an amendment to the Master Plan. Thus, the relief the Petitioners seek is the faithful execution of the laws of this State and the abatement of unauthorized and/or illegal conduct. Under these circumstances, the rights at issue are public, rather than private, and Gracey, in addition to Cragin Industries and Pike County, makes clear that the Petitioners, as taxpayers, have standing to enforce those public rights.

III. The City Abused its Discretion When It Approved the Settlement.

The Supreme Court of Nevada has made clear that an abuse of discretion occurs when there is an absence of any justification for a decision or when a decision is baseless, despotic, or "a sudden turn of mind without apparent motive; a freak, whim, mere fancy." City of Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994); see also City Council of the City of Reno v. Irvine, 102 Nev. 277, 279, 721 P.2d 371, 373 (1986) ("the essence of the abuse of discretion, of the arbitrariness or capriciousness of governmental action in denying a license application, is most often found in an apparent absence of any grounds or reasons for the decision. 'We did it just because we did it.'"). Accordingly, "[t]he function of the district court is to ascertain as a matter of law whether there was substantial evidence before the [City] which would sustain the [City's] actions." Enterprise Citizens Action Committee v. Clark County Board of Commissioners, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). If, after reviewing the record, this Court finds that the City's approval of the Settlement and decision to

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[9] To be sure, the plaintiffs in Gracey and Pike County sued to compel government action, whereas the Petitioners are seeking to void government action (i.e., the City's approval of the Settlement), but that is a distinction without a difference. The Petitioners, just like the plaintiffs in Gracey and Pike County, are seeking to enforce applicable laws and prevent government conduct that violates those laws. As a result, the Petitioners, as taxpayers, have standing to prosecute this action without a showing of special injury.

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proceed with the transfer of a purported nonrestricted gaming entitlement from Wingfield Springs to Tierra del Sol is not supported by substantial evidence, this Court must make a finding that the City abused its discretion and acted arbitrarily and capriciously in approving the Settlement. Enterprise, 112 Nev. at 654, 918 P.2d at 308.

As discussed more fully below, the City abused its discretion and acted arbitrarily and capriciously when it approved the Settlement because the Settlement, in violation of applicable laws and regulations, allows Redhawk to proceed to develop a non-restricted gaming establishment on the Pyramid Highway at Tierra del Sol without properly approved tourist commercial zoning required for non-restricted gaming. In particular, the City's actions constituted an abuse of discretion because (a) allowing nonrestricted gaming in the General Commercial zone at Tierra del Sol is not in substantial compliance with, but rather a total disregard of, the Master Plan, (b) proceeding with the Settlement without requiring an amendment to the Master Plan or the NSSOI Plan violates state law, (c) the present case does not involve a density bonus that could justify the City's actions under NRS 278.250, and (d) the Development Agreement for Wingfield Springs does not allow the relocation of a so-called unused development credit to any area in Northern Sparks.[10]

A. Nevada Law Requires Substantial Compliance With The Master Plan and the Settlement Disregards the Master Plan.

In approving the Settlement and allowing Redhawk to transfer its purported hotel/casino entitlement to a General Commercial zone where such a use is not allowed, the City has not just failed to substantially comply with its Master Plan, but has totally disregarded it. As a result, this Petition should be granted first and foremost because the Settlement cannot be reconciled with the Master Plan.

Under NRS 278.0284, "[a]ny action of a local government relating to development, zoning, the subdivision of land or capital improvements must conform to the master plan of the local government." (emphasis added). To be sure, the Nevada Supreme Court, in interpreting the required level of conformance with a master plan, has stated that a master plan is not a "legislative straightjacket from which no leave may be taken," Nova Horizon, Inc. v. City of Reno, 105 Nev. 92, 96, 769 P.2d 721,

[10] The hotel/casino contemplated for Wingfield Springs is not an unused development right other than by choice of Red Hawk Land Company whose president Harvey Whittemore has testified both before the Sparks Planning Commission on July 6, 2006 and the Sparks City Council on August 23, 2006 that, if he is not allowed to transfer the hotel casino to Tierra del Sol from Wingfield Springs, he will build the hotel casino in Wingfield Springs.

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723 (1989); however, the Court has also stated that the master plan is a "standard that commands deference and a presumption of applicability" and that they "are to be accorded substantial compliance under Nevada's statutory scheme." Id. at 96, 769 P.2d at 723-24. Thus, while strict compliance in all cases may not be required, the Master Plan, particularly the substantive use provisions, cannot be ignored, and conformity is to be insisted upon, subject only to minor deviations in rare cases. See Enterprise Citizens Action Committee v. Clark County Board of Commissioners, 112 Nev. 649, 660. 918 P.2d 305, 312 (1996). The City's actions in this case cannot be considered minor deviations from the Master Plan; instead, the City's actions have totally ignored and violated the Master Plan, and therefore, necessarily constitute an abuse of discretion. See NRS 278.0284 (the master plan governs any action on an application for development).

The Master Plan currently provides that hotel/casino uses may be conducted only in areas designated Tourist Commercial.[11] Therefore, in order to comply with NRS 278.0284, before developing a hotel/casino project in the City on land not designated as Tourist Commercial, the land must be re-designated Tourist Commercial, lest the project fail to conform to the Master Plan and violate state law.

The Sparks Municipal Code ("SMC") does not provide specific procedures for amending the Master Plan. Rather, guidelines for amending the Master Plan are found in Chapter 278 of the Nevada Revised Statutes. Under NRS 278.210, before adopting any substantial amendment to a master plan, the relevant government's planning commission must hold at least one public hearing, notice of which shall be provided to the public at least 10 days in advance. Amendment to a master plan also requires a resolution carried by the affirmative votes of not less than two-thirds of the commission. The commission may not amend the land use plan of a master plan more than four times a year, unless the change in use does not affect more than 25 percent of the area for which the use is designated. An attested copy of an amendment adopted by the commission must further be certified to the city council. Under NRS 278.220, upon receipt of the planning commission's certification, a city council must hold

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[11] The limitation of hotel/casino uses to areas master planned as Tourist Commercial is evidenced both by historical practice and the fact that hotel/casino uses are not mentioned as a permitted use in any land use designation other than Tourist Commercial.

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at least one public hearing before adopting a master plan amendment, which requires a simple majority vote. See Falcke v. County of Douglas, 116 Nev. 583, 589, 3 P.3d 661, 664 (2000).

Additionally, and in accordance with NRS 278.0282, before the adoption of an amendment to the Master Plan occurs, the City must submit the proposed amendment to the TMRPA, which reviews the amendment at one or more public hearings held within 60 days following receipt of the proposed amendment to determine whether the amendment conforms with the regional plan. The City may not adopt the amendment unless the TMRPA determines that the amendment conforms to the regional plan. Conformance requires a determination by not less than two-thirds of the TMRPA that the amendment does not conflict with the regional plan and that it promotes the goals and policies of the regional plan. If the TMRPA does not make a determination within the 60 day period, the amendment is deemed to be in conformance with the regional plan.

In approving the Settlement and reversing its original decision denying Redhawk's Application, the City has ignored its Master Plan by permitting a non-restricted gaming use in a General Commercial district at Tierra del Sol, where non-restricted gaming is not allowed. In addition, the City has effectively amended the Master Plan without satisfying the requirements for such an amendment in NRS 278.210 and NRS 278.0282. As a result, the City abused its discretion and acted arbitrarily and capriciously when it approved the Settlement, and the Settlement should be voided.

The Supreme Court of Nevada has emphasized that master plans are drafted so that uses not expressly listed are not allowed. In Enterprise Citizens Action Committee v. Clark County Board of Commissioners, the Court explained that if a use is not allowed either expressly or by virtue of a special use permit, in order to implement that use, the property must be re-designated to a district in which the use is expressly permitted. Id. at 659, 918 P.2d at 311. Accordingly, to permit a use in a district when such a use is not allowed is in effect to ignore the Master Plan and to accord it no deference at all in violation of State law.

Here, the City is allowing, without a required amendment to the Master Plan, the transfer of an alleged nonrestricted gaming entitlement from Wingfield Springs, where the Master Plan envisions, and by Land Use Map designates, the location of its sole Tourist Commercial node, to a General Commercial area along the Pyramid Highway. As a result, what the City is allowing in this case is not

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a mere absence of strict conformity with, but a total disregard for, the Master Plan in violation of unambiguous Nevada law. Accordingly, the City's actions cannot withstand judicial review, and the Settlement should be voided.

B. A Tourist Commercial Use in Tierra del Sol is Inconsistent With the NSSOI Plan.

The City and Redhawk may attempt to justify the City's approval of the Settlement (and therefore the Application) based upon a particular clause in the NSSOI Plan, that the City and Redhawk may claim allows for the transfer of the non-restricted gaming entitlement from Wingfield Springs to Tierra del Sol. The clause, however, only provides that a "small tourist commercial node" is to be allowed in the planning area. Redhawk has previously relied on this language alone for the proposition that the "small tourist commercial node" can be placed anywhere in the North Sparks planning area. This argument, however, is fundamentally flawed because it ignores the fact that, through its adopted Land Use Map covering the NSSOI planning area (see, in particular, Plate 15 of the NSSOI Plan), the City affixed this TC node to a specific location within the planning area, which location is nowhere near the proposed location for the hotel/casino within Tierra del Sol.

Given the time necessary to fully develop a community, the Land Use Map accompanying the NSSOI Plan is by necessity an evolving, rather than final, graphical rendering of land uses within particular areas. Nevertheless, the Land Use Map shows that the TC node is meant to be somewhere within Wingfield Springs and can be moved around within that development only. Accordingly, because the City affixed the TC node to a specific location, i.e. within Wingfield Springs, neither the City nor Redhawk can credibly claim that the node can be moved to Tierra del Sol, without a Master Plan amendment, in order to justify the Settlement.

Indeed, substantial evidence shows that the City did not intend for the TC node within Northern Sparks to be a moveable target until a particular project came along to fulfill it. Instead, the record, including discussions during the Planning Commission meetings, indicates that the TC node was meant to be a part of Wingfield Springs. See Exhibit 9. In addition, the TMRPA specifically adopted its Limited Gaming Policy in order to accommodate a resort hotel/casino to accompany the other amenities available, such as golfing and dining, at Wingfield Springs. See Exhibit 5. Thus, the

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evidentiary record makes clear that the TC node cannot be moved to Tierra del Sol to allow non-restricted gaming.

The City confirmed the foregoing at the City Council Meeting on August 23 24, 2006. The City found that the graphic depiction of land use designations in the NSSOI Plan prevailed over the textual provisions, thus permitting resort hotel casino gaming only in the area designated Tourist Commercial on Plate 15 of the NSSOI plan. The City also found that, because the proposed action was inconsistent with the Master Plan, the project was not in the public interest. Therefore, the City's original decision, before being threatened by a multi-million dollar lawsuit, was that the textual provisions of the NSSOI Plan must be read in conjunction with and reference to the land use map, and therefore, the TC node could not be moved from Wingfield Springs to Tierra del Sol. In light of this finding, there can be no justification for the Settlement, which effectively turns Tierra del Sol into a TC area with non-restricted gaming without a Master Plan amendment.

Finally, the City cannot now argue that Plate 15 of the NSSOI Plan is irrelevant in order to justify approving Redhawk's Application and the Settlement. Rather, in reading the text and map together, the NSSOI Plan places the TC node, as shown in Plate 15, in an area of Wingfield Springs along a major arterial roadway that is Vista Boulevard. If that conceptual land use plan is to be changed, the City has a duty to amend the NSSOI Plan and cannot simply move the TC node without such an amendment, which the Settlement effectively accomplishes.

C. The City Cannot Comply With the Master Plan By Treating the Gaming Entitlement As A Density Bonus

The City may also attempt to show conformance with the Master Plan under NRS 278.250(4) and (5), by adopting its Staff's reasoning that "[t]his statute envisions the possibility of exceptions to the Master Plan in exchange for certain socially desirable contributions by the developer for the benefit of the City." See Exhibit 8, at page 16. However, the City cannot justify allowing nonrestricted gaming on the Pyramid Highway under NRS 278.250(4) and (5), because this case does not involve a density bonus. Rather, allowing nonrestricted gaming in a General Commercial zone would not comply with the Master Plan because it would allow a more intense use, not a more dense use.

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In relevant part, Section 278.250 of the Nevada Revised Statutes provides as follows:

> 4. In exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate, including, without limitation, density bonuses, inclusionary zoning and minimum density zoning.
>
> 5. As used in this section:
>
> (a) "Density bonus" means an incentive granted by a governing body to a developer of real property that authorizes the developer to build at a greater density than would otherwise be allowed under the master plan, in exchange for an agreement by the developer to perform certain functions that the governing body determines to be socially desirable, including, without limitation, developing an area to include a certain proportion of affordable housing.

While it is true that NRS 278.250(4) alleviates the Master Plan conformance requirement for density bonuses, the statute does not provide an alternative means for finding the Settlement in compliance with the Master Plan.

At issue in this case is whether the City may approve a use that is disallowed in the General Commercial district at Tierra del Sol in the absence of an amendment to the Master Plan, not whether Redhawk should be allowed to build at a greater density. Use and density are different concepts altogether, density meaning "the quantity per unit volume, unit area, or unit length . . . the average number of individuals or units per space unit," and use in this context meaning "the legal enjoyment of property that consists in its employment, occupation, exercise or practice." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 309, 1301 (10th ed. 1997). Thus, if a hotel/casino with 50 units were allowed in the general commercial district, and Redhawk desired to build a hotel/casino with 100 units, such a use would involve a greater "quantity per unit area" and might qualify as a density bonus. However, building a hotel/casino involves the employment of land for a purpose (hotel/casino) not allowed in the General Commercial district at any density. Accordingly, the City's noncompliance with the Master Plan arises not from allowing Redhawk to build at too great a density, but from the simple fact that a hotel/casino is not an allowed use on the Tierra del Sol property. Nevada law is clear that only uses expressly permitted may be implemented. See Enterprise Citizens, 112 Nev. at 659, 918 P.2d at 311-12. The City cannot circumvent this rule by attempting to pigeonhole a disallowed use into the density transfer provision of NRS 278.250, when use and density are not the same.

If the City's position was correct, it would, in theory, be possible under NRS 278.250(4) for a local government to allow the transfer of a use to an area where that use is not otherwise permitted by

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the Master Plan. At present, however, neither the Nevada Revised Statutes nor the Sparks Municipal Code provides any direction or standard for determining when such action may be appropriate, if at all. In the absence of specific standards, if the City is allowed to go down the road of granting variances to the Master Plan, as it is doing by approving the Settlement with Redhawk here, it will create a situation in which exceptions to the Master Plan ultimately swallow the general rule of substantial conformance. Accordingly, NRS 278.250(4) and (5) are a dubious and dangerous basis on which to find Master Plan conformance.

Second, and perhaps even more important, is that the concern over exceptions-swallowing-the-rule, is exacerbated in this case by the terms of the Settlement. The City, by apparently finding Master Plan conformance in exchange for community facilities and $300,000 in cash to be paid by Redhawk under the Settlement, is setting the bar for all future developers seeking to offer public facilities and cash contributions as a means to be excepted from the City's planning and zoning documents, including the Master Plan. The funds being offered in this case, however, are not presented to offset development related impacts. Rather, they represent an offer of public facilities and a cash payment designed solely to avoid the ordinary application of the Master Plan. The laws of this State do not allow such a *quid pro quo* transaction, and therefore, the City further abused its discretion by approving the Settlement and ignoring the Master Plan in exchange for Redhawk's offer of public facilities and cash.

D. Section 3.08 of the Development Agreement Provides No Basis for Master Plan Conformance.

In its Settlement with Redhawk, the City states that it "has no right to refrain from cooperation in a contract that was entered into in 1994 or to act in bad faith, and in a manner calculated to destroy the benefit of the Development Agreement to Red Hawk." See Exhibit 15, at paragraph 42. In making this statement, the City relies heavily on Section 3.08 of the Development Agreement, which provides, in relevant part, that Redhawk and the City agree to enter into a Supplemental Development Agreement regarding the transfer and use of unused development credits outside of Wingfield Springs but within the City. According to the City, because Wingfield Springs and its related approvals were found to be in conformance with the Regional Plan in 1994, any relocation of a use made pursuant to

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the Development Agreement necessarily conforms to the Master Plan and the Regional Plan.

The City's reliance on Section 3.08 to find that the Application conforms to the Master Plan fails because allowing the relocation of land uses by way of a Development Agreement not only constitutes illegal contract zoning and ultra vires bargaining away of the police power, but also exceeds the City's zoning and planning authority under state law. Further, in addition to constituting illegal contract zoning and being beyond the scope of the City's authority, the Development Agreement is unenforceable because the terms and conditions of the subsequent agreement that section 3.08 contemplates are void for uncertainty and nothing more than an agreement to agree. Accordingly, the Development Agreement, and Section 3.08 in particular, cannot justify the City's decision to execute the Settlement and disregard the Master Plan.

1. Section 3.08 of the Agreement Constitutes Illegal Contract Zoning and Ultra Vires Bargaining Away of the Police Power

The City cannot rely on Section 3.08 of the Development Agreement to support its decision to allow Redhawk to relocate permitted uses within Wingfield Springs to locations outside of the Wingfield Springs PD, where such uses are not permitted, because such an interpretation of the Development Agreement results in illegal contract zoning.

Contract zoning describes an agreement between a municipality and a developer in which the municipality agrees to rezone property for consideration. Dacy v. Village of Ruidoso, 845 P.2d 793, 796 (N.M. 1992); Morgan Company, Inc. v. Orange County, 818 So.2d 640, 642 (Fla. Dist. Ct. App. 2002). Such agreements are void as a matter of law because a municipality may not contract away the exercise of its zoning powers. Attman v. Mayor and Aldermen of Annapolis, 552 A.2d 1277, 1282 (Md. 1989).

The prohibition against contract zoning is based on the principle that the authority granted to municipalities to control land use decisions must be exercised for the common welfare of the people, and not for the benefit of private landowners. Dacy, 845 P.2d at 797; Haymon v. Chattanooga, 513 S.W.2d 185, 188 (Tenn. Ct. App. 1974). As one court articulated, "Contracts made for the purpose of unduly controlling or affecting official conduct of the exercise of legislative, administrative or judicial functions, are plainly opposed to public policy. They strike at the very foundations of government and

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intend to destroy that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society." Id. at 187-88. In the case of land use decisions, "the carefully structured provisions for public notice, public hearings, and, in many cases, required consideration of staff or planning commission recommendations, would be stripped of all meaning and purpose if the decision-making body had previously bound itself to reach a specific result." Attman, 552 A.2d at 1283-84.

Based on the above, Section 3.08 of the Development Agreement, as applied by the City, is void as a matter of law and cannot support the Settlement. The City cannot interpret the Development Agreement to allow or otherwise require the transfer of non-restricted gaming from Wingfield Springs to Tierra del Sol because such an interpretation constitutes an implied promise on the part of the City to re-zone property owned by Redhawk, so as to permit the development of a hotel/casino. The mechanism through which the approval occurs—whether by a settlement agreement, amendment to the zoning code, amendment to a handbook, or amendment to the Master Plan—is immaterial, since in all cases the City is purporting to fulfill a contractual obligation in which it had "previously bound itself to reach a specific result."[12] Id. at 1284. Indeed, Redhawk framed its Application as an "election under Section 3.08 . . . for transfer of certain unused Development Approvals," and thus acknowledged and emphasized the City's implied promise to permit a hotel/casino use by way of changing the present land use designation. Because the City has now determined that it committed itself to reach a particular result (i.e, granting the Application) under the Development Agreement, the City cannot legitimize the process by electing to document the commitment in the Settlement. See Morgran Company, 818 So.2d at 643 (when contract zoning is involved, following legislative procedures is a mere "pro forma exercise").

Additionally, to the extent that the City is relying on the Development Agreement to establish conformance with the Master Plan or justification for the Settlement, the Development Agreement squarely violates the policy behind the prohibition against contract zoning. Specifically, such an

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[12] Courts apply contract zoning principles not just to *zoning*, but to other land use decisions as well. See Attman, 552 A.2d at 1283 (holding that the prohibition against contracting away the police power applies not only to zoning decisions, but also to special exception and conditional use cases, since the same policy applies and since "these closely related functions, often grouped generically under the broad topic of zoning, involve the exercise of the power of land use regulation").

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interpretation precludes the City from "exercis[ing] its unconstrained independent judgment in deciding matters of reclassification," and "preempts the power of the zoning authority to zone the property according to prescribed legislative procedures." Attman, 552 A.2d at 1283; Dacy, 845 P.2d at 797.

The Nevada Legislature has specifically conferred upon municipalities the power to regulate land use decisions for the purposes of promoting the health, safety, morals and general welfare of the community. See NRS 278.020. As demonstrated by the above principles, the City cannot agree for consideration to reclassify property in a particular manner for the benefit of a private party, as such an agreement constitutes a bargaining away and delegation of the City's police power. Accordingly, to the extent that the City has determined that the Development Agreement obligated the City to enter into the Settlement (or provides a basis to find conformance with the Master Plan), the Development Agreement and the Settlement constitute illegal contract zoning, and the Settlement must be voided.[13]

2. The City Exceeded Its Authority By Entering Into the Development Agreement.

To the extent Section 3.08 of the Agreement is read as allowing the movement of development approvals outside of the Wingfield Springs PD, it exceeds the City's zoning/planning authority under state law. Under NRS 278A, transfer of a development approval within a single PD is expressly authorized, but transfers outside of a specified PD are not. Specifically, NRS 278A.110(3) provides as follows:

> In the case of a planned unit development which is proposed to be developed over a period of years, the standards may, to encourage the flexibility of density, design and type intended by the provisions of this chapter, authorize a departure from the density or intensity of the use established for the entire planned unit development ***in the case of each section to be developed***. The ordinance may authorize the city or county to allow for a greater concentration of density or intensity of land use ***within a section of development*** whether it is earlier or later in the development than the other sections. The ordinance may require that the approval by the city or county of a greater concentration of density or intensity of land use for any section to be developed be offset by a smaller concentration in any completed prior stage or by an appropriate reservation of common open space on the remaining land by a grant of easement or by

[13] Notably, it is only when the Agreement is given the construction offered by the City and Redhawk that it becomes illegal contract zoning. For example, if the Agreement is interpreted as permitting the transfer of development approvals only to those locations where the approval is allowed under the existing zoning, handbook, and Master Plan designations, then there is no implied promise by the City to zone property in a particular way for the benefit of the Applicant.

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covenant in favor of the county or city . . . (emphasis added).

Under this provision, the authority of local governments to permit transfers of development approvals is limited to density transfers within a single planned development. Thus, the Development Agreement and the resulting Settlement are *ultra vires* because they allow Redhawk to transfer an alleged gaming entitlement outside of the Wingfield Springs PD to Tierra del Sol, and the transfer of the purported gaming entitlement is not a density transfer, but rather a transfer of an entire land use designation. This conclusion is supported by rule of statutory interpretation "*Expressio unis exclusio alterius*," the expression of one thing is the exclusion of another. See Desert Irrigation, Ltd. v. State of Nevada, 113 Nev. 1049, 1060, 944 P.2d 835, 842 (1997).[14] Simply stated, NRS 278A.110(3) allows transfers within one planned development but not between two planned developments, and therefore, NRS 278A.110(3) cannot be read to allow the Settlement, pursuant to which a purported gaming entitlement will be transferred from one planned development – Wingfield Springs – to another – Tierra del Sol.

3. The Development Agreement is Void for Uncertainty.

In addition to constituting illegal contract zoning and being beyond the scope of the City's authority, the Development Agreement is unenforceable under Nevada law because Section 3.08 contemplates the making of a subsequent agreement as a condition precedent to the transfer of development approvals. An agreement to enter into a subsequent agreement is enforceable only if the terms and conditions of the subsequent agreement – other than those terms that can be ascertained by reference to market or economic conditions – are sufficiently definite and certain. See Cassinari v. Mapes, 91 Nev. 778, 781, 542 P.2d 1069, 1071 (1975); see also City of Reno v. Silver State Flying Service, Inc., 84 Nev. 170, 175-76, 438 P.2d 257, 260-61 (1968). Section 3.08 of the Development Agreement provides that the City and Redhawk will enter into a supplemental agreement "[p]roviding for the Transfer of Unused Development Approvals regarding the transfer and use of development

[14] Case law confirms that local governments may only exercise their powers in the manner authorized by state legislatures. See West Montgomery Citizens Ass'n. v. Maryland-National Capital Park and Planning Commission, 522 A.2d 1328, 1329, 1336-37 (Md. 1987) (holding that "a [local government] enjoys no inherent power to zone or rezone, and may exercise zoning power only to the extent and in the manner directed by the State Legislature").

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credits outside the Wingfield Springs PC but within the City." The meaning of this provision is not ascertainable – it only contemplates undefined supplemental agreements – and cannot support the City's decision that the Settlement was required under the terms of the Development Agreement.

In fact, the Development Agreement contains several indefinite and/or undefined terms, underscoring the foregoing conclusion. The words "Unused Development Approvals" are not defined in the Development Agreement and could have several different meanings. Additionally, the Development Agreement does not define "development credit," and it leaves open the location to which the development approvals will be transferred. The location of the casino is certainly a material term that cannot be defined by the courts under both contract principles and separation of powers principles. None of the uncertain terms appearing in the Development Agreement are ascertainable by reference to market or economic conditions. Thus, the Development Agreement appears to be "so indefinite and uncertain in all respects that it is in fact a nullity and unenforceable." Silver State, 84 Nev. at 176, 438 P.2d at 260. Because the Development Agreement, and Section 3.08 in particular, is unenforceable, the City further abused its discretion when it determined that it was obligated to execute the Settlement and allow Redhawk to transfer its alleged gaming entitlement from Wingfield Springs to Tierra del Sol under the terms of the unenforceable Development Agreement.

Additionally, with respect to the location of the development approvals, the Development Agreement allows transfer of development approvals "outside of the Wingfield Springs PC but within the City." The property comprising the Tierra Del Sol PD was not annexed until 1999, five years after the parties executed the Development Agreement. Indeed, Redhawk did not even acquire its property in Tierra Del Sol until early 2004, more than a decade after execution of the Development Agreement. These facts demonstrate that the parties did not contemplate the transfer of any of the development approvals to what is now Tierra Del Sol because at the time the Development Agreement was executed, Tierra Del Sol was not within the City. As a result, the City's apparent belief that the Development Agreement required it to (i) ignore the Master Plan, (ii) execute the Settlement, and (iii) allow Redhawk to transfer its alleged gaming entitlement from Wingfield Springs to Tierra del Sol was entirely misplaced and cannot justify the City's blatant disregard of the Master Plan and Tierra del Sol's General Commercial designation, which does not permit unrestricted gaming.

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CONCLUSION

On August 23 24, 2006, the City determined that, based on substantial evidence, Redhawk's Application was inconsistent with the Master Plan and not in the best interests of the City. The City therefore voted 3-2 against the Application, denying the requested transfer of an alleged nonrestricted gaming entitlement from Wingfield Springs to Tierra del Sol. Immediately following the decision, Redhawk filed a lawsuit against the City, alleging that the decision would result in millions of dollars of damages to Redhawk. In response to the lawsuit, the City Attorney publicly stated that he would not be able to defend the City because, in his opinion, the Development Agreement required the transfer of the gaming entitlement and the City was bound to the terms of the Development Agreement.

Within days, and without seeking an outside legal opinion, the City Attorney privately settled the lawsuit. At the subsequent September 20, 2006, public meeting, the City Attorney then balked at the idea of the City seeking a second legal opinion regarding Redhawk's lawsuit, arguing that the City had no authority to hire outside legal counsel. As a result, the City was forced into a position in which it could either reverse itself and approve the Settlement or proceed with a lawsuit without the support of its counsel. The City chose the former over the latter and, in doing so, disregarded the Master Plan and State law. This arbitrary and capricious decision, based on fear of litigation rather than substantial evidence, cannot be reconciled with the City's August 23rd decision or the laws of this State. Accordingly, for all the foregoing reasons, the Petitioners respectfully request that this Petition for Judicial Review be granted and that this Court issue a writ of certiorari declaring the Settlement null and void, and issue a writ of mandamus reinstating the City's August 23 24, 2006, decision denying Redhawk's Application.

DATED this 6th day of October 2006.

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FILED

APR 2 0 2007

RONALD A. LONGTIN, JR. CLERK
By DEPUTY

Code 3060

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ROY ADAMS and JEANNIE ADAMS; RYAN BOREN and BRYAN BOREN; MELISSA T. CLEMENT; JOSEPH DONAHUE and ROSIE MARIE DONAHUE; IAN GRIEVE and CASSANDRA GRIEVE; BOBBY HENDRICKS and DINA HENDRICKS; DAVID MAHER and JANAE MAHER; EUGENE TRABITZ and KATHRYN TRABITZ; and SPARKS NUGGET, INC., a Nevada corporation,,

Petitioners,

vs.

Case No. CV06-02410

Dept. No. 3

CITY OF SPARKS, a municipal corporation Of the State of Nevada, and THE CITY COUNCIL thereof, and RED HAWK LAND COMPANY, LLC, a Nevada Limited Liability Company,

Respondents.

/

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW

This matter comes before the court by way of a petition for judicial review and for writs of certiorari and mandamus. The respondents filed a

EXHIBIT 4

motion to dismiss the petition and after oral argument the matter was submitted for consideration.

The relevant facts are as follows:

In 1994 the City of Sparks and Loeb Enterprises LLC, which is now Red Hawk Land Company entered into a development agreement that contained a section (3.08) that authorized the company to transfer unused development credits in the future to anywhere within the city of Sparks. That development agreement was approved by the Regional Planning Commission at that time and there was a finding that the agreement was consistent with the Master Plan. The development agreement was the result of Loeb wanting to develop Wingfield Springs and in his negotiations with the City it granted his company the right to transfer any unused development rights conditioned upon the developer securing adequate land use entitlements. The City essentially froze the land use designations as they existed in 1994 but did not freeze the city boundaries as they then existed.

No one or entity complained about the contract or objected to it.

Wingfield Springs went ahead with its development based upon their contract with the City and after thirteen years of the project there is an unused development right remaining – a tourist commercial node which would allow for gaming in the development.

In February, 2005 Red Hawk applied for tentative approval to amend their Tierra del Sol planned development handbook, a new development by Red Hawk, in order to gain approval for the transfer of the unused tourist commercial node from Wingfield Springs to the Tierra del Sol development. The benefit of that transfer to Tierra del Sol would have allowed it to change its designation to a resort area and that would have allowed for a resort/hotel including non-restricted gaming on that location adjacent to the

Pyramid highway in north Sparks. In effect they would transfer their entitlement to build a resort with gaming from the Wingfield Springs development to the Tierra del Sol development per their 1994 contract with the city.

On July 6, 2006 the Sparks Community Development Department recommended approval of the proposed amendment to the Sparks Planning Commission. It based its recommendation upon 21 findings that found that the plan was consistent with the goals of furthering public health, safety, morals, and general welfare. However, the Sparks Planning Commission on July 17, 2006 voted to deny the proposed amendment notwithstanding the 1994 Development Agreement. It felt the proposed amendment was not in conformance with the Master Plan and was not in the public interest. The Sparks City Council, on August 24, 2006 after a public hearing, denied Red Hawk's application by a 3-2 vote.

At that public hearing proponents and opponents showed up in support of their respective sides. The petitioners were present along with their attorney as were the respondents and their attorneys. During that meeting it was made known that however the City council voted that night would result in a lawsuit against them. Specifically, Mr. Mollath opined that he would be asking around $100,000,000 and Mr. Whitemore opined that he would be seeking around $300 – 400,000,000. They made no secret of their anticipated moves should the vote go against their interests. They lost that night; their application was denied.

On August 25, 2006, the next day, Red Hawk filed a $100,000,000 law suit naming the City of Sparks and the individual council members in their official capacities.

On August 31/September 1, 2006 the City Council met with their

attorney to discuss the pending lawsuit and after that meeting Red Hawk and the City of Sparks settled the lawsuit in Department 6 of this Court. A document had been prepared containing findings that were stipulated to by the respective attorneys and formalized into a judgment and order by the judge. The City Attorney claimed he had authority to bind the City in the settlement since it did not require the City to pay out any money. The wording of the settlement required the city council to approve of the settlement however.

On September 7, 2006 the Nevada Attorney General warned that the meeting leading to the settlement was in violation of the state's open meeting laws.

On September 20, 2006 a meeting was held at city hall to authorize the settlement with Red Hawk. At that public hearing proponents and opponents showed up in support of their respective sides. The petitioners were present along with their attorney as were the respondents and their attorneys. The Sparks City Attorney told the council to totally disregard the information that he provided to them on September 1st and for them to review the proposed settlement and to vote on it. When asked if he believed there was a lawsuit in place at that time, Mr. Adams responded that the council should consider that a lawsuit was in place and the purpose of the meeting was for them to vote on his authorization to settle the law suit. The council voted 3-2 to authorize settlement of the law suit. The September 1 settlement and order is the final documentation of the settlement agreement.

On October 6, 2006 the verified petition for judicial review and writ relief was filed.

On November 8, 2006 the petitioner recused Judge Adams and this department received the matter.

In support of their motion to dismiss the respondents argue that the petitioners (1) lack standing to prosecute this lawsuit; (2) failed to file this lawsuit in a timely manner; (3) cannot collaterally attack the settlement between the City and Red Hawk; (4) missed the statute of limitations; and (5) cannot seek extraordinary writ relief. They ask the Court to dismiss the petition for judicial review.

Petitioners counter that each of the respondents' arguments fail because it is the City's public decision on September 20, 2006 to approve the Red Hawk settlement that is at issue in this case and that the decision cannot be rendered immune from judicial scrutiny simply because a signed settlement pre-dated the City's public vote.

In addition, they argue that merely setting aside the September 20th decision to approve the settlement will not afford the petitioners complete relief unless the August 23-24, 2006 decision denying the application is reinstated, hence the writ applications. Finally, the petitioners argue they have standing to prosecute this lawsuit because all of the petitioners either have a beneficial interest in setting aside the settlement and reinstating the August 23-24 decision or enjoy standing as taxpayers of the City.

Of the arguments raised by the respondents, the court will only consider (1) the question of the timeliness of this action; (2) whether the petition for judicial review constitutes a collateral attack upon the settlement; and (3) whether the requests for extraordinary relief and the request for judicial review under NRS 278.3195 are properly before the court. The other issues raised by the parties are dismissed as inapplicable to the court's decision on this motion.

Respondents argue that the petitioners are too late to seek the relief they request. They maintain the petitioners should have intervened in the

lawsuit Red Hawk initiated against the City of Sparks if they wanted to attack Judge Adams's entry of judgment under NRCP 60.

Petitioners counter that they did not have time to intervene in the lawsuit since it was settled so quickly and they instead chose to bring this action to challenge the actions of the City Council on September 20, 2006 as arbitrary and capricious because of the council's unreasoned and abrupt turnaround from their August 24th position, when they rejected Red Hawk's amendment application.

Several issues are included in the analysis of this particular issue as this court sees it. The Petition is for judicial review of the September 20th council hearing wherein the council voted to authorize the settlement of the Red Hawk lawsuit. The consequence of that authorization was to reverse their earlier decision of August 25 That is the stated purpose of the judicial review petition – to have the court determine if that decision was capricious or arbitrary since, according to petitioners, it reversed a well thought out earlier decision of the council. It is not simply a review of a reconsideration by the council of an earlier action that is the subject of this action, but a review of a decision to settle a major lawsuit at the urging of their attorney as being in the best interests of the City that is the real focus in this petition. The reversal of the council's stand on the proposed development is a practical consequence of the settlement. Had the council not authorized the settlement, it would be in a legal action to determine the validity of the 1994 contract and whether the City breached their obligation to act in good faith towards Red Hawk and its development plans.

The writ applications will be addressed first. The writs were requested in order to return the parties to where they were after the August 25th council hearing that ended in favor of the petitioner's position in this matter.

Both are extraordinary writs. NRS 34.020 concerning the writ of certiorari states that the writ shall issue in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board of officer and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

NRS 34.160 concerns the writ of mandate. It provides that a court may issue the writ to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station and by case law, to control an arbitrary or capricious exercise of discretion. NRS 34.170 provides that the writ shall issue in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. The writ may not be used to compel a discretionary act.

The recent case of *Kay v. Nunez* 122 Nev. A.O. 94), 146 P.3d 801 (2006) holds that mandamus petitions are generally no longer appropriate to challenge zoning and land use decisions of a governing body. The Court noted that NRS 278.3195 which contains a right of review, constituted an adequate legal remedy that precluded extraordinary relief. Petitioners argue that this petition is for a review of a land use decision of the Sparks City Council.

As for the writ of certiorari, the request for the writ is denied. The court finds that the decision to settle the lawsuit was an executive decision, not a judicial one. The court further finds that the petitioners had available to them certain legal remedies which they chose not to utilize.

The writ of mandate application is likewise denied. It is not available to compel a discretionary act. The act of settling a lawsuit is a discretionary, executive act and the court cannot say that the council's decision to settle that multi-million dollar lawsuit was an arbitrary or capricious decision. If

the City had lost that case, the damages could have been extremely high and the impact would have affected the residents of the City. That decision clearly fell within the discretionary province of the City Council acting on the advice of their attorney. The court finds that situation no different from any other party to a lawsuit making the settlement decision. The *Kay* case suggests such a determination also, especially since the petitioners advanced their petition under the authority of NRS 278.3195 and refer to it as a land use decision review.

Respondents argued that because Judge Adams approved the stipulation ending the lawsuit and ordered the City Council to comply with its terms, Petitioners' action in this department of the Court, which they caused to occur by their recusal of Judge Adams earlier in this action, requires this court to necessarily overturn a judgment and order of an equal court and this court has no appellate power to do so. They point to NRS 3.220, the case holdings of *Rohlfing v. District Court*, 106 Nev. 902, 803 P.2d 659 (1990) and *State v. Sustacha*, 108 Nev. 223, 826 P.2d 959 (1992) and Article 6, Section 6 of the Nevada Constitution.

Petitioners argue that the order signed by Judge Adams is void because the City Attorney who engineered the settlement lacked the authority to do so, therefore there is no impediment to this court ignoring or contravening the judgment and order of Judge Adams. They also argue that there were no findings by Judge Adams to base the order upon and that essentially what he did was a ministerial function and if this court were to find that the City Attorney lacked authority, then the court should not be prevented from making findings against Judge Adams's judgment and order dismissing the lawsuit.

The court has a problem with the petitioner's argument in that they

were strangers to the lawsuit that was settled even though they could have participated in it had they intervened in it. They come to court as parties who will be affected by the results of the settlement, but they come as outsiders to the legal action that was pending at the time. What they are doing is attacking the settlement and its judicial approval collaterally, and the case law holds they cannot do that. Only void judgments can be collaterally attacked. Void judgments are those that lacked subject matter jurisdiction by the court that entered them or that lacked personal jurisdiction over a party affected by the judgment; otherwise judgments are at most, voidable and not subject to collateral attacks. *Sustacha, supra*, at 226. The September order and judgment by that definition is at most voidable, but certainly not void.

That presents a problem to petitioners. The case of *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308 (2005) is illustrative of their problem. There, a settlement was reached in a PI case and a party to the action eventually brought an independent action against the attorneys for malpractice because they settled the case and distributed the proceeds in a way that favored one of the plaintiffs over another. Their attempt was not to undo the settlement but they went after the attorneys because of the manner in which they allocated the funds received from the settlement among some of the plaintiffs. The Supreme Court found that the malpractice action was essentially a collateral attack on the underlying settlement approval. It held that the plaintiffs in the malpractice ought to have sought re-distribution under NRCP 60 before attacking the settlement. By their failure to timely attack the underlying settlement approval, the plaintiffs waived their right to seek redistribution by the malpractice action. Another issue in that case was that the settlement approval should have been brought in the family

court because of a guardianship issue and consequently, the district court's approval was merely voidable, not void as argued, since the district court had colorable authority to approve settlement of the original lawsuit. Therefore because the order approving the settlement was merely voidable, rather than void, it was not subject to collateral attack. *Id.* at 762 n.13.

Here the petitioners are asking the court to vacate the order of Judge Adams settling the Red Hawk lawsuit. They maintain the order is void in that the City Attorney had no authority to settle the case. They are not claiming that Judge Adams lacked subject matter jurisdiction or personal jurisdiction; hence the judgment and order of September 1, 2006 is not void and is not subject to collateral attack by the petitioners.

This Court finds that in order for Judge Adams to have signed the order he had to conclude that the City's decision was not arbitrary or capricious. The Court finds that if the petitioners believed that this was in error, the proper means for addressing the issue would have been to timely intervene pursuant to NRCP 24, and move under NRCP 60 to set aside the order. The Court finds that Petitioners' petition for relief is not against the City Council's decision to enter into a settlement agreement with Red Hawk; rather, the petition is really an attack on the Stipulation, Judgment and Order signed by the parties to the suit and approved by Judge Adams. This Court cannot overturn a judgment and order of another judge in a sister district court. See *Rohlfing, supra.*

The petitioners ought to have joined the Red Hawk lawsuit as intervenors. The Nevada Supreme Court has held that only a party may seek relief from a judgment pursuant to NRCP 60(b). See *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 557, 853 P.2d 1266, 1269 (1993). It is this court's opinion they would have been successful had they moved the court for

intervention. Their argument that they had too little time to do so lacks persuasiveness. The key to the timeliness of a motion to intervene is not the length of delay but the prejudice to existing parties. *Dangberg Holding Nev., L.L.C. v. Douglas County*, 115 Nev. 129, 978 P.2d 311 (1999). The timeliness of a motion to intervene is a matter within the discretion of the district court *Lawler v. Ginichio*, 94 Nev. at 623, 584 P.2d at 667; *Cleland v. Eighth Judicial Dist. Court ex rel. Clark country, Dep't No. V*, 92 Nev. 454, 552 P.2d 488 (1976).

This court finds that the petitioners had enough notice and time to intervene in the law suit and should have and in that way they could have exercised their rights under NRCP 60 to cause Judge Adams to reconsider his September 1st order for the reasons they have advanced herein. They would have had until March 1, 2007 to have moved to set aside the judgment for mistake, fraud, or excusable neglect. At the August 23/24 hearing it was made known by both sides, but especially Red Hawk's representatives that they would sue the City should the council vote against their application. They filed the suit the next day. The September 1st settlement required the council's ratification and the meeting for that was set for September 20th, 27 days after the complaint was filed.

Then when the complaint was made to the Attorney General's office about the illegal meeting of the City Attorney and Council on August 31/September 1 and the Attorney General agreed with their conclusion, petitioners had 60 days after the meeting in which to invalidate the settlement agreement and require the council to start over with the process. NRS 241.037(3). The court finds there was enough time and proper reasons to have intervened in the lawsuit. The court finds with respect to the writ applications that these available opportunities were adequate legal remedies

providing another reason to deny the requests.

A public body that takes action in violation of the Open Meeting Law, which action is null and void, is not forever precluded from taking the same action at another legally called meeting. *Valencia v. Cota*, 617 P.2d 63 (Ariz. Ct. App. 1980); *Cooper v. Arizona Western College District Governing Board*, 610 P.2d 465 (Ariz. Ct. App. 1980); *Spokane Education Ass'n v. Barnes*, 517 P.2d 1362 (Wash. 1974). However, mere perfunctory approval at an open meeting of a decision made in an illegally closed meeting does not cure any defect of the earlier meeting. *Scott v. Bloomfield*, 229 A.2d 667 (N.J. Super. Ct. Law Div. 1967). The September 20th hearing at city hall met the requirements of a properly conducted open meeting even though the practical result of it could be looked at as merely a ratification of the September 1st settlement agreement since the judgment and order is the only memorandum of the understanding and agreement that was reached between the parties concerning the transfer of the remaining entitlement. But there were discussions, there were questions and there was obvious disagreement among the council at that meeting. Ultimately, the decision of the council was to settle a lawsuit, and they voted to do just that.

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Unfortunately, one of the consequences of that settlement caused a reversal of an earlier decision favorable to the petitioners. However, the court does not find the decision to settle capricious or arbitrary under the facts presented to it in the exhibits and pleadings it reviewed. The City and City Attorney could have handled the matter differently and saved a lot of concern and aggravation, but what they did they had a right to do.

Accordingly, this court for the reasons set out above, is constrained to grant the respondents motion to dismiss.

IT IS SO ORDERED - Respondents' motion to dismiss is GRANTED.

DATED: April 20, 2007.

JEROME M. POLAHA
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 20th day of April, 2006, I deposited for mailing a copy of the foregoing to:

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Facsimile: 786-6179

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JERRINE ULLESEIT
Judicial Assistant

4085

SEP 2 1 2007

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ROY ADAMS and JEANNIE ADAMS; RYAN BOREN; MELISSA T. CLEMENT; JOSEPH DONAHUE and ROSE MARIE DONOHUE; CASSANDRA GRIEVE;DAVID MAHER and JANAE MAHER; EUGENE TRABITZ and KATHRYN TRABITZ; and SPARKS NUGGET, INC., a Nevada corporation,

Petitioners,

vs.

CITY OF SPARKS, a municipal corporation of the State of Nevada, and THE CITY COUNCIL thereof, and RED HAWK LAND COMPANY, LLC, a Nevada Limited Liability Company.

Respondents.

CASE NO. CV07 02180

DEPT NO. 4

Hale Lane Peek Dennison and Howard
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Reno, Nevada 89511

SUMMONS

TO: THE RESPONDENT, ***CITY OF SPARKS, a municipal corporation of the State of Nevada, and THE CITY COUNCIL thereof***: YOU HAVE BEEN SUED, THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.

A civil complaint has been filed by the plaintiff against you for the relief as set forth in that document (see complaint). When service is by publication, add a brief statement of the object of the action. See Rules of Civil Procedure, Rule 4(b).

1. If you intend to defend this lawsuit, you must do the following within 20 days after service of this summons, exclusive of the day of service:

a. File with the Clerk of this Court, whose address is shown below, a formal written answer to the complaint, along with the appropriate filing fees, in accordance with the rules of the Court.

EXHIBIT 5

b. Serve a copy of your answer upon the attorney or plaintiff whose nan and address is shown below.

2. Unless you respond, a default will be entered upon application of the plaintiff and th Court may enter a judgment against you for the relief demanded in the complaint.

Plaintiff's Attorney:

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Brad M. Johnston, Esq.
Tamara Jankovic, Esq.
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775-327-3000

Dated this 21 day of September, 2007.

RONALD A. LONGTIN, JR., CLERK OF THE COUR

D. Jaramillo

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ROY ADAMS and JEANNIE ADAMS; RYAN BOREN; MELISSA T. CLEMENT; JOSEPH DONAHUE and ROSE MARIE DONOHUE; CASSANDRA GRIEVE;DAVID MAHER and JANAE MAHER; EUGENE TRABITZ and KATHRYN TRABITZ; and SPARKS NUGGET, INC., a Nevada corporation,

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vs.

CITY OF SPARKS, a municipal corporation of the State of Nevada, and THE CITY COUNCIL thereof, and RED HAWK LAND COMPANY, LLC, a Nevada Limited Liability Company.

Respondents.

CASE NO. CV07 02180

DEPT NO. 4

WRIT OF CERTIORARI AND PETITION FOR JUDICIAL REVIEW

Petitioners Roy Adams, Jeannie Adams, Ryan Boren, Melissa T. Clement, Joseph Donohue, Rose Marie Donohue, Cassandra Grieve, David Maher, Janae Maher, Eugene Trabitz, Kathryn Trabitz, and Sparks Nugget, Inc., (collectively, the "Petitioners"), by and through their undersigned counsel of record, Hale Lane Peek Dennison and Howard, hereby petition this Court for (i) a writ of certiorari declaring the City of Sparks' (the "City") August 27, 2007 vote approving Red Hawk Land Company, LLC's ("Red Hawk") application to transfer an alleged nonrestricted gaming entitlement from

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Wingfield Springs to Tierra del Sol null and void; or, in the alternative, (ii) judicial review of the August 27, 2007 vote. In support of this Petition, the Petitioners allege the following:

STATEMENT OF FACTS

1. Introduction.

The Petitioners bring this writ of certiorari and petition for judicial review as a result of the City's unsustainable August 27, 2007 vote giving final approval to Red Hawk's application to transfer tourist commercial zoning and an alleged gaming entitlement from Wingfield Springs to another Red Hawk development along the Pyramid Highway known as Tierra del Sol (the "Application"). The City's most recent vote on the Application is void because one of the Sparks' City Council members, Mr. Michael Carrigan ("Carrigan"), was found to have committed an ethics violation by voting to approve the Application despite having a conflict of interest. Accordingly, the August 27, 2007 vote is merely another action in a string of improper decisions made by the Sparks City Council regarding Red Hawk's Application.

Red Hawk had originally submitted its Application to the City's Planning Staff (the "Staff") in July 2006, with the Staff initially recommending approval. Subsequently, the City of Sparks Planning Commission (the "Planning Commission"), at two public hearings, disagreed with the Staff's findings. In particular, the Planning Commission found, inter alia, that the Application conflicted with the City of Sparks' Master Plan (the "Master Plan"), and as a result, the Planning Commission recommended denial of the Application to the City Council. At an August 23-24, 2006 public meeting, the City adopted the Planning Commission's recommendation and denied the Application. With this initial vote, the City found that the Application conflicted with the Master Plan and could not therefore be approved.

In response to the City's well-reasoned decision, Red Hawk filed suit, alleging that the denial of the Application caused damages in excess of $100 million. The City, despite its previous findings concerning the Master Plan and without fully considering its legal options to defend itself against Red Hawk's lawsuit, decided to settle the matter privately in six days. The settlement notably ordered the City to approve Red Hawk's Application, despite the fact that the City had previously concluded that the Application conflicted with the Master Plan and could not be approved. After a public uproar, and

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a warning letter from the Nevada Attorney General's office regarding the City's potential violation of Nevada's Open Meeting Law, the City conducted a public meeting on September 20, 2006, to publicly consider the settlement and authorize the City Attorney to enter into the settlement. At the meeting the City Council voted three to two authorizing the City Attorney to settle the lawsuit.

Approximately one year later, Red Hawk once again came before the Planning Commission seeking final approval of the Application. This time, the Planning Commission recommended approval of the Application and forwarded the recommendation to the City Council. On August 27, 2007, Red Hawk sought final approval of its Application from the City Council. At the public hearing, the City Council voted three to two to grant final approval of the Application.

In entertaining this Petition, this Court's task is to determine (i) whether the City's August 27, 2007 vote is valid in light of the ethics violation by one of the council members, and (ii) whether substantial evidence supports the City's decision to approve the Application.[1] As demonstrated below, the August 27 vote is invalid, and must be declared null and void by this Court, because Councilmember Carrigan should have recused himself from all of the votes pertaining to the Red Hawk Application in light of his conflict of interest. Because Carrigan's vote cannot count in this instance, there is a 2-2 deadlock that must be resolved by a tie-breaking vote from the City of Sparks Mayor, Geno Martini. Further, the City's approval constitutes an abuse of discretion because the final approval comes about solely as a result of the City's invalid settlement of a lawsuit with Red Hawk, rather than a decision supported by substantial evidence in the record. Indeed, the City's approval of the Application effectively amends the City of Sparks' master plan without a master plan amendment. Accordingly, this Court should declare the August 27 vote void and find that the City's final approval of the Application cannot stand.

2. The Parties and Related Persons.

Petitioner, the Nugget, is a Nevada corporation doing business as John Ascuaga's Nugget Hotel

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[1] See City of Reno v. Lars Andersen & Assocs., Inc., 111 Nev. 522, 525, 894 P.2d 984, 986 (1995) ("If the act is supported by substantial evidence, the courts will not disturb it."); see also Nevada Contractors v. Washoe County, 106 Nev. 310, 792 P.2d 31 ("If this discretionary act is supported by substantial evidence, there is no abuse of discretion. Without an abuse of discretion, the grant or denial of a special use permit shall not be disturbed.").

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Casino in Sparks, Nevada.

Petitioners Ryan Boren, Cassandra Grieve, Joseph and Rose Marie Donohue, and Eugene an Kathryn Trabitz are residents of the City of Sparks, Nevada.

Petitioners Roy and Jeannie Adams, Melissa T. Clement, and David and Janae Maher ar residents of Spanish Springs, Washoe County, Nevada.

Respondent City is a municipal corporation under the laws of the State of Nevada; the City's Mayor is currently Geno Martini; and the City's Councilmembers are currently John Mayer, Phil Salerno, Ron Smith, Mike Carrigan, and Ron Schmitt.[2]

Respondent Red Hawk is a Nevada limited liability company engaged in the business of real-estate development and resort operations in Sparks, Nevada. Red Hawk is, upon information and belief, the successor to Loeb Enterprises under the development agreement described below.

Non-Party Loeb Enterprises is a Nevada limited liability company and was the original party to the development agreement with the City.

3. Factual Background.

a. The City's Master Plan and the Northern Sparks Sphere of Influence Plan.

The Master Plan governs land use planning and development for the City. See NRS 278.0284. The Northern Sparks Sphere of Influence Plan ("NSSOI Plan") is an element of the City's Master Plan, and it encompasses the southerly portion of the Spanish Springs Planning Area, including more than 7,000 acres of land in public and private ownership. See **Exhibit 1**, Sparks Master Plan/NSSOI Plan at page 2.199.[3] According to the NSSOI Plan, "[t]he area is intended to provide for a mix of residential, general commercial, restricted *industrial/business park and recreational* opportunities with an emphasis on master planned developments." Id. at page 2.200. The NSSOI Plan also provides the following:

> "[a] small tourist commercial node is anticipated in the area. Uses in such a node could include a resort hotel with gaming focused around recreational uses such as a golf course. The extent of gaming allowed in a resort facility shall be in accordance with Nevada Revised Statues on gaming limited by the City of Sparks."

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[2]At the time of the August 23-24, 2006 and September 20, 2006 votes on Red Hawk's Application, the fifth member of the City Council was Judy Moss, rather than Ron Smith.

[3]The Exhibits to this Petition for Judicial Review can be found in the Appendix to the Petition for Judicial Review filed concurrently with this Petition.

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Id. at page 2.205. Accompanying the NSSOI Plan text provisions is a Land Use Plan Map ("Land Use Map"), attached as **Exhibit 2**, which depicts the envisioned locations of the different land uses within the area and specific developments. The Land Use Map shows that the single Tourist Commercial node ("TC node") is within the Wingfield Springs development.

Both the Master Plan and the NSSOI Plan must comport with the Truckee Meadows Regional Plan (the "Regional Plan"). The Truckee Meadows Regional Planning Agency ("TMRPA"), under NRS 278.0278, has the authority to approve and must approve all Master Plan amendments. In addition to approving Master Plan amendments, the TMRPA must also review projects of regional significance. Under NRS 278.026(5), and guidelines the TMPRA has adopted pursuant to NRS 278.0277, a project of regional significance includes those projects that require

> a change in zoning, a special use permit, an amendment to a master plan, a tentative map or other approval for the use of land which, if approved, would have the effect on the region of increasing: (1) employment by not less than 938 employees; (2) housing by not less than 625 units; (3) hotel accommodations by not less than 625 rooms; (4) sewage by not less than 187,500 gallons per day; (5) water usage by not less than 625 acre feet per year; or (6) traffic by not less than an average of 6,250 trips daily.

b. The Wingfield Springs Proposal and Development Agreement.

In October 1994, Loeb entered into an agreement with the City for the development of a large planned development ("PD") in northeast Sparks, commonly known as Wingfield Springs, through the submission of the Wingfield Springs Development Agreement Handbook (the "Wingfield Handbook"), attached as **Exhibit 3**, and the Wingfield Springs Development Agreement (the "Development Agreement"), attached as **Exhibit 4**. The land uses within a PD, such as Wingfield Springs, are limited to those set forth in the PD's handbook, but a PD's handbook may include any use allowed in any other zone, provided the PD's uses are compatible with each other and the surrounding environment. See SMC 20.18.030. In the case of a development handbook that does not permit a particular use, such as a hotel/casino, the handbook must be amended to allow for that use before the use is allowed within the PD.

The Wingfield Handbook originally called for the development of approximately 2,242 residential lots, a neighborhood commercial development, a golf course, and a related golf complex. The Development Agreement and the Wingfield Handbook contemplated that Wingfield Springs

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would be entitled to a Tourist Commercial ("TC") designation[4] within Wingfield Springs in order for Loeb to develop a resort complex, which was anticipated to include, among other facilities, a hotel and casino with limited nonrestricted gaming (the "resort hotel/casino"). See Exhibit 3 at pages V-26, 27. The Development Agreement also included considerations for Loeb's personal and investor resources in the event the Wingfield Springs development was unsuccessful. In particular, section 3.08 of the Development Agreement contemplated supplemental development agreements for Loeb's benefit, with the understanding that the terms of the Development Agreement were broad and could require clarification. See Exhibit 4 at paragraph 3.08. Such supplemental development agreements would have to be consistent with the Development Agreement and were "intended only to supplement with more specific terms the subject matter of [the Development] Agreement." Id.

Section 3.08(d) of the Development Agreement stated that Loeb and the City could enter into a supplemental development agreement "Providing Transfer of Unused Development Approvals regarding the transfer and use of development credits outside Wingfield Springs PD but within the City." Id. at paragraph 3.08(d). The Development Agreement did not, however, define the terms "Unused Development Approvals" or "development credits," or provide any details regarding the types of situations that could trigger the application of Section 3.08(d).

Through the development process, Loeb presented its Wingfield Springs project to TMRPA to ask for review of the project's conformance to the Regional Plan, as a project of regional significance. TMRPA deemed Wingfield Springs a project of regional significance in Sparks at the Regional Planning Commission ("RPC") meetings of July 22, 1992 and April 28, 1993.

On November 9, 1994, Loeb again went before the RPC, this time requesting, among other things, an amendment to the Wingfield Handbook for the inclusion of a limited resort gaming facility. The RPC postponed the November 9 meeting in order to further consider the definitions of limited gaming in the context of rural gaming and resort-related gaming; however, the RPC reconvened on November 30, 1994, in a special session to complete its review of Loeb's proposed resort amendment

[4]SMC 20.86.020, governing TC zoning, is the only zoning designation that allows transient occupancy.

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for Wingfield Springs. In anticipation of this November 30 meeting, RPC staff prepared a report on limited gaming, including a history of limited gaming in the Regional Plan and the request for the adoption of a new "Limited Resort Gaming" policy. See **Exhibit 5**, Regional Staff Report of Nov. 30, 1994 at page 1.

In relevant part, the policy provided that varying amounts of casino square footage would be "permissible in association with resort-style developments. A resort-style development includes hotel and convention facilities, one or more restaurants, retail shops, and a major recreational amenity or amenities generating 300 or more resort customers a day, such as a golf course or a ski area." For an 18,000 square foot casino, the minimum baseline requirements would be "resort-type amenities, at least 200 hotel rooms, and over 2000 residential units." See id., Attachment 1. Based on this policy, the RPC made the specific finding that

> [t]he development of limited gaming of not greater than 18,000 square feet will be an accessory limited resort use rather than a primary component of the Wingfield Springs project and the Development Agreement Handbook will contain provisions to assure that the project will conform to the requirements set forth in the 'Limited Resort Gaming' policy. See id. at page 5.

As a result, the TMRPA approved the Development Agreement and Loeb's proposed amendment to the Wingfield Handbook.

Loeb proceeded with the development of Wingfield Springs, which currently consists of approximately two thousand two hundred forty two (2,242) residential lots; however, neither a hotel nor a casino was ever built in connection with the development. In fact, while "resort condominium" units were built and the Resort at Red Hawk rents such units for transient use, neither actual hotel rooms nor a resort were built, resulting in the current transient use being a non-conforming use in Wingfield Springs.

c. Red Hawk's Applications to Amend the Wingfield and Tierra del Sol Handbooks.

Loeb's successors-in-interest, Red Hawk, also failed to construct any type of gaming establishment to accompany the resort amenities at Wingfield Springs. Instead, Red Hawk decided to exercise what it interpreted to be its right under section 3.08(d) of the Development Agreement, and transfer its purported right to build a casino at Wingfield Springs to another one of its properties, Tierra del Sol.

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The Tierra del Sol property is located along State Route 445, commonly known as the Pyramid Highway, approximately 1.5 miles from Wingfield Springs. The City first approved the development handbook for Tierra del Sol, a multi-use development, on August 7, 2000. Neither the application nor the approval for Tierra del Sol included a TC zoning designation that would allow nonrestricted gaming. See **Exhibit 6**, Tierra Del Sol Community Project Description; **Exhibit 7**, Tierra del Sol PD Design Standards & Guidelines at page 7. Instead, the Master Plan's designation for Red Hawk's property at Tierra del Sol is General Commercial ("GC"), a designation within which a hotel casino use is not allowed. See SMC 20.85.020. In other words, the Master Plan designation for Red Hawk's property at Tierra del Sol is not tourist commercial and is not compatible with and does not permit non-restricted gaming.

The SMC includes provisions relating to the initial approval of development handbooks, but it does not identify any procedure by which development plans may be modified or amended. Nonetheless, in amending a development handbook, the City follows the same process used for initial approval of a development handbook, which is set forth in SMC 20.18.030. Additionally, state law provides specific standards by which the modification of a development handbook must be judged. In particular, under Section 278A.380 of the Nevada Revised Statutes, modification of a development handbook must (i) "further the mutual interest of residents and owners of the planned unit development and of the public in the preservation of the integrity of the plan as finally approved," and must not (ii) "impair the reasonable reliance of the residents and owners upon the provisions of the plan or result in changes that would adversely affect the public interest."[5]

In October 2004, Red Hawk submitted its Application to the City. The Application consisted of two handbook amendments: the first was an amendment to the Wingfield Handbook, eliminating

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[5] NRS 278A.410 further provides that the provisions of a handbook may be modified only if the modification (i) does not affect the rights of the residents of the PD to maintain and enforce those provisions, and (ii) the City finds the following facts at a public hearing: (a) the modification is consistent with the efficient development and preservation of the entire PD, (b) the modification *does not adversely affect either the enjoyment of land abutting upon or across the street from the PD*, (c) the modification *does not adversely affect the public interest*, and (d) the modification *is not granted solely to confer a private benefit upon any person*. (emphasis added). Application of this statute depends on whether one views the amendment in this case as one being brought by the City. To the extent the City claims it is compelled to consider Applicant's request per the Agreement (defined below), it would seem the amendment is being brought in part by the City, and NRS 278A.410 must apply.

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the resort hotel casino for Wingfield Springs; and the second was an amendment to the Tierra del Sol Handbook, adding the exact language that was removed from the Wingfield Handbook to allow hotel casino to be developed in Tierra del Sol.[6] Red Hawk did not seek an amendment to the Master Plan as part of its Application.

Upon review of the Application, the City's Planning Staff recommended approval. In its recommendation, the Staff adopted twenty-one planned development findings ("PD Findings") and set forth the facts that allegedly supported the findings in its report. Of particular importance were PD Findings 18 and 21. PD Finding 18 stated that "[t]he project, as submitted and conditioned, is consistent with the City of Sparks Master Plan." The Staff relied on the Tourist Commercial description in the NSSOI Plan to conclude that "[a]s long as the tourist commercial in Tierra del Sol is 37 acres or less and is accompanied by the removal of the tourist commercial use (i.e. one node) in Wingfield Springs, the handbook amendment is consistent with the NSSOI." See **Exhibit 8**, Staff Report, at page 15.

Further, PD Finding 18 provided that the project could alternatively be found consistent with the Master Plan under the density bonus statues found at NRS 278.250(4) and (5). The Staff reasoned as follows:

> [t]his statute envisions the possibility of exceptions to the master plan in exchange for certain socially desirable contributions by the developer for the benefit of the City. In this case the developer has agreed to construct, at no cost to the City, a community services facility. The applicant has also agreed, in principle, to contribute $300,000 towards developing an area which will include a certain proportion of affordable housing, to be spelled out in a supplemental development agreement to be approved by the City Council prior to Final Approval of the handbook by the City Council.

PD Finding 21 stated that

> [t]he Tierra del Sol Planned Development provides a mix of uses with residential, commercial, resort, and public facility uses. The commercial, resort, and public facility uses will benefit the residents in the Tierra del Sol community as well as those within the surrounding communities in all directions by providing convenient services and retail establishments to help meet day-today needs. The transfer of previously approved density from Wingfield Springs under the

[6]While the Application was being reviewed, the City established an Ad Hoc Committee on Gaming (the "Committee"). The Committee consisted of a number of residents and businesses of Sparks and considered gaming and how it relates to traffic, citizen opinion and use, tourism, economic growth, bankruptcy, in addition to alcoholism, crime, and property values. The Committee ultimately decided that gaming in Sparks is most desirable on major arterial roadways along the downtown corridor.

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terms of the original 1994 Wingfield Springs Development Agreement to the Tierra del Sol Planned Development is consistent with the City of Sparks Master Plan. See id. at pages 16-17.

Pursuant to the Planned Development Review provisions of SMC 20.18 *et seq.*, the Staff forwarded the Application and its recommendation to the Planning Commission.[7]

d. The Planning Commission's and City's Denial of the Application.

On July 6, 2006, the Planning Commission heard the Staff's recommendation to approve the Application. Due to the volume of questions and testimony from the public concerning the Application, the Planning Commission was forced to continue the meeting.

At the continuance of the meeting on July 17, 2006, Commissioner Mattina, who stated she was present in 1994 when the City entered into the Development Agreement for Wingfield Springs, recalled that the gaming portion of the Resort at Red Hawk was to be the secondary focus of the development, not the primary focus. Commissioner Mattina added: "And it was always the intent that if it was moved, if that component was moved, it would be moved within the Wingfield Springs development." See **Exhibit 9**, July 17, 2006, Planning Commission Meeting at page 4. Commissioner Lokken stated that "the approval by Regional Planning [of Wingfield Springs] back in 1994 seems to repeatedly and clearly focus on the notion of [Wingfield Springs] being a tourist-generating Tourist Commercial [zone] as a destination resort." Id. at page 8.

Commissioner Mattina went on to clarify that the Regional Planning Commission was:

> clearly linking [the gaming portion] to some type of recreational activity and when you had the resort connected to the golf course in Wingfield Springs, it was clearly linked to a recreational activity. [Tierra del Sol] is a piece of property that wants to be developed as Tourist Commercial that is not even within the Wingfield Springs perimeter, so it is hard to say . . . *I mean, it is clearly an independent standing facility*, whether a casino, hotel, or whatever. Yes. Can people get in their car and drive to Wingfield Springs? Certainly. But it is not tied to Wingfield Springs; it is not connected to the Resort at Wingfield Springs or at Red Hawk. Page 8.

Senior Planner Tim Thompson, in response to a question about whether a transfer could be

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[7] No evidence has been found in the record that the required procedures of SMC 20.07.050 were followed and that proper notice was given by mail to residents located within 300 feet of the area affected. Further, there is no evidence that required notice was given for any of the Planning Commission meetings, any of the public City Council meetings, or the closed session City Council meeting.

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accomplished without a Master Plan amendment, stated "[p]ossibly yes. In the case of [another planned development known as] the Foothills, . . . there was no Master Plan Amendment associated with the Foothills; we simply moved land uses around that were within those areas." Id. at page 12. However, Senior Planner Thompson acknowledged that the transfers were done "solely within the Foothills development" and that to his knowledge, "we have never done a transfer like this [from one PD to another]. This is definitely the first time." Id.

The Planning Commission voted four to three, against Staff's recommendation, and denied the Application. The Planning Commission denied the Application because it found that the Application was inconsistent with the Master Plan, and that the Application did not further the interests of the City. The Planning Commission presented the Application with a recommendation for denial to the City Council at a special meeting held August 23, 2006.

At that meeting, the Council Members adopted the Planning Commission's recommendation and voted three to two against the Application. In doing so, the City noted that the Application (i.e, the transfer of a non-restricted gaming use from Wingfield Springs to the GC Tierra del Sol property) was inconsistent with the Master Plan and could not accordingly be approved. Councilwoman Moss also questioned how the gaming entitlement could be moved pursuant to section 3.08(d) of the Development Agreement when Tierra del Sol was not within the City at the time the Development Agreement was made. She stated that if other sections of the Development Agreement were "frozen in time," then the phrase "within the City" should also be frozen in time. Councilwoman Moss further commented that according to the Regional Planning Commission, major changes to Wingfield Springs would require further review by the City and the Regional Planning Commission. Therefore, it was her understanding that Red Hawk's Application would have to first be reviewed and approved by the Regional Planning Commission, which had not occurred.

After a motion was made, the City, as noted above, adopted the Planning Commission's recommendation and voted three to two against the Application. Councilmember Mayer voted no because he did not believe the City intended to allow Red Hawk (as the successor to Loeb) to move gaming outside of Wingfield Springs under the Development Agreement; Councilmember Salerno voted no because he believed a Master Plan Amendment was needed and that the City's infrastructure

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was not prepared to support Red Hawk's project at Tierra del Sol; and Councilmember Moss voted n because she did not think that Tierra del Sol was the right location for a hotel casino.

e. Red Hawk's Lawsuit and The City's Approval of The Settlement.

On August 25, 2006, only two days following the City's decision, Red Hawk filed a complain against the City alleging, among other things, breach of the Development Agreement and damages in excess of $100 million. See **Exhibit 10**, Red Hawk's Complaint. The City Attorney, Chet Adams, responding to the lawsuit, believed the City Council did a good job of documenting their reasoning for the vote. See **Exhibit 11**, Court battle is likely after Lazy 8 rejected, Reno Gazette Journal, Aug. 25, 2006. Adams was quoted as saying that the City has "a considerable amount of discretion when it comes to land use, issues of public safety and health and welfare. They are vested with the authority to make those decisions as long as they are supported by the record." Id. "When asked if the council made a rational, reasonable decision, Adams said, 'they certainly believed they did.'" Id.

Adams further said, however, that: "'I believe the City Council has put me in a difficult situation because they have gone against our legal advice and that will obviously complicate the defense of this matter in court.'" See **Exhibit 12**, Developer sues Sparks over Lazy 8, Reno Gazette Journal, Aug. 26, 2006. Adams went on to add: "I will say that the complaint is very well written and that it appears at least at first reading to be meritorious." Id. Despite the City Attorney's comments, petitioner Nugget had sent numerous letters, through its undersigned counsel, to the Planning Commission and the City demonstrating that Red Hawk's Application could be denied under Nevada law. See **Exhibit 13**, Hale Lane Letters to Planning Commission.

Less than one week later, on September 1, 2006, the City Attorney and the Council members met and allegedly discussed the City's denial of the Application and Red Hawk's resulting lawsuit. This meeting resulted in the signing of a Stipulation, Judgment and Order by the City Attorney, the Deputy City Attorney, and two of Red Hawk's attorneys, Stephen Mollath, Esq. and Leif Reid, Esq. Judge Brent Adams approved the Settlement that same day.[8] See **Exhibit 14**, Sept. 1, 2006,

[8] Settlement discussions between Red Hawk and the City of Sparks has already been conducted earlier in the week and a settlement was reached during the parties settlement conference with the Honorable Brent Adams on August 31, 2006, subject to approval of the Sparks City Council

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Stipulation, Judgment and Order. After announcing the Settlement, Mayor Martini commented: "'. the beginning of the week, Chet Adams advised me that he could not defend the city against a lawsuit.'" See **Exhibit 15**, Angela Mann, Lazy 8 Casino given green light, Daily Sparks Tribune.

On September 7, 2006, the Nevada Attorney General's office sent a letter to the City Attorney stating that the September 1, 2006, meeting was conducted in violation of Nevada's Open Meeting Law and that if the City did not hold a public hearing to have a public vote on the Settlement, the Attorney General's office would file suit against the City. See **Exhibit 16**, Attorney General's Letter. In response to the letter, City Attorney Adams stated: "'You've seen how my clients are running and hiding to save their political futures here . . . If we go before a city council vote now, who knows what these people will vote for.'" See **Exhibit 17**, Sparks faces lawsuit over Lazy 8, Reno Gazette Journal, Sept. 7, 2006. Publicly, the City Attorney stated that he would not consider a public hearing on the Settlement, but on September 7, 2006, the City announced a special meeting to be held September 20, 2006, to review the Settlement publicly.

On September 20, 2006, the City Council did, in fact, meet publicly to discuss and vote on the Settlement. At that meeting, City Attorney Adams responded to the Attorney General's allegations regarding the potential violation of the Open Meeting Law by stating that he believed the September 1, 2006, meeting with the City was a privileged attorney-client session. After Councilmember Mayer made a motion to appoint outside legal counsel to review the issue and report back to the City, City Attorney Adams was "at a loss" as to why Mayer suggested hiring another lawyer and found the request "disingenuous at best." See **Exhibit 18**, Lazy 8 casino settlement approved, Reno Gazette Journal, Sept. 21, 2006. Councilmember Schmitt responded that he did not think the City Charter authorized the City to hire outside legal counsel and councilmember Mayer's motion was voted down 3-2.

Instead of delaying a decision on how to proceed, a motion was made to settle the lawsuit with Red Hawk. Councilmember Moss, who originally voted against Red Hawk's Application, voted to approve the Settlement. She expressed that although she would "like to dig in [her] heels," she did not feel like she could go on with the lawsuit because the City Attorney had ultimately recommended the Settlement. Councilmember Schmitt stated that only a judge could discern the intent of the

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Development Agreement. Schmitt also said he had received some personal, outside legal advice o the matter, stating that a friend of his told him the City's case is weak. Councilmember Carrigan voted to settle the lawsuit because the City Attorney had told the council "eight different times" that the City cannot win. Councilmembers Mayer and Salerno stood by their original decisions and voted against the Settlement. The City therefore approved the Settlement by a three to two vote. See id.

Just over a week later, Councilman Ron Schmitt expressed doubts about the City's decision to approve the Settlement. Councilman Schmitt was quoted as saying, "I don't want a whole hearing on the Lazy 8 again, but the question is, 'Are we doing the right thing?'" Schmitt also expressed concern that the City was "receiving advice from the city attorney that [he was] increasingly uncomfortable with." See **Exhibit 19**, Schmitt wants Lazy 8 revisited, Reno Gazette Journal, Sept. 29, 2006.

f. Events Leading Up To The August 27, 2007 Vote Approving The Application.

The Petitioners filed a petition for judicial review of the City's September 20, 2007 vote approving the Settlement. Ultimately, on April 20, 2007, the Honorable Jerome Polaha granted Red Hawk's and the City's joint motion to dismiss the petition, concluding that the petition constituted an impermissible collateral attack on the settlement approved and entered by a sister department of the Court.

On April 25, 2007, the Nevada Commission on Ethics (the "Commission") issued an Executive Director's Report and Recommendation Regarding Just and Sufficient Cause concerning a suspected ethics violation by Councilmember Carrigan in connection with the Application. See Report and Recommendation attached hereto as **Exhibit "20"**. The Commission issued its report in response to several complaints of potential ethics violations submitted in September 2006 by a number of interested individuals, including Petitioners Jeannie Adams and Janae Maher. The complaints alleged violations of several statutory provisions by Councilman Carrigan resulting from Carrigan's close personal friendship with Carlos Vasquez, a public relations consultant and spokesperson for Red Hawk, who also happens to be Carrigan's re-election campaign manager. In addition, the complaints claimed that the friendship between Vasquez and Carrigan constituted an undue influence over Carrigan's vote to approve Red Hawk's Application.

In his defense, Carrigan argued that he received advice from the City Attorney on the issue of

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his personal and professional relationship with Vasquez. In particular, on August 17, 2006, less than a week before the original vote on Red Hawk's Application, the City Attorney opined that Carrigan did not have a conflict of interest. Nevertheless, at the August 23, 2006 public hearing, Carrigan did disclose his relationship with Vasquez in accordance with conflict of interest disclosure requirements and, Carrigan cast one of two votes against denying the Application. The Commission, upon reviewing the evidence submitted by the complainants and Carrigan, found that just and sufficient cause existed for the Commission to hold a hearing and render an opinion regarding whether Carrigan violated the provisions of three separate statutes, NRS 281.481(1), NRS 481.501(2) and NRS 281.501(4). The full panel hearing before the Commission on these potential ethical violations was scheduled for August 29, 2007.

In the meantime, and pursuant to the terms of the Settlement, the City was purportedly obligated to proceed with approval of the Application so that Red Hawk could proceed with its proposed development. Accordingly, Red Hawk once again presented its Application to the Planning Commission, which this time was allegedly bound to approve the Application. On August 27, 2007, the Application came before the City Council for a vote. In contrast to its vote almost exactly one year previously, the City Council voted 3-2 to approve the Application. Carrigan placed one of the three votes approving the Application. In the absence of Carrigan's vote, the City council would have been deadlocked.

Two days later, on August 29, 2007, the Commission ruled that Carrigan violated state ethics laws on August 23, 2006 when he voted on Red Hawk's Application. See Transcript of August 29, 2007 Hearing attached hereto as **Exhibit "21"**. The Commission concluded that although Carrigan did disclose his relationship with Vasquez and that he was not improperly influenced by this relationship, he nevertheless should have recused himself and abstained from voting on the Application in August 2006. Because Carrigan should have abstained from the August 2006 vote regarding Red Hawk's Application, he also should have abstained and recused himself from voting to grant final approval to the Application on August 27, 2007.

STATEMENT OF THE ISSUE PRESENTED

Whether the City Council's August 27, 2007 vote approving Red Hawk's Application is void

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due to the finding that Councilmember Carrigan should have abstained from the a vote on the sa Application a year earlier. due to a conflict of interest.

Whether the City abused its discretion and acted arbitrarily and capriciously when it approv the Application, thereby allowing Red Hawk to proceed with its development of a casino along th Pyramid Highway in violation of the Master Plan and applicable State law.

STATEMENT OF RELIEF SOUGHT

The Petitioners respectfully request that this Court grant their Writ of Certiorari and declare the August 27, 2007 vote null and void resulting from the failure of Councilman Carrigan to abstain from voting due to his conflict of interest.

The Petitioners further request that this Court determine that the City's decision approving the Application is not supported by substantial evidence.

STATEMENTS OF REASONS WHY JUDICIAL REVIEW SHOULD BE GRANTED

1. A writ of certiorari is the proper remedy because the Petitioners have no plain, speedy, or adequate remedy in the ordinary course of the law to address the validity, or lack thereof, of the City's approval of the Application with Councilmember Carrigan voting to approve the Application.

2. The City abused its discretion and acted arbitrarily and capriciously when it approved the Application because (a) allowing tourist commercial zoning and nonrestricted gaming at Tierra del Sol, when such a use is not allowed in that development, is a complete disregard and violation of the Master Plan, (b) the City had already designated the location for a small tourist commercial node under the NSSOI Plan within Wingfield Springs, (c) the Application is not a density bonus exception to Master Plan conformance, and (d) the Development Agreement provides no basis for a finding of Master Plan conformance and a transfer of a so-called unused development right.

POINTS AND AUTHORITIES IN SUPPORT OF VERIFIED PETITION

I. Legal Standard.

Pursuant to NRS 34.020(2), a writ of certiorari or writ of review "shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." Therefore, a writ of certiorari is the proper method to seek a

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declaration from this Court regarding the validity of an agency's action, in this case, the City's August 27 vote. See e.g., State ex rel. Friedman v. Eighth Judicial Dist. Court, 81 Nev. 131, 399 P.2d 632 (1965) (involving a proceeding for a writ of certiorari to declare void a temporary restraining order) Further, several state supreme courts have recognized a writ of certiorari as the proper remedy for reviewing a city council's actions with respect to zoning or land use matters. See Sutton v. Dubuque City Council, 729 N.W.2d 796 (Iowa 2006) ("Our decisions have recognized that certiorari may be a proper remedy for reviewing the legality of decisions made by city councils and county boards of supervisors in zoning matters."); J.T. McCallen v. City of Memphis, 786 S.W.2d 633 (Tenn. 1990) (holding that the action of the city council giving approval to a planned development was administrative rather than legislative in nature and any challenge of the action is by writ of certiorari).

The recognition that a writ of certiorari is the proper remedy "rests on the conclusion that the action being reviewed by certiorari is of a quasi-judicial nature." Sutton, 729 N.W.2d at 797-98. "Zoning decisions may be either administrative or legislative depending upon the nature of the act .... [W]hen a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change." Fleming v. Tacoma, 502 P.2d 327, 331 (Wash. 1972) Raynes v. City of Leavenworth, 821 P.2d 1204, 1208

In general, an extraordinary writ may issue only when, as is the case here, there is no plain, speedy, and adequate remedy at law; however, if, as is also the case here, circumstances reveal urgency or strong necessity, a court may grant extraordinary relief. See Jeep Corp. v. District Court, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (citing Shelton v. District Court, 64 Nev. 487, 185 P.2d 320 (1947).) The Petitioners have no plain, speedy, or adequate remedy in the ordinary course of the law, other than through the instant Writ of Certiorari, and therefore, the writ is the proper procedural avenue for nullifying the City's August 27, 2007 vote granting Red Hawk's Application.

Moreover, this Court has authority to review the August 27, 2007 vote pursuant to Sparks Municipal Code ("SMC") 20.18.090, which states that "[a]ny decision of the city under this chapter granting or denying tentative or final approval of the plan or authorizing or refusing to authorize a

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modification in a plan is a final administrative decision and is subject to judicial review in properly presented cases."

II. The Petitioners Have Standing To File This Petition.[9]

a. The Following Petitioners Have An Interest in the Outcome of Litigation

"Standing is the legal right to set judicial machinery in motion." Secretary of State v. Nevada State Legislature, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) (quoting Smith v. Snyder, 839 A.2d 589, 594 (Conn. 2004)). To establish standing in a writ proceeding, "the petitioner must demonstrate a 'beneficial interest' in obtaining writ relief." Id. at 460-61, 93 P.3d at 749; see also State v. State Bank & Trust Co., 37 Nev. 55, 139 P. 505, 512 (1914) ("The cases holding that a party, in order to be entitled to have any affirmative relief in an action or to have the right of appeal, must have a beneficial interest are numerous and without conflict."). In Secretary of State v. Nevada State Legislature, the Nevada Supreme Court stated that "'[t]o demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." 120 Nev. at 461, 93 P.3d at 749 (quoting Lindelli v. Town of San Anselmo, 4 Cal.Rptr.3d 453, 461 (Cal. App. 4th 2003)). "Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." Id. (quoting Waste Management v. County of Alameda, 94 Cal.Rptr.2d 740, 747 (Cal. App. 4th 2000)).

Due to their proximity to the proposed hotel/casino development at Tierra del Sol, Petitioners Adams, Clement, Grieve, and Maher have a beneficial interest in obtaining a writ of certiorari declaring the August 27 vote null and void. These Petitioners live in residential communities on the opposite side of the Pyramid Highway, directly facing the proposed hotel/casino project. As a result of the City's invalid August 27 vote, these Petitioners will be subjected to a hotel/casino that is not permitted near their homes. Accordingly, these Petitioners will gain a direct benefit from this Court's issuance of a writ of certiorari declaring the City's August 27 vote null and void, and are bound to suffer a direct detriment if this Court declines to do so.

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[9]All petitioners are aggrieved persons within the meaning of NRS 278.3195(4) and the Sparks Municipal Code and would have the right to appeal a decision of the Sparks City Council on any land use matter.

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Additionally, Petitioners Ryan Boren, Cassandra Grieve, Joseph and Rose Marie Donchue, and Eugene and Kathryn Trabitz, and the Sparks Nugget have standing to prosecute this petition because all taxpaying citizens have standing in situations, such as this one, where a municipality has abused its discretionary powers or acted arbitrary and capriciously in violation of state law. See City of Las Vegas v. Cragin Indus., Inc., 86 Nev. 933, 939, 478 P.2d 585, 589 (1970), disapproved on other grounds by Sand Valley Assocs. v. Sky Ranch Estate Owners, 117 Nev. 948, 35 P.3d 964 (2001); see also Blanding v. City of Las Vegas, 52 Nev. 52, 75-76, 280 P. 644, 650 (1929); State of Nevada v. Gracey, 11 Nev. 223, 229-30 (1876). In City of Las Vegas v. Cragin Industries, Inc., 86 Nev. 933, 939, 478 P.2d 585, 589 (1970), disapproved on other grounds by Sandy Valley Assocs. v. Sky Ranch Estate Owners, 117 Nev. 948, 35 P.3d 964 (2001), the Supreme Court of Nevada concluded that "*any citizen* of the city of Las Vegas would have had standing to seek injunctive relief, inasmuch as the relief sought is the abatement of unauthorized conduct" that arose out of a written agreement between the City of Las Vegas and a private party that violated a local ordinance. This unambiguous statement from the Supreme Court of Nevada regarding taxpayer standing controls this case and mandates the conclusion that the above named Petitioners have standing to prosecute this Petition and challenge the validity of the Settlement.

Here, the Petitioners have specifically alleged that the City's August 27 vote approving the Application violates Nevada law because, among other things, the Application contravenes the Master Plan and Councilmember Carrigan's vote was needed to approve the Application. Further, the Application itself cannot be reconciled with the legal requirements of this State and the City's own ordinances. Moreover, the filing of the instant Writ of Certiorari and Petition was the only just, speedy and effective remedy available to them. Accordingly, the Petitioners have standing to prosecute this action because all taxpaying citizens have standing in situations, such as the one presented here, where a municipality has abused its discretionary powers or acted arbitrarily and capriciously in violation of a state or local law. See Cragin Indus., 86 Nev. at 939, 478 P.2d at 589.

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III. The City's August 27 Vote Must Be Declared Null and Void Due To Councilmember Carrigan's Conflict of Interest.

Only two days after the City Council voted 3-2 to grant final approval to Red Hawk's Application, the Nevada Ethics Commission ruled that Councilmember Carrigan had committed an ethics violation by failing to recuse himself from the original August 23-24, 2006 vote denying approval of the Application. Because the Commission found that Carrigan should have recused himself from the original vote over one year ago, Carrigan clearly committed additional ethics violations by failing to recuse himself from both the September 20, 2006 vote approving the Settlement and the most recent August 27, 2007 vote granting final approval to Red Hawk's Application.

The Nevada Supreme Court has addressed the impact a conflict of interest has on land use decisions. In Hantges v. City of Henderson, the Court took "the opportunity to decide whether an advisory commission decision must be overturned when members to the commission have an alleged conflict of interest." 121 Nev. 319, 113 P.3d 848 (2005). Two of the members of the advisory commission to the City of Henderson's Redevelopment Agency were also managing members of a Nevada corporation seeking permission from the City to redevelop its property. See id. at ___, 113 P.3d at 849. The taxpayer challenging the City's approval of the redevelopment argued that the two advisory commission members' direct interest in the property tainted the subsequent redevelopment plan determinations. Id. at ___, 113 P.3d at 851.

The Supreme Court first noted that both members recused themselves before the discussion regarding the redevelopment of the property began and neither was present during the public meeting to vote on approval of the plan. See id. Further, the Court noted that the members were not "public officers" for the purposes of NRS Chapter 281, the chapter pursuant to which public officials may be held accountable for actions taken despite a conflict of interest. Importantly, the Court noted that the advisory commission did not have legislative or fiscal power to bind the City or the Redevelopment Agency, and that its sole function is to make recommendations to the Agency. Accordingly, the Court concluded that the taxpayers' conflict of interest argument failed. See id. However, the Court specifically limited its opinion by acknowledging that it did not reach the issue of the effect of a

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conflict of interest of a board member on a board that has final approval authority. See id. at 853.

Within the Hantges decision, the Nevada Supreme Court referenced several decisions from other state supreme courts on the conflict of interest issue. For example, the California Supreme Court concluded that a city council's award of a contract to a council member, who had tendered his resignation just prior to the contract vote, had to be overturned despite the councilmember's resignation. See Stigall v. City of Taft, 375 P.2d 289, 291 (1962). The Court recognized that the negotiations, discussions, and planning which occur prior to a final decision are all part of the agreement and that conflict of interest statutes are designed to apply to any situation that would preclude officials from exercising absolute loyalty to the best interests of the city. See id.

Another case that illuminates the effect of a conflict of interest on the validity of a vote is the Washington Supreme Court decision in Chrobuck v. Snohomish County, 480 P.2d 489, 491 (Wash. 1971). In that case, a developer acquired property located within an area governed by a county's comprehensive plan. The property was zoned as rural and residential, and was designated for rural use. See id. The developer subsequently announced plans to construct and operate an oil refinery on its property, and sought to amend the comprehensive plan to permit a rezoning of a portion of its property from the rural residential classification to a heavy industrial designation. See id. The board of county commissioners adopted the planning commission's recommendation to amend the comprehensive plan, and further granted the developer's petition to re-zone its property. Id. at 492. A group of interested landowners sought judicial review, by way of a writ of certiorari, of the board's comprehensive plan amendment and rezone proceeding. Id. The superior court determined that the planning commission's hearings lacked the appearance of fairness based on the personal relationships and ex parte communications that several of its members had with the developer prior to the hearings. See id. at 494-95.

In affirming the findings of the superior court, the Washington Supreme Court observed that

> comprehensive planning and zoning proposes and imposes limitations upon the free and unhampered use of private as well as public property, and when such regulations are once enacted, the indiscriminate amendment, modification or alteration thereof tends to disturb that degree of stability and continuity in the usage of land to which affected landowners are entitled to look in the orderly occupation, enjoyment, and development of their properties.

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Id. at 495. The Court reasoned that as a result, "the initial imposition of zoning restrictions or t subsequent modification of adopted regulations compels the highest public confidence in t governmental processes bringing about such action." Id. As such, the Court held that a circumstances surrounding the process which might "undermine and dissipate confidence in th exercise of zoning power" must be closely scrutinized "with the view that the evil sought to b remedied lies not only in the elimination of actual bias, prejudice, improper influence or favoritism, but also in the curbing of conditions which, by their very existence, tend to create suspicion, generate misinterpretation, and cast a pall of partiality, impropriety, conflict of interest or prejudgment over the proceedings to which they relate." Id.

Courts have also held that an alleged conflict can be cured by independent review and approval of a possibly tainted decision. For example, the Hawaii Supreme Court examined the issue of whether to invalidate an administrative appeal board's building permit approval, in light of a board member's conflict of interest. See Waikiki Resort Hotel v. City & County of Honolulu, 624 P.2d 1353, 1370 (1981). The plaintiff in the case challenged the permit because one board member was also serving as the general contractor to construct the building contemplated by the permit. See id. The Court approved the grant of the permit, recognizing that with nine board members and unanimous board approval, there were enough votes to support the decision even without the conflicted member's vote. Id. at 1371.

Here, this Court does not even have to make any determinations regarding Councilmember Carrigan's conflict of interest. The Nevada Ethics Commission already conducted an investigation and held a hearing to conclude that, in fact, Carrigan committed an ethics violation by not recusing himself from the vote on the Red Hawk Application as a result of his conflict of interest. The Commission came to this conclusion despite the fact that Carrigan disclosed his relationship with Vasquez publicly, prior to the August 23-24 vote. As a result of this ethics violation, all subsequent actions that the City Council has taken with respect to the Red Hawk Application, with Carrigan's participation, must be voided because Carrigan failed to recuse himself from all of the subsequent votes.

Further, the facts of this case demonstrate that neither the City nor Councilmember Carrigan fall into any of the exceptions discussed by the cases above. Unlike the Nevada Supreme Court

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decision in Hantges, Carrigan is a public official and was found to have violated certain provisions of NRS Chapter 281. Further, unlike the Waikiki Resort Hotel case, there were never any unanimous votes on the Red Hawk Application. Rather, the votes were always close three to two decisions. Admittedly, without Carrigan's vote, the original August 23-24 vote would have remained valid because Carrigan was one of two Councilmembers voting against the denial. However, the subsequent votes to ratify the secret Settlement and the final approval on August 27, 2007 depended on Carrigan's vote to pass. Both of these votes must now be declared void as a result of Carrigan's conflict of interest and ethics violation in failing to recuse himself from each of these votes. As such, this Court should grant the Petitioners' Writ of Certiorari and declare the August 27, 2007 vote null and void.

IV. The City Council Abused Its Discretion By Granting Final Approval To An Application That Violates The Master Plan.

The Petitioners anticipate that the City will attempt to narrow the scope of its action at the August 27, 2007 public meeting, in an attempt to justify the vote, by arguing that it was merely giving final approval to a proposed development that already had tentative approval. Under SMC 20.18.080(B), "[a] public hearing on an application for final approval of the plan, or any part thereof, is not required if the plan, or any part thereof, submitted for final approval is in substantial compliance with the plan which has been given tentative approval." The City will likely argue that because Red Hawk's Application was in substantial compliance with the plan that had been given tentative approval by way of the Settlement, it did not abuse its discretion by voting to grant final approval of the Application. However, the City cannot give final approval where the tentative approval itself is not *supported by substantial evidence and violates the Master Plan. In fact, there was never a valid* tentative approval of Red Hawk's Application. Rather, the purported tentative approval was obtained solely as a result of Red Hawk suing the City and strong-arming the City Council into a secret settlement within six days. Indeed, nothing in SMC 20.18.080(B) allows the City to approve the Application when, as the City determined on August 23-24, 2006, the Application conflicts with the Master Plan.

Although the City and Red Hawk want to hide behind the Settlement, land use decisions simply cannot be made by way of settlement of a lawsuit. The Superior Court of New Jersey, in a case that is

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an all fours here, considered whether a judge, "by consent order, may approve the settlement of lan use litigation without a hearing and without the municipality adopting amendments to the zonin ordinance implementing the settlement terms." Warner Company v. Sutton, 644 A.2d 656, 657 (N.J Super. 1994). A developer applied to the Planning Board for a renewal of its license to continu minim activity on property that was rezoned as a conservation zone, where mining is neither c conditional nor permitted use. See id. at 658. After the application was granted in part and tabled in part, the developer sued the Planning Board alleging, amongst other things, an unlawful taking without just compensation. After extensive discovery and negotiations, a tentative settlement was reached under which the township granted the developer the right to continue its mining activities. See id. The settlement was memorialized in a consent order entered by a judge without a hearing. See id.

In reversing and vacating the consent order, the Superior Court reasoned that "zoning is inherently an exercise of the State's police power" and that zoning ordinances adopted by a municipality must satisfy certain objective criteria including that it "must be adopted in accordance with statutory and municipal procedural requirements." Id. at 659. "A municipality has no power to circumvent these substantive powers and procedural safeguards by contract with a private property owner." Id. The Court held that "[t]he obvious danger in settling such litigation, with or without a consent decree, is that it at least appears that the municipality, presumably protecting the public at large, may be bargaining away its legislative duties without public scrutiny or political accountability." Id. at 660.

Pursuant to the Settlement, the City purportedly had approve Red Hawk's Application, when only a week earlier it had voted three to two to deny the Application because, amongst other things, it conflicts with the Master Plan. As a result, the tentative approval is not supported by substantial evidence in the record and cannot be bootstrapped to support final approval of the Application. To the contrary, the evidence established in the record has always supported the original August 23-24, 2006 decision to deny the Application. As demonstrated more fully below, the City Council could not grant final approval to the Application because the Application contravenes the City's Master Plan, without a requisite amendment to the Master Plan, and constitutes impermissible contract zoning.

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V. The City's August 27th Vote Was Arbitrary and Capricious and Not Based on Substantial Evidence.

The Supreme Court of Nevada has made clear that an abuse of discretion occurs when there is an absence of any justification for a decision or when a decision is baseless, despotic, or "a sudden turn of mind without apparent motive; a freak, whim, mere fancy." City of Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994); see also City Council of the City of Reno v. Irvine, 102 Nev. 277, 279, 721 P.2d 371, 373 (1986) ("the essence of the abuse of discretion, of the arbitrariness or capriciousness of governmental action in denying a license application, is most often found in an apparent absence of any grounds or reasons for the decision. 'We did it just because we did it.'"). Accordingly, "[t]he function of the district court is to ascertain as a matter of law whether there was substantial evidence before the [City] which would sustain the [City's] actions." Enterprise Citizens Action Committee v. Clark County Board of Commissioners, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). If, after reviewing the record, this Court finds that the City's approval of Red Hawk's Application is not supported by substantial evidence, this Court must make a finding that the City abused its discretion and acted arbitrarily and capriciously in voting to approve the Application. Enterprise, 112 Nev. at 654, 918 P.2d at 308.

As discussed more fully below, the City abused its discretion and acted arbitrarily and capriciously when it approved the Application, because the Application, in violation of applicable laws and regulations, allows Red Hawk to proceed to develop a non-restricted gaming establishment on the Pyramid Highway at Tierra del Sol without properly approved tourist commercial zoning required for non-restricted gaming. In particular, the City's actions constituted an abuse of discretion because (a) allowing nonrestricted gaming in the General Commercial zone at Tierra del Sol is not in substantial compliance with, but rather a total disregard of, the Master Plan, (b) proceeding with the development without requiring an amendment to the Master Plan or the NSSOI Plan violates state law, (c) the present case does not involve a density bonus that could justify the City's actions under NRS 278.250, and (d) the Development Agreement for Wingfield Springs does not allow the relocation of a so-called

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unused development credit to any area in Northern Sparks.[10]

A. Nevada Law Requires Substantial Compliance With The Master Plan and this Application Disregards the Master Plan.

In approving the Application and allowing Red Hawk to transfer its purported hotel casino entitlement to a General Commercial zone where such a use is not allowed, the City has not just failed to substantially comply with its Master Plan, but has totally disregarded it. As a result, this Petition should be granted first and foremost because the Application cannot be reconciled with the Master Plan.

Under NRS 278.0284, "[a]ny action of a local government relating to development, zoning, the subdivision of land or capital improvements must conform to the master plan of the local government." (emphasis added). To be sure, the Nevada Supreme Court, in interpreting the required level of conformance with a master plan, has stated that a master plan is not a "legislative straightjacket from which no leave may be taken," Nova Horizon, Inc. v. City of Reno, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989); however, the Court has also stated that the master plan is a "standard that commands deference and a presumption of applicability" and that they "are to be accorded substantial compliance under Nevada's statutory scheme." Id. at 96, 769 P.2d at 723-24. Thus, while strict compliance in all cases may not be required, the Master Plan, particularly the substantive use provisions, cannot be ignored, and conformity is to be insisted upon, subject only to minor deviations in rare cases. See Enterprise Citizens Action Committee v. Clark County Board of Commissioners, 112 Nev. 649, 660, 918 P.2d 305, 312 (1996). The City's actions in this case cannot be considered minor deviations from the Master Plan; instead, the City's actions have totally ignored and violated the Master Plan, and therefore, necessarily constitute an abuse of discretion. See NRS 278.0284 (the master plan governs any action on an application for development).

The Master Plan currently provides that hotel casino uses may be conducted only in areas

[10] The hotel casino contemplated for Wingfield Springs is not an unused development right other than by choice of Red Hawk Land Company whose president Harvey Whittemore has testified both before the Sparks Planning Commission on July 6, 2006 and the Sparks City Council on August 23, 2006 that, if he is not allowed to transfer the hotel casino to Tierra del Sol from Wingfield Springs, he will build the hotel casino in Wingfield Springs.

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designated Tourist Commercial.[11] Therefore, in order to comply with NRS 278.0284, before developing a hotel casino project in the City on land not designated as Tourist Commercial, the land must be re-designated Tourist Commercial, lest the project fail to conform to the Master Plan and violate state law.

The Sparks Municipal Code ("SMC") does not provide specific procedures for amending the Master Plan. Rather, guidelines for amending the Master Plan are found in Chapter 278 of the Nevada Revised Statutes. Under NRS 278.210, before adopting any substantial amendment to a master plan, the relevant government's planning commission must hold at least one public hearing, notice of which shall be provided to the public at least 10 days in advance. Amendment to a master plan also requires a resolution carried by the affirmative votes of not less than two-thirds of the commission. The commission may not amend the land use plan of a master plan more than four times a year, unless the change in use does not affect more than 25 percent of the area for which the use is designated. An attested copy of an amendment adopted by the commission must further be certified to the city council. Under NRS 278.220, upon receipt of the planning commission's certification, a city council must hold at least one public hearing before adopting a master plan amendment, which requires a simple majority vote. See Falcke v. County of Douglas, 116 Nev. 583, 589, 3 P.3d 661, 664 (2000).

Additionally, and in accordance with NRS 278.0282, before the adoption of an amendment to the Master Plan occurs, the City must submit the proposed amendment to the TMRPA, which reviews the amendment at one or more public hearings held within 60 days following receipt of the proposed amendment to determine whether the amendment conforms with the regional plan. The City may not adopt the amendment unless the TMRPA determines that the amendment conforms to the regional plan. Conformance requires a determination by not less than two-thirds of the TMRPA that the amendment does not conflict with the regional plan and that it promotes the goals and policies of the regional plan. If the TMRPA does not make a determination within the 60 day period, the amendment is deemed to be in conformance with the regional plan.

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[11] The limitation of hotel/casino uses to areas master planned as Tourist Commercial is evidenced both by historical practice and the fact that hotel/casino uses are not mentioned as a permitted use in any land use designation other than Tourist Commercial.

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In approving the Application and reversing its original decision denying Red Hawk Application, the City has ignored its Master Plan by permitting a non-restricted gaming use in General Commercial district at Tierra del Sol, where non-restricted gaming is not allowed. In addition the City has effectively amended the Master Plan without satisfying the requirements for such an amendment in NRS 278.210 and NRS 278.0282. As a result, the City abused its discretion and acted arbitrarily and capriciously when it approved the Application, and its August 27, 2007 should be voided.

The Supreme Court of Nevada has emphasized that master plans are drafted so that uses not expressly listed are not allowed. In Enterprise Citizens Action Committee v. Clark County Board of Commissioners, the Court explained that if a use is not allowed either expressly or by virtue of a special use permit, in order to implement that use, the property must be re-designated to a district in which the use is expressly permitted. Id. at 659, 918 P.2d at 311. Accordingly, to permit a use in a district when such a use is not allowed is in effect to ignore the Master Plan and to accord it no deference at all in violation of State law.

Here, the City is allowing, without a required amendment to the Master Plan, the transfer of an alleged nonrestricted gaming entitlement from Wingfield Springs, where the Master Plan envisions, and by Land Use Map designates, the location of its sole Tourist Commercial node, to a General Commercial area along the Pyramid Highway. As a result, what the City is allowing in this case is not a mere absence of strict conformity with, but a total disregard for, the Master Plan in violation of unambiguous Nevada law. Accordingly, the City's August 27 vote approving the Application cannot withstand judicial review, and the vote should be voided.

B. A Tourist Commercial Use in Tierra del Sol Is Inconsistent With the NSSOI Plan.

The City and Red Hawk may attempt to justify the approval of the Application based upon a particular clause in the NSSOI Plan, that the City and Red Hawk may claim allows for the transfer of the non-restricted gaming entitlement from Wingfield Springs to Tierra del Sol. The clause, however, only provides that a "small tourist commercial node" is to be allowed in the planning area. Red Hawk has previously relied on this language alone for the proposition that the "small tourist commercial

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node" can be placed anywhere in the North Sparks planning area. This argument, however, fundamentally flawed because it ignores the fact that, through its adopted Land Use Map covering th NSSOI planning area (see, in particular, Plate 15 of the NSSOI Plan), the City affixed this TC node t a specific location within the planning area, which location is nowhere near the proposed location fo the hotel casino within Tierra del Sol.

Given the time necessary to fully develop a community, the Land Use Map accompanying the NSSOI Plan is by necessity an evolving, rather than final, graphical rendering of land uses within particular areas. Nevertheless, the Land Use Map shows that the TC node is meant to be somewhere within Wingfield Springs and can be moved around within that development only. Accordingly, because the City affixed the TC node to a specific location, i.e. within Wingfield Springs, neither the City nor Red Hawk can credibly claim that the node can be moved to Tierra del Sol, without a Master Plan amendment, in order to justify the approval of the Application.

Indeed, substantial evidence shows that the City did not intend for the TC node within Northern Sparks to be a moveable target until a particular project came along to fulfill it. Instead, the record, including discussions during the Planning Commission meetings, indicates that the TC node was meant to be a part of Wingfield Springs. See Exhibit 9. In addition, the TMRPA specifically adopted its Limited Gaming Policy in order to accommodate a resort hotel/casino to accompany the other amenities available, such as golfing and dining, at Wingfield Springs. See Exhibit 5. Thus, the evidentiary record makes clear that the TC node cannot be moved to Tierra del Sol to allow non-restricted gaming.

The City confirmed the foregoing at the City Council Meeting on August 23/24, 2006. The City found that the graphic depiction of land use designations in the NSSOI Plan prevailed over the textual provisions, thus permitting resort hotel/casino gaming only in the area designated Tourist Commercial on Plate 15 of the NSSOI plan. The City also found that, because the proposed action was inconsistent with the Master Plan, the project was not in the public interest. Therefore, the City's original decision, before being threatened by a multi-million dollar lawsuit and proceeding with a *pro forma* vote on August 27, 2007, was that the textual provisions of the NSSOI Plan must be read in conjunction with and reference to the land use map, and therefore, the TC node could not be moved

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from Wingfield Springs to Tierra del Sol. In light of this finding, there can be no justification for the August 27 approval of the Application, which effectively turns Tierra del Sol into a TC area with non-restricted gaming without a Master Plan amendment.

Finally, the City cannot now argue that Plate 15 of the NSSOI Plan is irrelevant to justify approving Red Hawk's Application. Rather, in reading the text and map together, the NSSOI Plan places the TC node, as shown in Plate 15, in an area of Wingfield Springs along a major arterial roadway that is Vista Boulevard. If that conceptual land use plan is to be changed, the City has a duty to amend the NSSOI Plan and cannot simply move the TC node without such an amendment, which the Application effectively accomplishes.

C. The City Cannot Comply With the Master Plan By Treating the Gaming Entitlement As A Density Bonus.

The City may also attempt to show conformance with the Master Plan under NRS 278.250(4) and (5), by adopting its Staff's reasoning that "[t]his statute envisions the possibility of exceptions to the Master Plan in exchange for certain socially desirable contributions by the developer for the benefit of the City." See Exhibit 8, at page 16. However, the City cannot justify allowing nonrestricted gaming on the Pyramid Highway under NRS 278.250(4) and (5), because this case does not involve a density bonus. Rather, allowing nonrestricted gaming in a General Commercial zone would not comply with the Master Plan because it would allow a more intense use, not a more dense use.

In relevant part, Section 278.250 of the Nevada Revised Statutes provides as follows:

> 4. In exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate, including, without limitation, density bonuses, inclusionary zoning and minimum density zoning.
>
> 5. As used in this section:
>
> (a) "Density bonus" means an incentive granted by a governing body to a developer of real property that authorizes the developer to build at a greater density than would otherwise be allowed under the master plan, in exchange for an agreement by the developer to perform certain functions that the governing body determines to be socially desirable, including, without limitation, developing an area to include a certain proportion of affordable housing.

While it is true that NRS 278.250(4) alleviates the Master Plan conformance requirement for density bonuses, the statute does not provide an alternative means for finding the Application in compliance with the Master Plan.

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At issue in this case is whether the City may approve a use that is disallowed in the Gener Commercial district at Tierra del Sol in the absence of an amendment to the Master Plan, not wheth Red Hawk should be allowed to build at a greater density. Use and density are different concep altogether, density meaning "the quantity per unit volume, unit area, or unit length . . . the averag number of individuals or units per space unit," and use in this context meaning "the legal enjoyment o property that consists in its employment, occupation, exercise or practice." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 309, 1301 (10th ed. 1997). Thus, if a hotel/casino with 50 units were allowed in the general commercial district, and Red Hawk desired to build a hotel/casino with 100 units, such a use would involve a greater "quantity per unit area" and might qualify as a density bonus. However, building a hotel/casino involves the employment of land for a purpose (hotel/casino) not allowed in the General Commercial district at any density. Accordingly, the City's noncompliance with the Master Plan arises not from allowing Red Hawk to build at too great a density, but from the simple fact that a hotel/casino is not an allowed use on the Tierra del Sol property. Nevada law is clear that only uses expressly permitted may be implemented. See Enterprise Citizens, 112 Nev. at 659, 918 P.2d at 311-12. The City cannot circumvent this rule by attempting to pigeonhole a disallowed use into the density transfer provision of NRS 278.250, when use and density are not the same.

If the City's position was correct, it would, in theory, be possible under NRS 278.250(4) for a local government to allow the transfer of a use to an area where that use is not otherwise permitted by the Master Plan. At present, however, neither the Nevada Revised Statutes nor the Sparks Municipal Code provides any direction or standard for determining when such action may be appropriate, if at all. In the absence of specific standards, if the City is allowed to go down the road of granting variances to the Master Plan, as it is has done by approving Red Hawk's Application, it will create a situation in which exceptions to the Master Plan ultimately swallow the general rule of substantial conformance. Accordingly, NRS 278.250(4) and (5) are a dubious and dangerous basis on which to find Master Plan conformance.

Second, and perhaps even more important, is that the concern over exceptions-swallowing-the-rule, is exacerbated in this case by the August 27 vote. The City, by apparently finding Master Plan conformance in exchange for community facilities and $300,000 in cash to be paid by Red Hawk

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under the Settlement, is setting the bar for all future developers seeking to offer public facilities and cash contributions as a means to be excepted from the City's planning and zoning documents including the Master Plan. The funds being offered in this case, however, are not presented to offset development related impacts. Rather, they represent an offer of public facilities and a cash payment designed solely to avoid the ordinary application of the Master Plan. The laws of this State do not allow such a *quid pro quo* transaction, and therefore, the City further abused its discretion by voting to approve the Application and ignoring the Master Plan in exchange for Red Hawk's offer of public facilities and cash.

D. Section 3.08 of the Development Agreement Provides No Basis for Master Plan Conformance.

In its Settlement with Red Hawk, the City states that it "has no right to refrain from cooperation in a contract that was entered into in 1994 or to act in bad faith, and in a manner calculated to destroy the benefit of the Development Agreement to Red Hawk." See Exhibit 15, at paragraph 42. In making this statement, the City relies heavily on Section 3.08 of the Development Agreement, which provides, in relevant part, that Red Hawk and the City agree to enter into a Supplemental Development Agreement regarding the transfer and use of unused development credits outside of Wingfield Springs but within the City. According to the City, because Wingfield Springs and its related approvals were found to be in conformance with the Regional Plan in 1994, any relocation of a use made pursuant to the Development Agreement necessarily conforms to the Master Plan and the Regional Plan.

The City's reliance on Section 3.08 to find that the Application conforms to the Master Plan fails because allowing the relocation of land uses by way of a Development Agreement not only constitutes illegal contract zoning and ultra vires bargaining away of the police power, but also exceeds the City's zoning and planning authority under state law. Further, in addition to constituting illegal contract zoning and being beyond the scope of the City's authority, the Development Agreement is unenforceable because the terms and conditions of the subsequent agreement that section 3.08 contemplates are void for uncertainty and nothing more than an agreement to agree. Accordingly, the Development Agreement, and Section 3.08 in particular, cannot justify the City's decision to execute the Settlement, approve the Application, and disregard the Master Plan.

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1. Section 3.08 of the Agreement Constitutes Illegal Contract Zoning and Ultra Vires Bargaining Away of the Police Power.

Contract zoning describes an agreement between a municipality and a developer in which the municipality agrees to rezone property for consideration. Dacy v. Village of Ruidoso, 845 P.2d 793, 796 (N.M. 1992); Morgan Company, Inc. v. Orange County, 818 So.2d 640, 642 (Fla. Dist. Ct. App. 2002). Such agreements are void as a matter of law because a municipality may not contract away the exercise of its zoning powers. Attman v. Mayor and Aldermen of Annapolis, 552 A.2d 1277, 1282 (Md. 1989). The City cannot rely on Section 3.08 of the Development Agreement to support its decision to allow Red Hawk to relocate permitted uses within Wingfield Springs to locations outside of the Wingfield Springs PD, where such uses are not permitted, because such an interpretation of the Development Agreement results in illegal contract zoning.

The prohibition against contract zoning is based on the principle that the authority granted to municipalities to control land use decisions must be exercised for the common welfare of the people, and not for the benefit of private landowners. See Dacy, 845 P.2d at 797; Haymon v. Chattanooga, 513 S.W.2d 185, 188 (Tenn. Ct. App. 1974). As one court articulated, "[c]ontracts made for the purpose of unduly controlling or affecting official conduct of the exercise of legislative, administrative or judicial functions, are plainly opposed to public policy. They strike at the very foundations of government and intend to destroy that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society." Haymon, 513 S.W.2d at 187-88. In the case of land use decisions, "the carefully structured provisions for public notice, public hearings, and, in many cases, required consideration of staff or planning commission recommendations, would be stripped of all meaning and purpose if the decision-making body had previously bound itself to reach a specific result." Attman, 552 A.2d at 1283-84.

Based on the above, Section 3.08 of the Development Agreement, as applied by the City, as well as the Settlement that purports to be based on the Settlement Agreement, are void as a matter of law and cannot support approval of the Application. The City cannot interpret the Development Agreement to allow or otherwise require the transfer of non-restricted gaming from Wingfield Springs to Tierra del Sol because such an interpretation constitutes an implied promise on the part of the City

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to re-zone property owned by Red Hawk, so as to permit the development of a hotel casino. T mechanism through which the approval occurs—whether by a settlement agreement, amendment to t zoning code, amendment to a handbook, or amendment to the Master Plan—is immaterial, since in a cases the City is purporting to fulfill a contractual obligation in which it had "previously bound itse to reach a specific result."[12] Id. at 1284. Indeed, Red Hawk framed its Application as an "electio under Section 3.08 . . . for transfer of certain unused Development Approvals," and thus acknowledge and emphasized the City's implied promise to permit a hotel/casino use by way of changing the present land use designation. Because the City has now determined that it committed itself to reach a particular result (i.e, granting the Application) under the Development Agreement, the City cannot legitimize the process by electing to document the commitment in the Settlement and subsequently follow-through with its promise by approving the Application by way of a public vote. See Morgran Company, 818 So.2d at 643 (when contract zoning is involved, following legislative procedures is a mere "pro forma exercise").

Additionally, to the extent that the City is relying on the Development Agreement to establish conformance with the Master Plan or justification for approving the Application, the Development Agreement squarely violates the policy behind the prohibition against contract zoning. Specifically, such an interpretation precludes the City from "exercis[ing] its unconstrained independent judgment in deciding matters of reclassification," and "preempts the power of the zoning authority to zone the property according to prescribed legislative procedures." Attman, 552 A.2d at 1283; Dacy, 845 P.2d at 797.

The Nevada Legislature has specifically conferred upon municipalities the power to regulate land use decisions for the purposes of promoting the health, safety, morals and general welfare of the community. See NRS 278.020. As demonstrated by the above principles, the City cannot agree for consideration to reclassify property in a particular manner for the benefit of a private party, as such an

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[12] Courts apply contract zoning principles not just to *zoning*, but to other land use decisions as well. See Attman, 552 A.2d at 1283 (holding that the prohibition against contracting away the police power applies not only to zoning decisions, but also to special exception and conditional use cases, since the same policy applies and since "these closely related functions, often grouped generically under the broad topic of zoning, involve the exercise of the power of land use regulation").

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agreement constitutes a bargaining away and delegation of the City's police power. Accordingly, to the extent that the City has determined that the Development Agreement obligated the City to enter into the Settlement (or provides a basis to find conformance with the Master Plan), the Development Agreement and the City's August 27 vote approving the Application (pursuant to its purported obligation to do so under the Settlement) constitute illegal contract zoning, and the August 27 vote must be voided.[13]

2. The City Exceeded Its Authority By Entering Into the Development Agreement.

To the extent Section 3.08 of the Agreement is read as allowing the movement of development approvals outside of the Wingfield Springs PD, it exceeds the City's zoning/planning authority under state law. Under NRS 278A, transfer of a development approval within a single PD is expressly authorized, but transfers outside of a specified PD are not. Specifically, NRS 278A.110(3) provides as follows:

> In the case of a planned unit development which is proposed to be developed over a period of years, the standards may, to encourage the flexibility of density, design and type intended by the provisions of this chapter, authorize a departure from the density or intensity of the use established for the entire planned unit development ***in the case of each section to be developed***. The ordinance may authorize the city or county to allow for a greater concentration of density or intensity of land use ***within a section of development*** whether it is earlier or later in the development than the other sections. The ordinance may require that the approval by the city or county of a greater concentration of density or intensity of land use for any section to be developed be offset by a smaller concentration in any completed prior stage or by an appropriate reservation of common open space on the remaining land by a grant of easement or by covenant in favor of the county or city . . . (emphasis added).

Under this provision, the authority of local governments to permit transfers of development approvals is limited to density transfers within a single planned development. Thus, the Development Agreement and the approval of the Application are *ultra vires* because they allow Red Hawk to transfer an alleged gaming entitlement outside of the Wingfield Springs PD to Tierra del Sol, and the transfer of the purported gaming entitlement is not a density transfer, but rather a transfer of an entire

[13] Notably, it is only when the Agreement is given the construction offered by the City and Red Hawk that it becomes illegal contract zoning. For example, if the Agreement is interpreted as permitting the transfer of development approvals only to those locations where the approval is allowed under the existing zoning, handbook, and Master Plan designations, then there is no implied promise by the City to zone property in a particular way for the benefit of the Applicant.

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land use designation. This conclusion is supported by rule of statutory interpretation "*Expressio unius exclusio alterius*," the expression of one thing is the exclusion of another. See Desert Irrigation, Ltd. v. State of Nevada, 113 Nev. 1049, 1060, 944 P.2d 835, 842 (1997).[4] Simply stated, NRS 278A.110(3) allows transfers within one planned development but not between two planned developments, and therefore, NRS 278A.110(3) cannot be read to allow approval of the Application, pursuant to which a purported gaming entitlement will be transferred from one planned development – Wingfield Springs – to another – Tierra del Sol.

3. The Development Agreement is Void for Uncertainty.

In addition to constituting illegal contract zoning and being beyond the scope of the City's authority, the Development Agreement is unenforceable under Nevada law because Section 3.08 contemplates the making of a subsequent agreement as a condition precedent to the transfer of development approvals. An agreement to enter into a subsequent agreement is enforceable only if the terms and conditions of the subsequent agreement – other than those terms that can be ascertained by reference to market or economic conditions – are sufficiently definite and certain. See Cassinari v. Mapes, 91 Nev. 778, 781, 542 P.2d 1069, 1071 (1975); see also City of Reno v. Silver State Flying Service, Inc., 84 Nev. 170, 175-76, 438 P.2d 257, 260-61 (1968). Section 3.08 of the Development Agreement provides that the City and Red Hawk will enter into a supplemental agreement "[p]roviding for the Transfer of Unused Development Approvals regarding the transfer and use of development credits outside the Wingfield Springs PC but within the City." The meaning of this provision is not ascertainable – it only contemplates undefined supplemental agreements – and cannot support the City's decision that approving Red Hawk's Application was required under the terms of the Development Agreement.

In fact, the Development Agreement contains several indefinite and/or undefined terms, underscoring the foregoing conclusion. The words "Unused Development Approvals" are not defined

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[4] Case law confirms that local governments may only exercise their powers in the manner authorized by state legislatures. See West Montgomery Citizens Ass'n. v. Maryland-National Capital Park and Planning Commission, 522 A.2d 1328, 1329, 1336-37 (Md. 1987) (holding that "a [local government] enjoys no inherent power to zone or rezone, and may exercise zoning power only to the extent and in the manner directed by the State Legislature").

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in the Development Agreement and could have several different meanings. Additionally, the Development Agreement does not define "development credit," and it leaves open the location to which the development approvals will be transferred. The location of the casino is certainly a material term that cannot be defined by the courts under both contract principles and separation of powers principles. None of the uncertain terms appearing in the Development Agreement are ascertainable by reference to market or economic conditions. Thus, the Development Agreement appears to be "so indefinite and uncertain in all respects that it is in fact a nullity and unenforceable." Silver State, 84 Nev. at 176, 438 P.2d at 260. Because the Development Agreement, and Section 3.08 in particular, is unenforceable, the City further abused its discretion when it determined that it was obligated to approve the Application and allow Red Hawk to transfer its alleged gaming entitlement from Wingfield Springs to Tierra del Sol under the terms of the unenforceable Development Agreement.

Additionally, with respect to the location of the development approvals, the Development Agreement allows transfer of development approvals "outside of the Wingfield Springs PC but within the City." The property comprising the Tierra Del Sol PD was not annexed until 1999, five years after the parties executed the Development Agreement. Indeed, Red Hawk did not even acquire its property in Tierra Del Sol until early 2004, more than a decade after execution of the Development Agreement. These facts demonstrate that the parties did not contemplate the transfer of any of the development approvals to what is now Tierra Del Sol because at the time the Development Agreement was executed, Tierra Del Sol was not within the City. As a result, the City's apparent belief that the Development Agreement required it to (i) ignore the Master Plan, (ii) execute the Settlement, and (iii) subsequently vote to approve the Application and allow Red Hawk to transfer its alleged gaming entitlement from Wingfield Springs to Tierra del Sol was entirely misplaced and cannot justify the City's blatant disregard of the Master Plan and Tierra del Sol's General Commercial designation, which does not permit unrestricted gaming.

CONCLUSION

On August 23/24, 2006, the City determined that, based on substantial evidence, Red Hawk's Application was inconsistent with the Master Plan and not in the best interests of the City. The City therefore voted 3-2 against the Application, denying the requested transfer of an alleged nonrestricted

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gaming entitlement from Wingfield Springs to Tierra del Sol. Immediately following the decisi Red Hawk filed a lawsuit against the City, alleging that the decision would result in millions of dolla of damages to Red Hawk. Within days, and without seeking an outside legal opinion, the Cit Attorney privately settled the lawsuit, an action which the City Council subsequently authorized a September 20, 2006, public meeting.

On August 27, 2007 the Application once again came before the City Council for a vote. This time, the City Council voted 3-2 to approve the Application. Only two days later, the Nevada Ethics Commission ruled that Councilman Carrigan should have recused himself from the original August 23/24, 2006 vote because of his conflict of interest. In light of this ethics violation, Carrigan was also obligated to recuse himself from the August 27 vote, but failed to do so. Accordingly, the August 27 vote approving the Application must be declared void.

Further, even if this Court does not invalidate the August 27 vote due to Carrigan's conflict of interest, the vote must nevertheless be invalidated because the City's decision was arbitrary and capricious and not supported by substantial evidence in the record. The Petitioners respectfully request that this Court grant their Writ of Certiorari, or, in the alternative, grant their Petition for Judicial Review of the August 27, 2007 vote approving Red Hawk's Application.

DATED this 21st day of September 2007.

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **WRIT OF CERTIORARI AN PETITION FOR JUDICIAL REVIEW** filed in District Court Case No. _____ doe not contain the social security number of any person.

DATED this 21st day of September, 2007.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

RED HAWK LAND COMPANY, LLC. a Nevada Limited Liability Company,

Plaintiff-Petitioner,

vs.

CITY OF SPARKS, a municipal corporation of the State of Nevada,

Defendant-Respondent.

CASE NO. CV06-02078

DEPT. NO. 6

MOTION TO INTERVENE AND MOTION TO CONSOLIDATE RELATED CASES

Pursuant to Rules 24(a)(2) and 24(b)(2) of the Nevada Rules of Civil Procedure, Defendants-in-Intervention Roy Adams and Jeannie Adams; Ryan Boren; Melissa T. Clement; Joseph Donahue and Rosie Marie Donahue; Cassandra Grieve; David Maher and Janae Maher; Eugene Trabitz and Kathryn Trabitz; Sparks Nugget, Inc. (collectively, the "Intervenors"), by and through their undersigned counsel of record, Hale Lane Peek Dennison and Howard, hereby move this Court for leave to intervene in the underlying lawsuit filed by Plaintiff Red Hawk Land Company, LLC ("Red Hawk") against Defendant City of Sparks ("the City"). Intervenors are seeking leave to intervene in this lawsuit to assert the claims and defenses set forth in the Counterclaim and Cross Claim in Intervention attached hereto as **Exhibit "A"**.

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In addition, Intervenors further move this Court, pursuant to Rule 42(a) of the Nevada Rules of Civil Procedure, for an order consolidating with this case Case No. CV07-01981, *Red Hawk Land Company v. Sparks Nugget Inc.*, currently pending before this Department, and Case No. CV07-02180, *Adams et. al. v. City of Sparks*, currently pending before Department 3 (the "Related Cases"). This Motion is supported by the following Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

This lawsuit and the Related Cases center on the unsupportable decision of the Sparks City Council to reverse itself on a significant land use decision by way of a secret settlement in this case. In particular, Red Hawk submitted an application to the City's Planning Staff (the "Staff") in July 2006 to transfer a purported gaming entitlement from its development known as Wingfield Springs, to a location along the Pyramid Highway known as Tierra del Sol (the "Application"). The Staff recommended approval of the Application to the City of Sparks Planning Commission (the "Planning Commission"), but the Planning Commission disagreed with the Staff's recommendation. The Planning Commission found, inter alia, that the Application conflicted with the City of Sparks' Master Plan (the "Master Plan"), and as a result, the Planning Commission recommended denial of the Application to the Sparks City Council. At an August 23-24, 2006 public meeting, the City adopted the Planning Commission's recommendation and denied the Application. The City Council, consistent with the Planning Commission's findings, determined that the Application conflicted with the Master Plan and *could not be approved.*

In response to the City's well-reasoned decision, which was supported by the administrative record, Red Hawk filed this lawsuit alleging that the denial of the Application breach a development agreement between the City and Red Hawk and caused damages in excess of $100 million. The City, despite its previous denial of the Application and without fully considering its legal options, decided to settle the matter privately in six days, as part of the stipulated settlement signed by this Court, and agreed to approve Red Hawk's Application, despite the fact that the City had already concluded that the Application conflicted with the

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Master Plan and could not be approved. The settlement further dismissed the individual Councilmembers from the lawsuit, with prejudice, with this Court retaining jurisdiction over the City. After a public uproar and a warning letter from the Nevada Attorney General's office regarding the City's potential violation of Nevada's Open Meeting Law, the City conducted a public meeting on September 20, 2006, to publicly consider the settlement and authorize the City Attorney to enter into the settlement. At the meeting, the City Council voted three to two authorizing the City Attorney to settle this lawsuit. Without the September 20, 2006 vote authorizing the settlement, the settlement would have been null and void.

Accordingly, Intervenors challenged the City's September 20, 2006 vote authorizing the settlement by seeking writs of certiorari and mandamus, as well as judicial review of the decision. The District Court, Judge Jerome Polaha presiding, ultimately dismissed the petition for judicial review and denied writ relief, concluding that Intervenors should have intervened in this underlying lawsuit between Red Hawk and the City. Intervenors have appealed the District Court's order dismissing their petition to the Nevada Supreme Court because Internenors have the right to seek judicial review of the City's September 20, 2006 decision and the Intervenors did not have an opportunity to intervene in this lawsuit before the City's secret settlement was first signed by the parties' attorneys and this Court.

Approximately one year later, Red Hawk once again came before the Planning Commission seeking final approval of the Application, pursuant to the terms of Red Hawk's settlement with the City. This time, the Planning Commission recommended approval of the Application and forwarded its recommendation to the City Council. On August 27, 2007, Red Hawk sought final approval of its Application from the City Council. At the public hearing, the City Council voted three to two to grant final approval of the Application. Only two days later, the Nevada Commission on Ethics concluded that Councilmember Michael Carrigan committed an ethics violation by failing to recuse himself from the original August 23-24, 2006 vote on Red Hawk's Application. As a result of this finding, Councilman Carrigan should have recused himself from the September 20, 2006 vote authorizing the settlement and the August 27, 2007 vote approving the Application.

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In response to the City's August 27, 2007 vote approving the Application, the Intervenors filed another petition for judicial review, arguing the August 27, 2007 vote is invalid and must be declared null and void because Councilmember Carrigan should have recused himself from all of the votes pertaining to Red Hawk's Application in light of his conflict of interest.

Red Hawk filed a separate lawsuit against the Nugget and Sparks City Councilmember Phillip Salerno, currently pending before this Department, alleging, among other things, civil RICO claims based on the Nugget's opposition to the Application. Red Hawk alleges, as part of its RICO case, that it was forced to file this lawsuit as a result of the Nugget's actions in opposition to the Application. Thus, a critical issue in Red Hawk's RICO case against the Nugget and Salerno is what transpired in this lawsuit, the claims Red Hawk asserted, and the defenses the City may have had but failed to raise.

In light of the City's failure to stand behind its original decision rejecting Red Hawk's Application and Red Hawk's RICO case, Intervenors now move to intervene in this underlying case between Red Hawk and the City and consolidate the related lawsuit filed by Red Hawk against the Nugget and Councilmember Salerno as well as the Related Cases. Intervention and consolidation are warranted so that all issues related to the Application can be heard in one proceeding before this Court.

Intervenors have been compelled to seek intervention at this juncture because, despite their pending appeal to the Nevada Supreme Court regarding the City's September 20, 2006 vote authorizing the settlement, Red Hawk moved ahead with seeking final approval of its Application. Intervenors may intervene as of right because their motion is timely, it is clear that the City has failed to adequately represent Intervenors' interests, and there would be no prejudice to either Red Hawk or the City as a result of the intervention. Further, and despite the fact that the City and Red Hawk settled their lawsuit on September 1, 2006, Red Hawk did not pursue final approval until almost a year after the entry of the order, and this Court retained jurisdiction over the case to ensure that the City proceeded with the approval, as stipulated between the parties. Considering the totality of the circumstances, this Court should grant Intervenors leave to intervene in this case to protect their interests, and further consolidate the Related Cases with

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this one because they all involve the Application.

II. Statement of Facts.

a. The City's Master Plan and the Northern Sparks Sphere of Influence Plan.

The Master Plan governs land use planning and development for the City. See NRS 278.0284. The Northern Sparks Sphere of Influence Plan ("NSSOI Plan") is an element of the City's Master Plan, and it encompasses the southerly portion of the Spanish Springs Planning Area, including more than 7,000 acres of land in public and private ownership. See **Exhibit 1**. Sparks Master Plan NSSOI Plan at page 2.199. According to the NSSOI Plan, "[t]he area is intended to provide for a mix of residential, general commercial, restricted industrial business park and recreational opportunities with an emphasis on master planned developments." Id. at page 2.200. The NSSOI Plan also provides the following:

> "[a] small tourist commercial node is anticipated in the area. Uses in such a node could include a resort hotel with gaming focused around recreational uses such as a golf course. The extent of gaming allowed in a resort facility shall be in accordance with Nevada Revised Statues on gaming limited by the City of Sparks."

Id. at page 2.205. Accompanying the NSSOI Plan text provisions is a Land Use Plan Map ("Land Use Map"), attached as **Exhibit 2**, which depicts the envisioned locations of the different land uses within the area and specific developments. The Land Use Map shows that the single Tourist Commercial node ("TC node") is within the Wingfield Springs development.

Both the Master Plan and the NSSOI Plan must comport with the Truckee Meadows Regional Plan (the "Regional Plan"). The Truckee Meadows Regional Planning Agency ("TMRPA"), *under NRS 278.0278, has the authority to approve and must approve all* Master Plan amendments. In addition to approving Master Plan amendments, the TMRPA must also review projects of regional significance. Under NRS 278.026(5), and guidelines the TMPRA has adopted pursuant to NRS 278.0277, a project of regional significance includes those projects that require

> a change in zoning, a special use permit, an amendment to a master plan, a tentative map or other approval for the use of land which, if approved, would have the effect on the region of increasing: (1) employment by not less than 938 employees; (2) housing by not less than 625 units; (3) hotel accommodations by not less than 625 rooms; (4) sewage by

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not less than 187,500 gallons per day; (5) water usage by not less than 625 acre feet per year; or (6) traffic by not less than an average of 6,250 trips daily.

b. Wingfield Springs Proposal and Development Agreement.

In October 1994, Loeb entered into an agreement with the City for the development of a large planned development ("PD") in northeast Sparks, commonly known as Wingfield Springs, through the submission of the Wingfield Springs Development Agreement Handbook (the "Wingfield Handbook"), attached as **Exhibit 3**, and the Wingfield Springs Development Agreement (the "Development Agreement"), attached as **Exhibit 4**. The land uses within a PD, such as Wingfield Springs, are limited to those set forth in the PD's handbook, but a PD's handbook may include any use allowed in any other zone, provided the PD's uses are compatible with each other and the surrounding environment. See SMC 20.18.030. In the case of a development handbook that does not permit a particular use, such as a hotel/casino, the handbook must be amended to allow for that use before the use is allowed within the PD.

The Wingfield Handbook originally called for the development of approximately 2,242 residential lots, a neighborhood commercial development, a golf course, and a related golf complex. The Development Agreement and the Wingfield Handbook contemplated that Wingfield Springs would be entitled to a Tourist Commercial ("TC") designation within Wingfield Springs in order for Loeb to develop a resort complex, which was anticipated to include, among other facilities, a hotel and casino with limited nonrestricted gaming (the "resort hotel/casino"). See Exhibit 3 at pages V-26, 27. The Development Agreement also included *considerations for Loeb's personal and investor resources in the event the Wingfield Springs* development was unsuccessful. In particular, section 3.08 of the Development Agreement contemplated supplemental development agreements for Loeb's benefit, with the understanding that the terms of the Development Agreement were broad and could require clarification. See Exhibit 4 at paragraph 3.08. Such supplemental development agreements would have to be consistent with the Development Agreement and were "intended only to supplement with more specific terms the subject matter of [the Development] Agreement." Id.

Section 3.08(d) of the Development Agreement stated that Loeb and the City could enter

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into a supplemental development agreement. "Providing Transfer of Unused Development Approvals regarding the transfer and use of development credits outside Wingfield Springs PD but within the City." Id. at paragraph 3.08(d). The Development Agreement did not, however, define the terms "Unused Development Approvals" or "development credits," or provide any details regarding the types of situations that could trigger the application of Section 3.08(d).

Through the development process, Loeb presented its Wingfield Springs project to TMRPA to ask for review of the project's conformance to the Regional Plan, as a project of regional significance. TMRPA deemed Wingfield Springs a project of regional significance in Sparks at the Regional Planning Commission ("RPC") meetings of July 22, 1992 and April 28, 1993. On November 9, 1994, Loeb again went before the RPC, this time requesting, among other things, an amendment to the Wingfield Handbook for the inclusion of a limited resort gaming facility. The RPC postponed the November 9 meeting in order to further consider the definitions of limited gaming in the context of rural gaming and resort-related gaming; however, the RPC reconvened on November 30, 1994, in a special session to complete its review of Loeb's proposed resort amendment for Wingfield Springs. In anticipation of this November 30 meeting, RPC staff prepared a report on limited gaming, including a history of limited gaming in the Regional Plan and the request for the adoption of a new "Limited Resort Gaming" policy. See **Exhibit 5**, Regional Staff Report of Nov. 30, 1994 at page 1.

In relevant part, the policy provided that varying amounts of casino square footage would be "permissible in association with resort-style developments. A resort-style development *includes hotel and convention facilities, one or more restaurants, retail shops, and a major* recreational amenity or amenities generating 300 or more resort customers a day, such as a golf course or a ski area." For an 18,000 square foot casino, the minimum baseline requirements would be "resort-type amenities, at least 200 hotel rooms, and over 2000 residential units." See id., Attachment 1. Based on this policy, the RPC made the specific finding that

> [t]he development of limited gaming of not greater than 18,000 square feet will be an accessory limited resort use rather than a primary component of the Wingfield Springs project and the Development Agreement Handbook will contain provisions to assure that the project will conform to the requirements set forth in the 'Limited Resort Gaming' policy. See id. at page 5.

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As a result, the TMRPA approved the Development Agreement and Loeb's proposed amendment to the Wingfield Handbook.

Loeb proceeded with the development of Wingfield Springs, which currently consists of approximately two thousand two hundred forty two (2,242) residential lots; however, neither a hotel nor a casino was ever built in connection with the development. In fact, while "resort condominium" units were built and the Resort at Red Hawk rents such units for transient use, neither actual hotel rooms nor a resort were built, resulting in the current transient use being a non-conforming use in Wingfield Springs.

c. Red Hawk's Applications to Amend the Wingfield and Tierra del Sol Handbooks.

Loeb's successors-in-interest, Red Hawk, also failed to construct any type of gaming establishment to accompany the resort amenities at Wingfield Springs. Instead, Red Hawk decided to exercise what it interpreted to be its right under section 3.08(d) of the Development Agreement, and transfer its purported right to build a casino at Wingfield Springs to another one of its properties, Tierra del Sol.

The Tierra del Sol property is located along State Route 445, commonly known as the Pyramid Highway, approximately 1.5 miles from Wingfield Springs. The City first approved the development handbook for Tierra del Sol, a multi-use development, on August 7, 2000. Neither the application nor the approval for Tierra del Sol included a TC zoning designation that would allow nonrestricted gaming. See **Exhibit 6**, Tierra Del Sol Community Project Description; **Exhibit 7**, Tierra del Sol PD Design Standards & Guidelines at page 7. Instead, the Master Plan's designation for Red Hawk's property at Tierra del Sol is General Commercial ("GC"), a designation within which a hotel/casino use is not allowed. See SMC 20.85.020 In other words, the Master Plan designation for Red Hawk's property at Tierra del Sol is not tourist commercial and is not compatible with and does not permit non-restricted gaming.

The SMC includes provisions relating to the initial approval of development handbooks, but it does not identify any procedure by which development plans may be modified or amended. Nonetheless, in amending a development handbook, the City follows the same process used for initial approval of a development handbook, which is set forth in SMC 20.18.030. Additionally,

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state law provides specific standards by which the modification of a development handbook must be judged. In particular, under Section 278A.380 of the Nevada Revised Statutes, modification of a development handbook must (i) "further the mutual interest of residents and owners of the planned unit development and of the public in the preservation of the integrity of the plan as finally approved," and must not (ii) "impair the reasonable reliance of the residents and owners upon the provisions of the plan or result in changes that would adversely affect the public interest."

In October 2004, Red Hawk submitted its Application to the City. The Application consisted of two handbook amendments: the first was an amendment to the Wingfield Handbook, eliminating the resort hotel/casino for Wingfield Springs; and the second was an amendment to the Tierra del Sol Handbook, adding the exact language that was removed from the Wingfield Handbook to allow a hotel/casino to be developed in Tierra del Sol. Red Hawk did not seek an amendment to the Master Plan as part of its Application even though the Master Plan does not permit a hotel/casino at Tierra del Sol.

Upon review of the Application, the City's Planning Staff recommended approval. In its recommendation, the Staff adopted twenty-one planned development findings ("PD Findings") and set forth the facts that allegedly supported the findings in its report. Of particular importance were PD Findings 18 and 21. PD Finding 18 stated that "[t]he project, as submitted and conditioned, is consistent with the City of Sparks Master Plan." The Staff relied on the Tourist Commercial description in the NSSOI Plan to conclude that "[a]s long as the tourist commercial *in Tierra del Sol is 37 acres or less and is accompanied by the removal of the tourist commercial* use (i.e. one node) in Wingfield Springs, the handbook amendment is consistent with the NSSOI." See **Exhibit 8**, Staff Report, at page 15.

Further, PD Finding 18 provided that the project could alternatively be found consistent with the Master Plan under the density bonus statues found at NRS 278.250(4) and (5). The Staff reasoned as follows:

> [t]his statute envisions the possibility of exceptions to the master plan in exchange for certain socially desirable contributions by the developer for the benefit of the City. In this case the developer has agreed to construct, at no cost to the City, a community services facility. The applicant has also agreed, in principle, to contribute $300,000 towards

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developing an area which will include a certain proportion of affordable housing, to be spelled out in a supplemental development agreement to be approved by the City Council prior to Final Approval of the handbook by the City Council.

PD Finding 21 stated that

> [t]he Tierra del Sol Planned Development provides a mix of uses with residential, commercial, resort, and public facility uses. The commercial, resort, and public facility uses will benefit the residents in the Tierra del Sol community as well as those within the surrounding communities in all directions by providing convenient services and retail establishments to help meet day-today needs. The transfer of previously approved density from Wingfield Springs under the terms of the original 1994 Wingfield Springs Development Agreement to the Tierra del Sol Planned Development is consistent with the City of Sparks Master Plan. See id. at pages 16-17.

Pursuant to the Planned Development Review provisions of SMC 20.18 et seq., the Staff forwarded the Application and its recommendation to the Planning Commission.[1]

d. The Planning Commission's and City's Denial of the Application.

On July 6, 2006, the Planning Commission heard the Staff's recommendation to approve the Application. Due to the volume of questions and testimony from the public concerning the Application, the Planning Commission was forced to continue the meeting.

At the continuance of the meeting on July 17, 2006, Commissioner Mattina, who stated she was present in 1994 when the City entered into the Development Agreement for Wingfield Springs, recalled that the gaming portion of the Resort at Red Hawk was to be the secondary focus of the development, not the primary focus. Commissioner Mattina added: "And it was always the intent that if it was moved, if that component was moved, it would be moved within the Wingfield Springs development." See **Exhibit 9**, Report of Planning Commission Action at page 4. Commissioner Lokken stated that "the approval by Regional Planning [of Wingfield Springs] back in 1994 seems to repeatedly and clearly focus on the notion of [Wingfield Springs] being a tourist-generating Tourist Commercial [zone] as a destination resort." Id. at page 8.

Commissioner Mattina went on to clarify that the Regional Planning Commission was:

> clearly linking [the gaming portion] to some type of recreational activity and when you had the resort connected to the golf course in Wingfield Springs, it was clearly linked to a recreational activity. [Tierra del Sol] is a piece of property that wants to be developed as

[1] No evidence has been found in the record that the required procedures of SMC 20.07.050 were followed and that proper notice was given by mail to residents located within 300 feet of the area affected. Further, there is no evidence that required notice was given for any of the Planning Commission meetings, any of the public City Council meetings, or the closed session City Council meeting.

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> Tourist Commercial that is not even within the Wingfield Springs perimeter, so it is hard to say . . . I mean, it is clearly an independent standing facility, whether a casino, hotel, or whatever. Yes. Can people get in their car and drive to Wingfield Springs? Certainly. But it is not tied to Wingfield Springs; it is not connected to the Resort at Wingfield Springs or at Red Hawk. Page 8.

Senior Planner Tim Thompson, in response to a question about whether a transfer could be accomplished without a Master Plan amendment, stated "[p]ossibly yes. In the case of [another planned development known as] the Foothills, . . ., there was no Master Plan Amendment associated with the Foothills; we simply moved land uses around that were within those areas." Id. at page 12. However, Senior Planner Thompson acknowledged that the transfers were done "solely within the Foothills development" and that to his knowledge, "we have never done a transfer like this [from one PD to another]. This is definitely the first time." Id.

The Planning Commission voted four to three, against Staff's recommendation, and denied the Application. The Planning Commission denied the Application because it found that the Application was inconsistent with the Master Plan, and that the Application did not further the interests of the City. The Planning Commission presented the Application with a recommendation for denial to the City Council at a special meeting held August 23, 2006.

At that meeting (which carried over into the early hours of August 24, 2006), the Council Members adopted the Planning Commission's recommendation and voted three to two against the Application. In doing so, the City noted that the Application (i.e., the transfer of a non-restricted gaming use from Wingfield Springs to the GC Tierra del Sol property) was *inconsistent with the Master Plan and could not accordingly be approved.* Councilwoman Moss also questioned how the gaming entitlement could be moved pursuant to section 3.08(d) of the Development Agreement when Tierra del Sol was not within the City at the time the Development Agreement was made. She stated that if other sections of the Development Agreement were "frozen in time," then the phrase "within the City" should also be frozen in time. Councilwoman Moss further commented that according to the Regional Planning Commission, major changes to Wingfield Springs would require further review by the City and the Regional Planning Commission. Therefore, it was her understanding that Red Hawk's

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Application would have to first be reviewed and approved by the Regional Planning Commission, which had not occurred.

After a motion was made, the City, as noted above, adopted the Planning Commission's recommendation and voted three to two against the Application. Councilmember Mayer voted no because he did not believe the City intended to allow Red Hawk (as the successor to Loeb) to move gaming outside of Wingfield Springs under the Development Agreement; Councilmember Salerno voted no because he believed a Master Plan Amendment was needed and that the City's infrastructure was not prepared to support Red Hawk's project at Tierra del Sol; and Councilmember Moss voted no because she did not think that Tierra del Sol was the right location for a hotel/casino.

e. Red Hawk's Lawsuit and the City's Approval of the Settlement.

On August 25, 2006, only two days following the City's decision, Red Hawk filed this lawsuit against the City, alleging, among other things, breach of the Development Agreement and damages in excess of $100 million. See **Exhibit 10**, Red Hawk's Complaint. The City Attorney, Chet Adams, responding to the lawsuit, believed the City Council did a good job of documenting their reasoning for denying the Application. See **Exhibit 11, Court battle is likely** after Lazy 8 rejected, Reno Gazette Journal, Aug. 25, 2006. Adams was quoted as saying that the City has "a considerable amount of discretion when it comes to land use, issues of public safety and health and welfare. They are vested with the authority to make those decisions as long as they are supported by the record." Id. "When asked if the council made a rational, reasonable *decision, Adams said, 'they certainly believed they did.'*" Id.

Adams further said, however, that: "'I believe the City Council has put me in a difficult situation because they have gone against our legal advice and that will obviously complicate the defense of this matter in court.'" See **Exhibit 12**, Developer sues Sparks over Lazy 8, Reno Gazette Journal, Aug. 26, 2006. Adams went on to add: "I will say that the complaint is very well written and that it appears at least at first reading to be meritorious." Id. Despite the City Attorney's comments, petitioner Nugget had sent numerous letters, through its undersigned counsel, to the Planning Commission and the City demonstrating that Red Hawk's Application

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could be denied under Nevada law. See **Exhibit 13**, Hale Lane Letters to Planning Commission.

Less than one week later, on September 1, 2006, the City Attorney and the Council members met and allegedly discussed the City's denial of the Application and Red Hawk's resulting lawsuit. This meeting resulted in the signing of a Stipulation, Judgment and Order by the City Attorney, the Deputy City Attorney, and two of Red Hawk's attorneys, Stephen Mollath, Esq. and Leif Reid, Esq. This Court approved the Settlement that same day. See **Exhibit 14**, Sept. 1, 2006, Stipulation, Judgment and Order. After announcing the Settlement, Mayor Martini commented: "'At the beginning of the week, Chet Adams advised me that he could not defend the city against the lawsuit.'" See **Exhibit 15**, Angela Mann, Lazy 8 Casino given green light, Daily Sparks Tribune. The Settlement was negotiated and signed by the Sparks City Attorney's Office without any notice to the public.

On September 7, 2006, the Nevada Attorney General's office sent a letter to the City Attorney, stating that the September 1, 2006, meeting was conducted in violation of Nevada's Open Meeting Law and that if the City did not hold a public hearing to have a public vote on the Settlement, the Attorney General's office would file suit against the City. See **Exhibit 16**, Attorney General's Letter. In response to the letter, City Attorney Adams stated: "'You've seen how my clients are running and hiding to save their political futures here . . . If we go before a city council vote now, who knows what these people will vote for.'" See **Exhibit 17**, Sparks faces lawsuit over Lazy 8, Reno Gazette Journal, Sept. 7, 2006. Publicly, the City Attorney stated that he would not consider a public hearing on the Settlement, but on September 7, 2006, *the City announced a special meeting to be held September 20, 2006, to review the Settlement* publicly.

On September 20, 2006, the City Council did, in fact, meet publicly to discuss and vote on the Settlement. At that meeting, City Attorney Adams responded to the Attorney General's allegations regarding the potential violation of the Open Meeting Law by stating that he believed the September 1, 2006, meeting with the City was a privileged attorney-client session. After Councilmember Mayer made a motion to appoint outside legal counsel to review the issue and report back to the City, City Attorney Adams was "at a loss" as to why Mayer suggested hiring

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another lawyer and found the request "disingenuous at best." See **Exhibit 18**, Lazy 8 casino settlement approved, Reno Gazette Journal, Sept. 21, 2006. Councilmember Schmitt responded that he did not think the City Charter authorized the City to hire outside legal counsel and councilmember Mayer's motion was voted down 3-2.

Instead of delaying a decision on how to proceed, a motion was made to authorize the settlement with Red Hawk. Councilmembers Moss, Carrigan and Schmitt voted to authorize the Settlement. Councilmembers Mayer and Salerno stood by their original decisions and voted against the Settlement. The City therefore authorized the Settlement by a three-to-two vote. Just over a week later, Councilmember Schmitt expressed doubts about the City's decision to authorize the Settlement. Councilmember Schmitt was quoted as saying, "I don't want a whole hearing on the Lazy 8 again, but the question is, 'Are we doing the right thing?'" Schmitt also expressed concern that the City was "receiving advice from the city attorney that [he was] increasingly uncomfortable with." See **Exhibit 19**, Schmitt wants Lazy 8 revisited, Reno Gazette Journal, Sept. 29, 2006.

f. Intervenors Seek Judicial Review of the September 20, 2006 Vote.

Intervenors filed a Petition for Judicial Review, Writ of Certiorari and Writ of Mandamus (the "Petition") on October 6, 2006, seeking (i) a declaration from the district court that the City's September 20, 2006 vote authorizing the settlement in this case with Red Hawk was void and (ii) reinstatement of the City's August 23-24 decision denying the Application. Apparently realizing that the City's decision to settle with Red Hawk could not be reconciled with the City's earlier determination that the Application conflicts with the Master Plan, the City and Red Hawk sought to shield the City's settlement from judicial scrutiny by moving to dismiss the Petition. Red Hawk argued that Intervenors (i) lacked standing to bring the Petition, (ii) failed to file the Petition in a timely manner, (iii) could not collaterally attack the settlement between the City and Red Hawk, and (iv) could not seek extraordinary writ relief.

In response, Intervenors argued that the City's public decision on September 20, 2006 to approve the Red Hawk settlement was the decision at issue in the case and could not be rendered immune from judicial scrutiny simply because a signed settlement agreement pre-dated the

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City's public vote. In addition, Intervenors contended that merely setting aside the September 20 public decision to approve the Red Hawk settlement would not afford complete relief because the August 23-24, 2006 decision denying the Application would have to be reinstated, further justifying the Appellants' claims for writ relief. Finally, Intervenors argued that they had standing to bring the Petition because all of the Intervenors either had a beneficial interest in setting aside the settlement and reinstating the August 23-24 decision or enjoyed standing as taxpayers of the City.

After conducting a hearing, the District Court, on April 20, 2007, entered an order granting Red Hawk's and the City's motion to dismiss. See April 20, 2007 order attached hereto as **Exhibit 20**. Judge Polaha denied writ relief, concluding that the City's decision to settle the lawsuit was an executive decision, not a judicial one. Judge Polaha further found that Intervenors should have joined this underlying lawsuit between Red Hawk and the City. See id. Intervenors subsequently sought reconsideration of the District Court's order, arguing that the District Court's finding that there was adequate time (and reason) to intervene in Red Hawk's lawsuit against the City was clearly erroneous. On May 18, 2007, the District Court entered its order denying Intervenors' Request for Reconsideration. See May 18, 2007 order attached hereto as **Exhibit 21**. Intervenors subsequently filed a notice of appeal of the April 20, 2007 order, as well as from the May 18, 2007 order denying their request for reconsideration.

g. The August 27, 2007 Vote Granting Final Approval to Red Hawk's Application.

On April 25, 2007, the Nevada Commission on Ethics (the "Commission") issued an Executive Director's Report and Recommendation Regarding Just and Sufficient Cause concerning a suspected ethics violation by Councilmember Carrigan in connection with the Application. The Commission issued its report in response to several complaints of potential ethics violations submitted in September 2006 by a number of interested individuals, including individual Intervenors Jeannie Adams and Janae Maher. The complaints alleged violations of several statutory provisions by Councilman Carrigan resulting from Carrigan's close personal friendship with Carlos Vasquez, a public relations consultant and spokesperson for Red Hawk, who also happens to be Carrigan's re-election campaign manager. In addition, the complaints

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claimed that the friendship between Vasquez and Carrigan constituted undue influence over Carrigan's vote to approve Red Hawk's Application.

In his defense, Carrigan argued that he received advice from the City Attorney on the issue of his personal and professional relationship with Vasquez. In particular, on August 17, 2006, less than a week before the original vote on Red Hawk's Application, the City Attorney opined that Carrigan did not have a conflict of interest. Nevertheless, at the August 23, 2006 public hearing, Carrigan did disclose his relationship with Vasquez in accordance with conflict of interest disclosure requirements and Carrigan cast one of the two votes against denying the Application. The Commission, upon reviewing the evidence submitted by the complainants and Carrigan, found that just and sufficient cause existed for the Commission to hold a hearing and render an opinion regarding whether Carrigan violated the provisions of three separate statutes, NRS 281.481(1), NRS 481.501(2) and NRS 281.501(4). The full panel hearing before the Commission on these potential ethical violations was scheduled for August 29, 2007.

In the meantime, and pursuant to the terms of the Settlement, the City was purportedly obligated to proceed with approval of the Application so that Red Hawk could proceed with its proposed development. Accordingly, Red Hawk once again presented its Application to the Planning Commission, which this time was allegedly bound to approve the Application. On August 27, 2007, the Application came before the City Council for a vote. In contrast to its vote almost exactly one year previously, the City Council voted 3-2 to approve the Application. Notwithstanding the pending ethics investigation, Carrigan cast one of the three votes approving the Application. In the absence of Carrigan's vote, the City council would have been deadlocked.

Two days later, on August 29, 2007, the Commission ruled that Carrigan violated state ethics laws on August 23, 2006 when he voted on Red Hawk's Application. The Commission concluded that although Carrigan did disclose his relationship with Vasquez and that he was not improperly influenced by this relationship, he nevertheless should have recused himself and abstained from voting on the Application in August 2006. The Intervenors, except for Councilmember Salerno, sought judicial review of this most recent vote approving Red Hawk's

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Application. (Case No. CV07-02180). The Intervenors argue that (i) the City's August 27, 2007 vote is invalid in light of the ethics violation by Councilmember Carrigan, and (ii) substantial evidence does not support the City's decision to approve the Application.

h. Red Hawks Sues the Nugget and Councilmember Salerno.

On August 30, 2007, Red Hawk filed suit against the Sparks Nugget (the "Nugget") and Councilmember Phillip Salerno ("Salerno"). See Complaint, attached hereto as **Exhibit 22**. Red Hawk's frivolous lawsuit is a weak effort to fend off the inevitable scrutiny resulting from the ethics violation committed by Councilmember Carrigan, who has been closely aligned with Red Hawk throughout these proceedings. Red Hawk's Complaint alleges, amongst other things, that the Nugget (1) intentionally pressured Salerno to vote against Red Hawk's Application; (2) acted in concert with Salerno with intent to harm Red Hawk by denying its ability to enforce its purported contractual rights with the City of Sparks; and (3) threatened Salerno, a public official, with substantial financial harm if he voted in favor of Red Hawk's Application. The Nugget filed an answer and counterclaim on October 10, 2007. See Answer and Counterclaim, attached hereto as **Exhibit 23**. The allegations in the Red Hawk's complaint (i.e., contract rights Red Hawk sought to enforce in this case) necessarily implicate what transpired here before the Settlement, necessitating the instant motion.

III. Legal Argument.

a. Standard for Intervention.

Pursuant to NRS 12.130(1), "[b]efore the trial, any person may intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." There are two types of intervention under Nevada law: (i) intervention as of right, see NRCP 24(a)(2), and (ii) permissive intervention. See NRCP 24(b)(2). As demonstrated below, Intervenors should be permitted to intervene in the underlying lawsuit under both types of intervention available under Nevada law.

b. Intervenors May Intervene As of Right.

Rule 24(a) of the Nevada Rules of Civil Procedure provides that:

> [u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or

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transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Supreme Court of Nevada has made clear that applicants, such as Intervenors, have the right to intervene under NRCP 24(a) "where the application is timely, its rights are impacted by the subject litigation, and its interests are not being adequately represented." SIIS v. District Court, 111 Nev. 28, 32-33, 888 P.2d 911 (1995). Here, each of the three requirements for intervention as of right are easily satisfied and, therefore, Intervenors' request for leave to intervene should be granted.

i. Intervenors' Application for Intervention Is Timely.

The Supreme Court has "previously held that the timeliness of a motion to intervene pursuant to NRCP 24 is a matter within the sound discretion of the district court." Dangberg Holdings v. Douglas Co., 115 Nev. 129, 141, 978 P.2d 311, 318 (1999). "'The most important question to be resolved in the determination of timeliness of an application for intervention is not the length of the delay by the intervenor but the extent of prejudice to the rights of existing parties resulting from the delay.'" Id. quoting Lawler v. Ginochio, 94 Nev. 623, 626, 584 P.2d 667, 668 (1978); see also Lidell v. Caldwell, 546 F.2d 768, 770 (8th Cir. 1976) ("[G]uiding factors include consideration of the progression of the suit, the reason for the delay, and the possible prejudice any delay due to intervention might cause the existing parties.").

Despite the fact that this Court entered an order on September 1, 2006 approving the Settlement between Red Hawk and the City, Intervenors seek to intervene in the case approximately three months after the parties actually took the first step towards complying with the Court's order (i.e., approving the Application). In Lidell v. Caldwell, the Eighth Circuit Court of Appeals determined that six black pupils could intervene in an underlying school desegregation case almost four years after the initial class action lawsuit had been filed and despite the fact that the pupils had previously failed to intervene when invited by the district court to do so. Lindell, 546 F.2d at 770. The district court had retained jurisdiction over the case to ensure implementation of the ultimate plan of desegregation. See id. The Court of Appeals

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reasoned that because "only partial steps toward implementing a unitary school system have taken place, we find the district court erred in denying the petition for intervention for lack of timeliness." Id. at 771.

Here, this Court has similarly retained jurisdiction over the Settlement between Red Hawk and the City.[2] Although the individual Councilmembers were dismissed from the underlying case, the City itself remains a defendant. The Settlement purports to direct the City to proceed with a number of actions to fully comply with the Settlement. At any time after the Settlement was entered, therefore, Red Hawk could have sought additional relief from this Court, should the City have failed to comply with the terms of the order. Despite the fact that this Court signed the Settlement on September 1, 2006, the City and Red Hawk did not proceed with fulfilling any of the terms of this Court's order until almost a year later. Further, and despite the fact that the City voted to grant final approval for the Application on August 27, 2007, upon information and belief, the City and Red Hawk have not executed the Supplemental Development Agreement contemplated by the Settlement. Accordingly, there is more to be done before this case can be characterized as completed and this motion to intervene is timely.

Indeed, no prejudice would result to either the City or Red Hawk from the intervention because Red Hawk has not, upon information and belief, taken any steps to proceed with the development of a hotel/casino at Tierra del Sol in the two months since receiving final approval of the Application. In fact, Red Hawk cannot proceed with the development of the property until it enters into the Supplemental Development Agreement contemplated by the Settlement. Further, Red Hawk has been on notice that Intervenors strongly oppose its Application ever since it first submitted the Application to the Staff for consideration. Finally, the City and Red Hawk have been litigating against Intervenors for over a year on these identical issues, which are now before the Nevada Supreme Court, this Court, and Judge Polaha.

[2] Intervenors anticipate that the City and Red Hawk will argue against intervention on the basis that the September 1, 2006 Settlement was a final judgment. "The general rule is that motion for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." U.S. v. Associated Milk Producers, Inc., 534 F.2d 113, 116 (8th Cir. 1976). Even if the Settlement could somehow be construed as a final judgment, which it cannot be due to the fact that the City has never been dismissed from the case, Intervenors have nevertheless shown a strong entitlement to intervene and adequate justification for any purported failure to intervene sooner.

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Further, Intervenors' motion to intervene cannot be deemed untimely if this Court considers the totality of the circumstances and the efforts already expended by Intervenors in seeking to protect their interests. Although Intervenors did not seek to intervene when the Settlement was initially entered, Intervenors nevertheless immediately challenged the City's decision to enter into approval of the Settlement by filing their Petition seeking judicial review of the September 20, 2006 vote. Similarly, the Intervenors have once again sought judicial review of the most recent vote on August 27, 2007 granting final approval of the Application.

Whether or not Intervenors' original decision to seek writ relief and judicial review was the proper course of action is a matter that is currently before the Nevada Supreme Court for decision. Yet, despite the pending appeals, Red Hawk moved ahead with seeking final approval of its Application. As a result, Intervenors have now been forced to seek additional relief from this Court, by way of the instant Motion. In light of the foregoing circumstances, Intervenors' Motion is timely.

ii. Intervenors' Rights Are Impacted by the Subject Litigation.

Intervenors may intervene as a matter of right because their rights are impacted by the City's approval of Red Hawk's Application pursuant to the Settlement. Due to their proximity to the proposed hotel/casino development at Tierra del Sol, individual intervenors Adams, Clement, Grieve, and Maher have a beneficial interest in contesting the validity of the Settlement and the resulting August 27 vote. These intervenors live in residential communities on the opposite side of the Pyramid Highway, directly facing the proposed hotel/casino project. As a result of the City's August 27, 2007 vote, these intervenors will be subjected to a hotel/casino that is not permitted near their homes. Accordingly, these intervenors will gain a direct benefit from this Court's consideration of their counterclaims to Red Hawk's claims against the City, and are bound to suffer a direct detriment if this Court declines to do so.

Additionally, the rights of Ryan Boren, Cassandra Grieve, Joseph and Rose Marie Donohue, and Eugene and Kathryn Trabitz, and the Sparks Nugget are impacted by the Settlement. As taxpaying citizens, these Intervenors have standing to prosecute their claims against Red Hawk because the City has abused its discretionary powers or acted arbitrary and

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capriciously in violation of state law. See City of Las Vegas v. Cragin Indus., Inc., 86 Nev. 933, 939, 478 P.2d 585, 589 (1970), disapproved on other grounds by Sandy Valley Assocs. v. Sky Ranch Estate Owners, 117 Nev. 948, 35 P.3d 964 (2001); see also Blanding v. City of Las Vegas, 52 Nev. 52, 75-76, 280 P. 644, 650 (1929); State of Nevada v. Gracey, 11 Nev. 223, 229-30 (1876). In City of Las Vegas v. Cragin Industries, Inc., the Supreme Court of Nevada concluded that "any citizen of the city of Las Vegas would have had standing to seek injunctive relief, inasmuch as the relief sought is the abatement of unauthorized conduct" that arose out of a written agreement between the City of Las Vegas and a private party that violated a local ordinance. 86 Nev. 933, 939, 478 P.2d 585, 589 (1970), disapproved on other grounds by Sandy Valley Assocs. v. Sky Ranch Estate Owners, 117 Nev. 948, 35 P 3d 964 (2001).

This unambiguous statement from the Supreme Court of Nevada regarding taxpayer standing controls this case and mandates the conclusion that Intervenors' rights have been impacted by the Settlement and as such, Intervenors have standing to assert defenses and counterclaims against Red Hawk challenging the validity of the Settlement and approval of the Application pursuant to the Settlement. Here, the Intervenors are entitled to argue that the City's August 27 vote approving the Application violates Nevada law because, among other things, the Application contravenes the Master Plan and Councilmember Carrigan's vote was needed to approve the Application. Further, the Application itself cannot be reconciled with the legal requirements of this State and the City's own ordinances.

iii. Intervenors' Interests Are Not Being Adequately Represented.

The City's decision to reverse its position on Red Hawk's Application in a matter of days was both unexpected and unforeseeable. Intervenors had openly opposed the Application from the time that Red Hawk initially submitted its plans to the City Staff. When the City initially rejected the Application on August 23-24, 2006, Intervenors' position was vindicated. At that point in time, Intervenors rightfully believed that the City's interests were aligned with its own. See U.S. v. Carpenter, 298 F.3d 1122, 1123 (9th Cir. 2002) (holding that until parties have notice that the government may not be representing their interests, parties are entitled to rely on the presumption that the government is representing their interests). As a result, when Red Hawk

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filed its trumped up lawsuit, there was no indication that the City would simply reverse itself rather than defend its position regarding the August 23-24, 2006 vote.

Moreover, and despite the fact that the Intervenors challenged the City's actions by way of judicial review and demand for writ relief, the City nevertheless only voted to grant final approval to the Application on August 27, 2007. It is more than clear, at this stage, that the City has absolutely no interest in asserting any defenses against Red Hawk, but has been willing to meekly comply with Red Hawk's demands without even awaiting a decision from the Nevada Supreme Court. As such, the Intervenors' interests are not being adequately represented by the only remaining defendant, the City, and Intervenors cannot allow either the City or Red Hawk to take any further steps regarding the Application in direct contravention of State law and the Intervenors' rights.

In summary, the Supreme Court of Nevada has made clear that intervention as of right is available whenever the intervening party timely files its application, has an interest in the lawsuit, and is not adequately represented. See State Indus. Ins. Sys. v. Eighth Judicial District Court of the State of Nev., 111 Nev. 28, 32-33, 888 P.2d 911 (1995). These three requirements, as set forth above, are easily satisfy in this case given the Intevenors' interest in ensuring that the City enforce the provisions of its Master Plan, rather than engage in impermissible contract zoning when faced with the threat of a lawsuit. Accordingly, the Intervenors should be permitted to intervene in this lawsuit as a matter of right under NRCP 24(a).

c. The Intervenors Should Be Allowed Permissive Intervention.

If this Court determines that the Intervenors cannot intervene as a matter of right pursuant to NRCP 24(a), this Court should nonetheless allow the Intervenors to intervene permissively under NRCP 24(b). Rule 24(b) provides that "[u]pon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the Main Action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

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In this case, permissive intervention is plainly warranted because, as set forth in the attached Counterclaim and Cross Claim in Intervention, the Intervenors' claims share common questions of law and fact with Red Hawk's claims against the City and implicate this Court's stated jurisdiction over the Settlement. The Counterclaim challenges, on a number of grounds, the validity of the Settlement and Red Hawk's assertion that it is entitled to transfer its purported gaming entitlement from Wingfield Springs to Tierra del Sol. Intervenors allege that the City abused its discretion and acted arbitrarily and capriciously when it authorized the Settlement, and subsequently voted to approve the Application, because (a) allowing tourist commercial zoning and nonrestricted gaming at Tierra del Sol, when such a use is not allowed in that development, is a complete disregard and violation of the Master Plan, (b) the City had already designated the location for a small tourist commercial node under the NSSOI Plan within Wingfield Springs, (c) the Application is not a density bonus exception to Master Plan conformance, and (d) the Development Agreement provides no basis for a finding of Master Plan conformance and a transfer of a so-called unused development right. The Intervenors should be allowed to assert these defenses and claims, which the City, although well aware of and upon which it initially rejected the Application, never bothered to assert in response to Red Hawk's lawsuit. In fact, the City did not even file an answer to the lawsuit, but instead, secretly settled the case within a matter of days.

Further, permissive intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. The respective rights of the original parties have *already* been challenged by Intervenors and are being considered by the Nevada Supreme Court. Accordingly, neither the City nor Red Hawk can argue, in good faith, that they will be unduly delayed if Intervenors are permitted to intervene in their underlying lawsuit Accordingly, this Court should grant Intervenors leave to intervene pursuant to NRCP 24(b).

d. <u>This Case Should Be Consolidated With Red Hawk's Recent Lawsuit Against The Nugget and Councilmember Salerno.</u>

Rule 42(a) of the Rules of Civil Procedure provides as follows:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the

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actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The purpose of Rule 42(a) and the consolidation thereunder, "is to permit trial convenience and economy in administration." Feldman v. Hanley, 49 F.R.D. 48, 50 (S.D.N.Y. 1969). Thus, consolidation is appropriate where two or more cases share a common question of law or fact, and consolidation of the cases would promote judicial economy and avoid unnecessary costs, delay, and duplicative efforts on the part of the litigants. See NRCP 42(a); Mikulich v. Carner, 68 Nev. 161, 168-69, 228 P.2d 257, 260-61 (1957); Fields v. Wolfson, 41 F.R.D. 329, 330 (S.D.N.Y. 1967) (consolidation appropriate where it avoids needless duplication of time, effort and expense on the part of the parties and enables the proceedings to be expedited and proceed more efficiently). Critically, Rule 42(a) does not require the consent of all parties before consolidation can be ordered. See NRCP 42(a). Because (i) Red Hawk's recent lawsuit against the Nugget and Councilmember Salerno, (ii) the Intervenors petition for judicial review of the August 27, 3007 vote, and (iii) the underlying case all arise out of the same set of operative facts, share common questions of law, and consolidation of the three cases would promote judicial economy and efficient litigation, the Motion to Consolidate should be granted.

Here, Red Hawk alleged in this lawsuit that the City breached its purported obligations under the Development Agreement when the City first denied the Application. The Settlement accordingly directs the City to approve the Application, which it has done, in accordance with Red Hawk's interpretation of the Development Agreement. In Red Hawk's RICO case against the Nugget and Salerno, Red Hawk alleges that the Nugget tortiously interfered with the Development Agreement when the Nugget exercised its right to petition the government and opposition to the Application. Red Hawk further alleges that it had to file this lawsuit and obtain the Settlement as a result of the Nugget's conduct. Finally, the Intervenors have alleged in their petition for judicial review now pending before Judge Polaha that (i) the September 20, 2006 vote authorizing the Settlement is invalid because the three votes needed to authorize the Settlement included Carrigan's vote; (ii) the August 27, 2007 vote approving the Application is invalid, notwithstanding the Settlement, because the City cannot approve the Application without a master plan amendment; and (iii) the August 27, 2007 vote approving the Application is invalid

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because the three votes needed to approve the Application included Carrigan's vote. The foregoing allegations are also pending before this Court in the RICO case as part of the Nugget's counterclaims.

The foregoing summary of the litigation pending between the parties demonstrates that the Related Cases should be consolidated with this case. It is this case that resulted in the Settlement, which resulted in the Related Cases. Moreover, the terms of the Development Agreement and the City's obligations thereunder are at issue in all of the cases. Indeed, to fully defend itself in Red Hawk's RICO case, the Nugget must be permitted to show that the Settlement is invalid and that the City had a defense in this case to Red Hawk's claims. This is necessary to defend the assertion that Red Hawk was entitled, contractually to receive approval of the Application and, therefore, the Nugget did not interfere with any contractual rights. Stated differently, Red Hawk has opened the door for the Nugget to challenge the Settlement, and this should occur in a consolidated case before this Court. Finally, the issue of whether the City legitimately authorized the Settlement and thereafter approved the Application are issues in all of the pending cases. Accordingly, common questions of fact and law permeate all the pending cases, warranting consolidation before this Court.

In addition to satisfying the requirements of NRCP 42(a), consolidation of these cases will promote judicial economy and avoid needless duplicative efforts. The Court stands to benefit from consolidation because all factual and legal issues with respect to all parties will be resolved at once, thereby avoiding piecemeal review of the entire controversy. Further, combining the cases will evade the danger of inconsistent results, the potential of which is inevitably present when more than one court decides the same controversy. Moreover, multiple appeals on this matter would unduly waste judicial resources. Therefore, in the interest of fairness, time, economy and convenience, consolidation of *Red Hawk Land Company vs. Sparks Nugget Inc.*, CV07-01981, and *Adams et. al. v. City of Sparks*, CV07-02180, with this case is warranted.

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IV. Conclusion.

Based on the foregoing, Intervenors respectfully request that this Court grant them leave to intervene in the above-referenced case to assert defenses and counterclaims against Red Hawk. Further, in the interests of judicial economy, this Court should consolidate case number CV 07-01981 and CV07-02180 with the instant action.

DATED this 14th day of December 2007.

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PROOF OF SERVICE VIA HAND DELIVERY

I, Liz Ford, declare:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Hale Lane Peek Dennison and Howard. My business address is 5441 Kietzke Lane Second Floor, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

I am readily familiar with Hale Lane Peek Dennison and Howard's practice for collection and delivery of its hand-deliveries. Such practice in the ordinary course of business provides for the delivery of all hand-deliveries on the same day requested.

On December 14, 2007, I caused the foregoing **MOTION TO INTERVENE AND MOTION TO CONSOLIDATE RELATED CASES** to be hand-delivered by providing a true and correct copy to Hale Lane Peek Dennison and Howard's runners with instructions to hand-deliver the same to:

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David C. Creekman, Esq.
Senior Assistant Sparks City Attorney
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Attorney for Phil Salerno

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on December 14, 2007.

Liz Ford

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **MOTION TO INTERVENE AND MOTION TO CONSOLIDATE RELATED CASES** filed in District Court Case No. CV07-02078 does not contain the social security number of any person.

DATED this 14th day of December, 2007.

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CARSON CITY

MICHAEL A. CARRIGAN, Fourth Ward City Council Member, of the City of Sparks,

Petitioner,

vs.

Case No. 07-OC-012451B

Dept. No. 2

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent. /

AFFIDAVIT OF TIMOTHY SAATHOFF

STATE OF NEVADA)
:ss.
COUNTY OF WASHOE)

I, Timothy Saathoff, do hereby declare under penalty of perjury that the following is true and correct and based upon my personal knowledge and belief.

1. I am an Information Technology Support Specialist II with the City of Sparks and have been so employed for the past 3 years, 2 months.

2. That on October 10, 2007, I printed the pages contained in Exhibit "A" from the Walther, Key, Maupin, Cox & Legoy website.

3. That Exhibit "A" is an accurate depiction of what was contained on the website on October 10, 2007.

Further your Affiant sayeth naught.

Dated this 15 day of October, 2007.

Timothy Saathoff
Information Technology, City of Sparks

Subscribed and Sworn to before me this 15th day of October, 2007.

Notary Public

EXHIBIT 7

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A

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ROY ADAMS and JEANNIE ADAMS; RYAN BOREN and BRYAN BOREN; MELISSA T. CLEMENT; JOSEPH DONAHUE and ROSE MARIE DONOHUE; IAN GRIEVE and CASSANDRA GRIEVE; BOBBY HENDRICKS and DINA HENDRICKS; DAVID MAHER and JANAE MAHER; EUGENE TRABITZ and KATHRYN TRABITZ; and SPARKS NUGGET, INC., a Nevada corporation,

Petitioners,

vs.

CITY OF SPARKS, a municipal corporation of the State of Nevada, and THE CITY COUNCIL thereof, and RED HAWK LAND COMPANY, LLC, a Nevada Limited Liability Company.

Respondents.
_____/

Case No. CV06-02410

Dept No. 4

OPPOSITION TO MOTION TO DISMISS PETITIONERS' PETITION FOR JUDICIAL REVIEW, WRIT OF CERTIORARI, AND WRIT OF MANDAMUS

Petitioners Roy Adams, Jeannie Adams, Ryan Boren, Bryan Boren, Melissa T. Clement, Joseph Donohue, Rose Marie Donohue, Ian Grieve, Cassandra Grieve, Bobby Hendricks, Dina Hendricks, David Maher, Janae Maher, Eugene Trabitz, Kathryn Trabitz, and Sparks Nugget, Inc. (collectively, "Petitioners"), by and through their undersigned counsel of record, Hale Lane Peek Dennison and Howard, hereby oppose Respondents' Motion to Dismiss Petitioners' Petition for Judicial Review, Writ of Certiorari, and Writ of Mandamus.

EXHIBIT 8

FILED
MAR 22 2007
BY

Hale Lane Peek Dennison and Howard
5441 Kietzke Lane, Second Floor
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This Opposition is supported by the following memorandum of points and authorities.[1]

POINTS AND AUTHORITIES

I. Introduction

This lawsuit stems from the Respondent City of Sparks' (the "City") unlawful decision to settle a lawsuit brought by Respondent Red Hawk Land Company, LLC ("Red Hawk"), resulting in the reversal of the City's prior decision to deny Red Hawk's application (the "Application") to transfer an alleged non-restricted gaming entitlement from Wingfield Springs to Tierra del Sol. In particular, on August 26, 2006, the City of Sparks Planning Commission (the "Planning Commission") recommended denial of the Application because, among other things, the Application conflicted with the City of Sparks' Master Plan (the "Master Plan"). Subsequently, at an August 23-24, 2006 public meeting, the City adopted the Planning Commission's recommendation and denied the Application because the City correctly found, as the Planning Commission had already concluded, that the Application conflicted with the Master Plan and could not therefore be lawfully approved.

Red Hawk responded to the City's decision to deny the Application by filing a grossly exaggerated lawsuit, alleging, among other things, that the denial of the Application caused damages in excess of $100 million dollars. The City, despite its previous finding that the Application could not be approved, covertly decided, merely six days later, to settle the lawsuit. (the "Settlement"). The proposed Settlement notably obligated the City to approve the Application, despite the fact that the City, as noted above, previously concluded that the Application conflicted with the Master Plan. After a public outcry, and a warning from the Nevada Attorney General with respect to Nevada's Open Meeting Law, the City conducted a public meeting on September 20, 2006 and voted to approve its Settlement with Red Hawk. The Settlement, however, cannot be reconciled with governing law or the City's August 23-24, 2006 finding that the Application conflicts with the Master Plan. As a result, the Petitioners filed this lawsuit on October 6, 2006 to have this Court declare the Settlement null and void and reinstate the City's August 23-24 decision denying the Application.

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[1] Respondents state that their motion is brought pursuant to NRS 3.223 and NRCP 60; however, Section 3.223 of the Nevada Revised Statutes addresses the jurisdiction of family courts and does not serve as a basis for dismissing the instant lawsuit.

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Apparently realizing that the City's decision to settle with Red Hawk cannot be reconciled with the City's earlier determination that the Application conflicts with the Master Plan, the Respondents currently seek to shield the City's Settlement from judicial scrutiny by moving to dismiss the instant lawsuit on procedural grounds. In this regard, the Respondents argue that the Petitioners (i) lack standing to prosecute this lawsuit, (ii) failed to file this lawsuit in a timely manner, (iii) cannot collaterally attack the Settlement between the City and Red Hawk, and (iv) cannot seek extraordinary writ relief. As discussed more fully below, each of these arguments fails because it is the City's public decision on September 20, 2006 to approve the Red Hawk Settlement that is at issue in this case and that decision cannot be rendered immune from judicial scrutiny simply because a signed settlement agreement pre-dated the City's public vote. In addition, merely setting aside the September 20 decision to approve the Red Hawk Settlement will not afford the Petitioners complete relief because the August 23-24, 2006 decision denying the Application must be reinstated, further justifying the Petitioners' claims for writ relief. Finally, the Petitioners have standing to prosecute this lawsuit because all of the Petitioners either have a beneficial interest in setting aside the Settlement and reinstating the August 23-24 decision or enjoy standing as taxpayers of the City. Accordingly, the Respondents' motion to dismiss represents a thinly veiled attempt to insulate the City's illegal actions from judicial review and the motion should therefore be denied.

II. Factual Background

In October 1994, Red Hawk's predecessor-in-interest – Loeb Enterprises – entered into an agreement (the "Development Agreement") with the City for the development of a planned development in northeast Sparks, commonly known as Wingfield Springs. The Development Agreement and the handbook for Wingfield Springs contemplated that Wingfield Springs would be entitled to a Tourist Commercial designation within Wingfield Springs in order for Loeb Enterprises to develop a resort complex, which was anticipated to include, among other facilities, a hotel and casino with limited non-restricted gaming. Section 3.08(d) of the Development Agreement additionally stated that "the City could enter into a supplemental development agreement for the transfer and use of development credits outside Wingfield Springs but within the City."

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Red Hawk failed to construct any type of gaming establishment at Wingfield Springs. Instead Red Hawk has decided to exercise what it interprets to be its right under section 3.08(d) of the Development Agreement, and transfer its purported right to build a casino at Wingfield Springs to another one of its properties – Tierra del Sol. Tierra del Sol is located along State Route 445 commonly known as the Pyramid Highway, approximately 1.5 miles from Wingfield Springs. Critically, the Tierra deal Sol property does not include a Tourist Commercial area that would presently allow non-restricted gaming.

In October 2004, Red Hawk submitted its Application to the City seeking to eliminate the hotel/casino from Wingfield Springs and transfer it to Tierra del Sol. Upon review of the Application, the City's Planning Staff recommended approval, and on July 6 and 17, 2006, the Planning Commission heard the Staff's recommendation. The Planning Commission voted four to three against the Staff's recommendation and denied the Application. The Planning Commission found that the Application was inconsistent with the Master Plan and that granting the Application would not further the interests of the City. The Planning Commission presented the Application with a recommendation for denial to the City Council at a special meeting held on August 23-24, 2006.

At the City Council meeting on August 23-24, 2006, the City considered the Planning Commission's recommendation for denial. In doing so, the City noted that the transfer of a non-restricted gaming use from Wingfield Springs to the General Commercial area at Tierra del Sol would be inconsistent with the Master Plan and could not accordingly be approved. After a motion was made, the City adopted the Planning Commission's recommendation and voted three to two to deny the Application.

On August 25, 2006, only two days after the City denied the Application, Red Hawk filed a lawsuit against the City, alleging, among other things, breach of the Development Agreement and damages in excess of $100 million. Approximately six days later, on September 1, 2006, the Sparks city attorney – who disagreed with the City's decision to deny the Application – and members of the Sparks City Council met to allegedly discuss the City's denial of the Application and Redhawk's resulting lawsuit. This meeting apparently resulted in the signing of the Settlement by the Sparks city attorney, the Sparks deputy city attorney, and Red Hawk's attorneys. The Honorable Brent Adams

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signed-off on the Settlement that same day. The Settlement provided, in relevant part, that the City would allow judgment to be entered against it and that "[s]uch judgment shall be by way of an Order directing the Sparks City Council to approve Plaintiff's Application."

On September 7, 2006, the Nevada Attorney General's office sent a letter to the Sparks city attorney, stating that the September 1, 2006 meeting to sign the Settlement was conducted in violation of Nevada's Open Meeting Law and that if the City did not conduct a public hearing to hold a public vote on the Settlement, the Attorney General's office would file a lawsuit against the City. As a result, on September 20, 2006, the City Council met publicly to discuss and vote on the Settlement. The City approved the Settlement by a three to two vote. The Petitioners subsequently petitioned this court for judicial review, a writ of certiorari, and a writ of mandamus, seeking (i) judicial review of the City's decision to approve the Settlement, (ii) a writ of certiorari declaring the Settlement null and void, and (iii) judicial review and a writ of mandamus, reinstating the City's August 23-24, 2006 decision denying the Application. The Respondents tellingly now seek to dismiss this lawsuit on procedural grounds, without addressing the merits of the City's decision to enter into the Settlement with Red Hawk.

III. Legal Argument

a. Petitioners Can Properly Seek and Obtain Both Extraordinary Writ Relief and Judicial Review

Respondents first argue that because the Petitioners are seeking judicial review pursuant to NRS 278.3195(4), they are automatically precluded from seeking extraordinary writ relief. See Motion to Dismiss at page 5, lines 13-14. This argument is nonsensical and misinterprets the Nevada Supreme Court's recent decision in Kay v. Nunez, 122 Nev. ____, 146 P.3d 801 (2006), because this lawsuit requires not only judicial review of the City's decision to approve the Settlement on September 20, 2006, which compels a land use decision (approval of the Application), but also a writ of certiorari declaring the Settlement, separate and apart from the resulting land use decision, null and void, and a writ of mandamus reinstating the City's August 23-24, 2006 decision denying the Application. Indeed, without each of these three forms of relief, the Petitioners cannot obtain complete relief in this case – denial of the Application in accordance with the City's original public determination that the

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Application conflicts with the Master Plan. Accordingly, the Petitioners are properly seeking judicial review and writ relief because the City's unlawful conduct does not simply involve an arbitrary and capricious land use decision that can be reviewed and remedied by the normal and customary judicial review process.

i. Writs of Certiorari and Mandamus Should Issue to Void The City's Approval of the Settlement and Reinstate the August 23-24 Denial of the Application.

It is well-settled that a petition for an extraordinary writ, such as certiorari and mandamus, is the proper procedural avenue for seeking judicial review of a city's actions to determine whether the city abused its discretionary powers or acted arbitrarily and capriciously in violation of state law. See, e.g., Washington v. Clark County Liquor & Gaming Licensing Bd., 100 Nev. 425, 428, 683 P.2d 31, 33-34 (1984); Board of Comm'rs of the City of Las Vegas v. Dayton Dev. Co., 91 Nev. 71, 75, 530 P.2d 1187, 1189 (1975) (writ of mandamus "available to correct a manifest abuse of discretion by the governing body"); see also County of Clark v. Atlantic Seafoods, Inc., 96 Nev. 608, 611, 615 P.2d 233, 235 (1980) ("Mandamus is an appropriate remedy when discretion is exercised arbitrarily or capriciously."); see also Livingston Rock & Gravel Co. v. County of Los Angeles, 272 P.2d 4, 9 (Cal. 1954) ("Either certiorari or mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board."). Furthermore, Section 34.160 of the Nevada Revised Statutes provides that a "writ of mandamus may issue to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion." Thus, certiorari and mandamus are appropriate mechanisms for seeking review and abolition of the Settlement (certiorari) as well as reinstatement of the City's August 23-24, 2006 decision denying the Application (mandamus).

Indeed, the City's arbitrary and capricious decision to approve the Settlement, contrary to its prior finding of an irreconcilable conflict between the Application and the Master Plan, is official misconduct from which the Petitioners were required to seek extraordinary relief because mere judicial review of the City's decision to approve the Application, as a result of the Settlement, would not negate the Settlement itself. Accordingly, the Petitioners, to challenge the propriety of the Settlement, are entitled to seek a writ of certiorari declaring the Red Hawk Settlement null and void. See, e.g.,

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Washington, 100 Nev. at 428, 683 P.2d at 33-34. In addition, the Petitioners are entitled to seek a writ of mandamus because a writ of certiorari setting aside the Settlement will not necessarily reinstate the City's August 23-24, 2006 decision denying the Application. See, e.g., ABG Real Estate Dev. Co. v. St. John's County, 608 So.2d 59 (Fla. App. 1992) ("A court's certiorari review power does not extend to directing that any particular action be taken, but is limited to quashing the order reviewed."). A writ of mandamus is the appropriate remedy to compel performance, see NRS 34.160, and therefore, once this Court issues a writ of certiorari declaring the Settlement null and avoid, the Petitioners will be entitled to a writ of mandamus, directing the City to reinstate its initial decision denying the Application, because, absent reinstatement of that decision, the Application will not be denied in accordance with the City's initial public finding, supported by substantial evidence, that the Application is inconsistent with the Master Plan. Accordingly, the Petitioners' requests for extraordinary writ relief are entirely proper in this case in light of the circumstances of the City's unlawful conduct and the relief that must be granted to remedy the City's unlawful conduct.

ii. The Petitioners Are Also Entitled to Judicial Review of the Settlement Because the Settlement Obligated the City to Approve the Application.

The Petitioners' ability to seek extraordinary writ relief is not negated by the fact that the Petitioners are also seeking judicial review pursuant Section 278.3195 of the Nevada Revised Statutes. As discussed above, the Settlement obligates the City to approve the Application, and therefore, the City's approval of the Application – a land use decision – is subject to judicial review under Section 278.3195 of the Nevada Revised Statutes. See NRS 278.3195(4) (a party aggrieved by the decision of the governing body "may appeal that decision to the district court of the proper county by filing a petition for judicial review"). Judicial review under this statute, however, would not necessarily void the Settlement or reinstate the City's August 23-24, 2006 decision denying the Application. In fact, nothing in Section 278.3195 of the Nevada Revised Statutes suggests that judicial review under the statute would empower this Court to do anything other than negate the City's decision to approve the Application. Accordingly, the remedies of judicial review under Section 278.3195, certiorari, and mandamus are not mutually exclusive. To the contrary, the remedies are complementary, when, as is the case here, Petitioners seek not only the reversal of a land use decision (approval of the Application)

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but also the reinstatement of a prior City Council decision and the abolition of a separate settlemen agreement.

The Nevada Supreme Court's recent decision in Kay v. Nunez does not alter the foregoing conclusion because Kay is factually distinguishable from this case and did not eliminate writ relief in cases such as this one. In Kay, the Nevada Supreme Court clarified that when a party can file a petition for judicial review pursuant to NRS 278.3195(4) to challenge a local zoning or planning decision, the party generally has an adequate remedy at law, and therefore, a mandamus petition is inappropriate. 122 Nev. at ___, 146 P.3d at 804. The court specifically stated that "mandamus petitions are *generally* no longer appropriate to challenge the [county commission's] final decision." Id. at ___, 146 P.3d at 805. (emphasis added). The court further clarified, however, that a district court has complete discretion to entertain a petition for a writ of mandamus and should grant mandamus relief "to compel the performance of an act that the law requires, or to control an arbitrary or capricious exercise of discretion." Id. Importantly, the petitioner in Kay contested the county commission's authority to waive certain development procedures, but did not challenge the commission's substantive decision to approve an application, negating any need for mandamus relief. See id. n. 7. Accordingly, the Kay decision did not abolish writ relief in land use cases altogether or hold that judicial review under NRS 278.3195 and writ relief are mutually exclusive in such cases. To the contrary, the Supreme Court of Nevada re-affirmed the district courts' discretion to grant extraordinary writ relief in appropriate cases. Thus, the holding in Kay does not require the dismissal of the Petitioners' claims for writ relief, as the Respondents would like this Court to believe.

Furthermore, the case *sub judice* is easily distinguishable from Kay because the Petitioners, as explained above, are not simply seeking to challenge a local zoning or planning decision under NRS 278.3195(4). Instead, the Petitioners seek to have the Settlement between the Respondents declared null and void and the City's August 23-24, 2006 decision reinstated. In addition, unlike the petitioner in Kay, the Petitioners in this case *are* challenging the City's substantive decision to approve Redhawk's Application as a result of the Settlement. Thus, the Petitioners stand in a very different position than the petitioner in Kay because the Petitioners have to seek writs of certiorari and mandamus to obtain complete and proper relief in this case. Therefore, it is necessary for this Court to

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entertain, and ultimately issue, the writs of mandamus and certiorari that have been requested to control and remedy the City's arbitrary and capricious decision to enter into the Settlement, approve the Application, and negate the August 23-24, 2006 decision initially denying the Application. Indeed, without the issuance of these additional writs of certiorari and mandamus, the Petitioners do not have an adequate remedy at law, and therefore under Kay, the Petitioners' complementary judicial review and writ claims can be maintained simultaneously in this case.

b. This Court Has Subject Matter Jurisdiction to Consider the Petition for Judicial Review

Mischaracterizing this lawsuit as an attack on the Stipulation, Judgment and Order signed by Judge Adams in the lawsuit Red Hawk filed against the City, rather than an attack on the City's decision to enter into the Settlement, the Respondents claim that this case must be dismissed because (i) this Court lacks jurisdiction to review Judge Adams' Order, and (ii) the Petitioners cannot collaterally attack Judge Adams' Order. As discussed more fully below, these arguments are meritless. Indeed, to accept the Respondents' position on the jurisdictional issues raised in their motion, this Court would have to conclude that the City could take any action it wished to take, without regard to the laws of this State, so long as the action was done to settle a lawsuit pursuant to a signed stipulation. This Court cannot reach such a conclusion, underscoring the conclusion that the mere existence of a stipulation signed by Judge Adams cannot insulate the City's unlawful conduct and defeat the Petitioners' claims.[2]

i. The Petitioners Had No Legitimate Opportunity to Intervene in Red Hawk's Lawsuit Against the City.

The Respondents first argue that this Court lacks subject matter jurisdiction to entertain the Petitioners' claims because the Petitioners could and should have intervened in Red Hawk's lawsuit against the City if they believed the Settlement was unlawful. This argument is wholly disingenuous

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[2] The Respondents argue that Judge Adams' signature on their stipulation evidences a finding by Judge Adams that the City was acting within its authority when it secretly agreed to the Settlement. Tellingly absent from the Respondents' motion, however, is any explanation as to how Judge Adams could make such a finding when the City did not vote on the Settlement, as required by Nevada law, until after Judge Adams signed the Respondents' stipulation. Furthermore, the title "judgment" placed on the parties' stipulation was obviously a contrived effort by the Respondents to create the very argument they now present to avoid arguing the merits of this case, underscoring the conclusion that the City cannot justify its unlawful conduct by simply referencing a signed stipulation.

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in light of the facts and circumstances that resulted in the Settlement.

As the chronology of events in this case demonstrates, the Petitioners did not have a legitimate opportunity to intervene in the lawsuit Red Hawk filed against the City. The lawsuit was filed on August 26, 2006 - two days after the City denied the Application. It is obvious that Red Hawk, in anticipation of an adverse decision, was waiting to serve the City with a trumped-up lawsuit alleging $100 million dollars in damages with the intent to scare the City into approving the Application. Red Hawk's plan initially worked because, within a mere six days, the Sparks city attorney cowered to Red Hawk's threats and the idea of defending his client, resulting in his and the City's decision to capitulate to Red Hawk's demands. The City notably did not even bother answering Red Hawk's complaint before settling the lawsuit. In addition, the Settlement was initially reached without any public hearing on the lawsuit, the Settlement, or the legal options available to the City. Accordingly, the Settlement was not only reached in six days with the City not so much as answering Red Hawk's complaint; but the Settlement was also reached in a shroud of secrecy beyond public view.

In light of the foregoing, the Petitioners, according to the Respondents, were supposed to predict that the City would (i) ignore its prior finding that the Application was inconsistent with the Master Plan, (ii) tuck tail and run in response to Red Hawk's complaint, and (iii) secretly settle the case in six days without even answering Red Hawk's complaint, and then based on these predictions, the Petitioners were supposed to intervene in the case on shortened time in less than six days to stop the Settlement. The Petitioners need not satisfy such unrealistic requirements to challenge the City's unlawful conduct, and tellingly, the Respondents do not cite any authority to suggest otherwise. Accordingly, the Respondents' argument that this case should be dismissed because the Petitioners should have intervened in Red Hawk's lawsuit is disingenuous at best and more precisely frivolous.

ii. The Petitioners Could Not Move To Set Aside The Settlement Pursuant to Rule 60 of the Nevada Rules of Civil Procedure.

Respondents next argue that "[t]he proper course of conduct, pursuant to Nevada Supreme Court case law, was to intervene in the proceedings before a judgment was entered and to move to set it aside if it were unfavorable." See Motion to Dismiss at page 10. As discussed above, the Petitioners had no chance to intervene in the lawsuit between the City and Red Hawk because the Respondents

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secretly settled and dismissed the suit within six days of it being filed. Therefore, the Petitioners never had a chance to become a party to the proceedings and could not, under the Nevada Rules of Civil Procedure, move to set aside the judgment pursuant to Rule 60(b).

Rule 60(b) of the Nevada Rules of Civil Procedure provides that "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for certain enumerated reasons. (emphasis added). Although the language of Rule 60 could not be clearer, the Nevada Supreme Court has nevertheless held that only a party may seek relief from a judgment pursuant to Rule 60(b). See Lopez v. Merit Ins. Co., 109 Nev. 553, 557, 853 P.2d 1266, 1269 (1993). Specifically, the Nevada Supreme Court has held that where post-judgment intervention is impermissible, a non-party never properly becomes "a party" to the action and cannot properly seek relief from the judgment under Rule 60. See id. The Petitioners never became a party to the lawsuit between the City and Red Hawk because the City immediately caved to Red Hawk's exaggerated lawsuit. Therefore, the Respondents' statement that, "even as strangers to the judgment, [Petitioners] failed to timely seek to set it aside," shows ignorance of the basic rules of procedure and the lengths to which they will go to avoid the merits of this case.

Furthermore, as discussed below, this Court may treat the Petition as an independent action for equitable relief from the Settlement to the extent the Court equates the Settlement to a judgment. "An independent action is considered to be a new civil action, not a motion under Rule 60(b). When a proceeding is an independent action to obtain equitable relief from a prior judgment, it is not brought under Rule 60(b) and hence the time limitation contained in the rule has no application." Nevada Industrial Development, Inc. v. Benedetti, 103 Nev. 360, 364-65, 741 P.2d 802, 805 (1987). Accordingly, the Respondents have failed to establish that this lawsuit should be dismissed because the Petitioners did not intervene in Red Hawk's lawsuit or move to set aside the district court's order entering the Settlement.

iii. The Petition Is Not An Impermissible Collateral Attack on the Settlement

Finally, Respondents argue that this case constitutes an impermissible collateral attack on the judgment entered by the district court in Red Hawk's lawsuit against the City. See Motion to Dismiss at page 8, lines 11-12. The City's September 20, 2006 vote to approve the Settlement, however, is a

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separate, official act of the City from which the Petitioners have the right to seek relief. Indeed, as the Petitioners' original Petition alleges, the City acted arbitrarily and capriciously when it decided to approve the Settlement because the Settlement obligates the City to approve the Application after the City publicly found that the Application conflicted with the Master Plan. It is this arbitrary and capricious conduct that is the subject matter of this lawsuit, not the parties' stipulation that embodies the conduct. Furthermore, if the City had no legal basis to enter into the Settlement, which is the case here, the Settlement is void *ab initio* and cannot stand simply because it was embodied in an unlawful Stipulation that the City had no authority to sign or later approve. Again, the City cannot insulate its conduct from judicial scrutiny by merely pointing to a Stipulation that pre-dated the City's public vote to approve the Settlement because it is the public vote and the official actions that resulted from the public vote that are subject to review in these proceedings under the laws of this State. See NRS 278.3195; Washington, 100 Nev. at 428, 683 P.2d at 33-34; Kay, 146 P.3d at 804-05. Nevertheless, even if this case could be characterized as a collateral attack on the September 1, 2006 Settlement, it is not an impermissible collateral attack, but rather an independent action for equitable relief that is necessary to preserve the rights of the Petitioners.

Respondents principally rely on Mainor v. Nault, 120 Nev. 750, 101 P.3d 308 (2005), to argue that the judgment approving the Settlement is valid on its face and not susceptible to a collateral attack by the Petitioners. See Motion to Dismiss at page 9, lines 10-12. In Mainor, the Nevada Supreme Court reasoned that parents ratified a settlement agreement entered in the lawsuit underlying their legal malpractice claim because the parents never contested the settlement agreement and did seek to set it aside pursuant to NRCP 60(b). 120 Nev. at 761, 101 P.3d at 316. The Court noted that "the [parents] expressly agreed not to contest the final settlement of the tort action or any other issue relating to the settlement," and that "the [parents] approved of the settlement amount and complain only that the division of the proceeds was improper." Id. at 762-63, 101 P.3d at 316-17. As a result, the parents could not collaterally attack the settlement in a separate, subsequent legal malpractice case.

There is nothing that is similar between the facts of Mainor and the Petitioners' position before this Court. As discussed above, the Petitioners, unlike the parents in Mainor, could not move to set-aside the Settlement in this case because they never had the opportunity to become parties to the

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lawsuit between the City and Red Hawk. Further, the Petitioners could not be deemed to have acquiesced to the terms of the Settlement that was secretly negotiated or to have agreed not to contest the Settlement, as did the parents in Mainor, because the Petitioners were not parties to the Settlement and by their actions in instituting this Petition, have established an intent to dispute the effects of the Settlement. Most importantly, while the parents in Mainor disputed the division of funds from the settlement in that case, the Petitioners here dispute the City's authority to approve the Settlement.

Because of these numerous distinctions between this case and Mainor, this Court should treat this lawsuit as an independent action to obtain relief from the unlawful Settlement. "An equitable independent action for relief from a prior judgment is not precluded by the doctrine of former adjudication." Benedetti, 103 Nev. at 365, 741 P.2d at 805.[3] Further, the Supreme Court has noted "an exception to according res judicata effect to a prior judgment when to accord such preclusive effect would contravene an important public policy, particularly when the judgment was entered after stipulation or settlement." Willerton v. Bassham, 111 Nev. 10, 18-19, 889 P.2d 823, 828 (1995) (reasoning that a minor child is not barred from instituting a later action to determine paternity when a prior action brought in his name has reached judgment through a stipulated agreement). Allowing the Respondents to hide behind the September 1, 2006 stipulation would render meaningless the requirements of open meetings and allow the City to make important land use decisions by way of litigation, rather than public action taken at public hearings. In light of the above, the Respondents have failed to demonstrate that the instant petition is an impermissible collateral attack on a judgment, rather than a justified petition for extraordinary relief and review from a final administrative decision.

c. The Petitioners Have Adequately Established That They Have Standing

Respondents argue, on several legally unsupported grounds, that the Petitioners lack standing to bring their petition for judicial review; however, as established in detail below, Petitioners Adams, Clement, Grieve, Hendricks and Maher, although not residents of the City, have standing to contest the City's decision because they have a beneficial interest in seeking a writ of mandamus reinstating the

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[3]Respondents argue, without distinguishing the facts of the two cases, that Mainor v. Nault "impliedly" overrules Benedetti. However, until the Nevada Supreme Court chooses to expressly overrule a case, the case remains controlling authority.

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August 23-24 decision denying Red Hawk's Application, while the remaining Petitioners, as taxpayers of the City, have standing to challenge the illegal actions of the City in approving the Settlement with Red Hawk.[4]

i. Petitioners Are Not Required To Make An Appearance Before the City Council

Respondents first note that Petitioners Boren and Hendricks did not make an appearance before the City Council to voice their opposition to the Settlement, and accordingly, are not "aggrieved parties" for purposes of NRS Chapter 278. See Motion to Dismiss at page 10, lines 19-23. This conclusory statement makes no sense because a party need not voice its opposition to be aggrieved and the Respondents tellingly fail to cite to any authority in Chapter 278 or elsewhere supporting the proposition that aggrieved parties are only those who publicly voice their opposition. Indeed, a review of NRS Chapter 278 indicates that an appearance before an administrative body is not required before someone is deemed to be an aggrieved party. As such, Petitioners Boren and Hendricks can be aggrieved by the City's decision to approve the Settlement and may properly seek review before this Court even if they did not appear before the City.

ii. Petitioners Have A Beneficial Interest In Seeking Mandamus Relief

Second, Respondents argue that Petitioners Adams, Clement, Grieve, and Maher cannot have standing by virtue of their "proximity" to the proposed resort casino at Tierra del Sol because they are not residents of the City. See Motion to Dismiss at page 11, lines 1-4. Respondents conclude that because these Petitioners are not residents of the City, they are not within the "zone of interests" to be protected by the City's decision to settle a lawsuit against it. See id. at lines 15-17.

The Respondents' argument that these Petitioners do not have standing lacks merits because the Sparks Municipal Code has specific provisions that contemplate giving notice to property owners living adjacent to the property involved in a public hearing, regardless of whether those property

[4] It should be noted that the Respondents' standing arguments are internally inconsistent and in conflict with other portions of their motion to dismiss. In particular, the Respondents assert, when it is convenient for them to do so in addressing standing, that this case involves the City's decision to settle a lawsuit, so standing under NRS Chapter 278 does not apply. See Motion to Dismiss at p. 11. Yet, the Respondents argue that writ relief is inappropriate in this case because the only issue is a land use decision subject to judicial review under NRS Chapter 278. The Respondents obviously cannot have it both ways and their inconsistent positions only further demonstrate that the motion to dismiss is nothing more than a series of scattered arguments designed to obviscate the real issue in this case – the City's arbitrary and capricious decision to approve the Settlement and pre-mediated attempts to insulate that arbitrary and capricious decision from judicial review.

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owners are in fact taxpaying residents of the City. Section 20.07.050(3) of the Sparks Municipal Code specifically provides that whenever a public hearing is held, at least ten days notice of the time, place and purpose of such public hearing shall be "[g]iven by mail to owners of property within three hundred feet of the exterior limits of the property or area involved as shown by the assessor's latest ownership maps or to thirty (30) adjacent owners of property, which ever is greater." Pursuant to this provision, the City provided notification of the public hearing on Red Hawk's application to numerous property owners. See "Notification for PCN05073" in the Administrative Record at Chapter 3. Included in this notification are Petitioners Adams, Clement and Hendricks. See id. Accordingly, the City admittedly realized that any action it took with respect to Red Hawk's Application would affect not only residents of the City, but also adjacent property owners, who could very well be aggrieved by the City's ultimate decision to approve the Application. Thus, for the Respondents to now argue that certain of the Petitioners do not have standing because they do not live in the City is disingenuous and contrary to the City Municipal Code.

Respondents rely, in part, on the Nevada Supreme Court's decision in Philips v. City of Reno, 92 Nev. 563, 554 P.2d 740 (1976), to argue that the Petitioners not only have to own property within the City, but that they must own property within the City that borders Tierra Del Sol. See Motion to Dismiss at page 13, lines 14-17. A proper reading of the Court's decision in Philips does not, however, support he Respondents' position. In Philips, the Nevada Supreme Court reasoned that the plaintiffs did not have standing to protest the challenged annexation for two reasons: (1) none of the plaintiffs owned property within the annexed area or the area bordering the annexed area, and (2) the annexation was performed under a "special statute" that precluded challenges to voluntary annexation. See id. at 564, 554 P.2d at 741. Thus, a statute prohibited the plaintiffs' challenge and the plaintiffs' property was not a part of or near the proposed annexation. Accordingly, even if the Philips case were applicable here, which it is not, the Petitioners residing outside of the City would nevertheless have standing to seek relief from the City's decision because the Settlement obligates the City to approve the Application, which will permit a hotel/casino across the Pyramid Highway from the Petitioners' property.

In fact, a plain reading of the Court's decision in Philips is that a plaintiff must either own

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property within the affected area or own property that is adjacent to the affected area, like Petitioners Adams, Clement, Grieve, Hendricks and Maher. Philips does not require that these Petitioners own property that is both within the City **and** bordering Tierra del Sol. The referenced Petitioners live in residential communities on the opposite side of the Pyramid Highway, directly facing the proposed hotel/casino project at Tierra del Sol. Philips instructs that this proximity to the proposed project confers standing on these Petitioners to prosecute this lawsuit.

Further, the plaintiffs in Philips were seeking judicial review of an annexation performed under a special statute from which the Court held there could be no challenges. There is no special statute at issue in this case, pursuant to which the City purportedly acted. Rather, the City arbitrarily and capriciously exercised its discretion to approve the Settlement. The Petitioners therefore have the right to seek extraordinary relief to control the City's conduct by establishing that they have a beneficial interest in obtaining writ relief.

Finally, "[t]o establish standing in a mandamus proceeding, the petitioner must demonstrate a 'beneficial interest' in obtaining writ relief." Secretary of State v. Nevada State Legislature, 120 Nev. 456, 460-61, 93 P.3d 746, 749 (2004); see also State v. State Bank & Trust Co., 37 Nev. 55, 139 P. 505, 512 (1914) ("The cases holding that a party, in order to be entitled to have any affirmative relief in an action or to have the right of appeal, must have a beneficial interest are numerous and without conflict."). In Secretary of State v. Nevada State Legislature, the Nevada Supreme Court stated that "'[t]o demonstrate a beneficial interest sufficient to pursue a mandamus action, a party must show a direct and substantial interest that falls within the *zone of interests to be protected by the legal duty* asserted." 120 Nev. at 461, 93 P.3d at 749 (quoting Lindelli v. Town of San Anselmo, 4 Cal.Rptr.3d 453, 461 (Cal. App. 4th 2003)). "Stated differently, the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." Id. (quoting Waste Management v. County of Alameda, 94 Cal.Rptr.2d 740, 747 (Cal. App. 4th 2000)).

The Petitioners whose property borders the Pyramid Highway and the Tierra del Sol development will suffer all of the consequences that accompany the development of a hotel/casino that is practically in their backyard. In fact, as a result of the City's Settlement, these Petitioners will be subjected to a hotel/casino that is not, as the City concluded on August 23-24, 2006, permitted near

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ORIGINAL

In the Supreme Court of the State of Nevada

FILED

JUN 30 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Mateo
DEPUTY CLERK

Michael A. Carrigan, Fourth Ward City Council Member of the City of Sparks

Appellant(s),

vs.

The Commission on Ethics of the State of Nevada

Respondent(s).

Cross-Appellant(s),

vs.

Cross-Respondent(s).

No. 51920

DOCKETING STATEMENT CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to attach documents as requested in this statement, completely fill out the statement, or to fail to file it in a timely manner, will constitute grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

RECEIVED
JUN 30 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

08-16608

1. Judicial District 1st Judicial District Ct. Department Two County Carson City
Judge Honorable William A. Maddox District Ct. Docket No. 07-OC-012451B

2. **Attorney filing this docket statement:**

Attorney Chester H. Adams, Esq.; Douglas R. Thornley, Esq. Telephone 775-353-2324
Firm Sparks City Attorney's Office
Address 431 Prater Way; P.O. Box 857
Sparks, NV 89432

Client(s) Michael A. Carrigan, the City Councilman elected to represent the Fourth Ward of the City of Sparks.

If this is a joint statement completed on behalf of multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondent(s):**

Attorney Adriana G. Fralick, Esq. Telephone 775-687-5469
Firm Nevada Commission on Ethics
Address 3476 Executive Pointe Way, Suite 10
Carson City, NV 89706

Client(s) Nevada Commission on Ethics

Attorney Telephone
Firm
Address

Client(s)

(List additional counsel on separate sheet if necessary)

4. **Nature of disposition below (check all that apply):**

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Dismissal
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify)
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☑ Review of agency determination
- ☐ Divorce decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify)

5. **Does this appeal raise issues concerning any of the following:**

- ☐ Child custody
- ☐ Venue
- ☐ Adoption
- ☐ Termination of parental rights
- ☐ Grant/denial of injunction or TRO
- ☐ Juvenile matters

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Michael A. Carrigan, Fourth Ward City Council Member, of the City of Sparks v. The First Judicial District Court of the State of Nevada in and for Carson City, and, the Nevada Commission on Ethics

Docket No. 51850

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. **Nature of the action.** Briefly describe the nature of the action, including a list of the causes of action pleaded, and the result below:

This is an appeal from the District Court's Order Denying a Petition for Judicial Review of a Nevada Commission on Ethics' Decision.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal:

1. Whether the District Court erred in concluding that the former NRS 281.501(8) (presently NRS 281A.420(8)) is not unconstitutionally vague.
2. Whether the District Court erred in concluding that the former NRS 281.501(2) (presently NRS 281A.420(2)) is not unconstitutionally vague.
3. Whether the District Court erred in concluding that the vagueness of the former NRS 281.501(8) and the former NRS 281.501(2) did not violate the First Amendment of the United States Constitution.
4. Whether the Order of the District Court, coupled with the opinion of the Nevada Commission on Ethics in this case, amounts to a prior restraint of protected speech.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

N/A

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A ✓ Yes ..... No .....

If not, explain .....

12. **Other issues.** Does this appeal involve any of the following issues?

- ☐ Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
- ☑ An issue arising under the United States and/or Nevada Constitutions
- ☑ A substantial issue of first-impression
- ☑ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

If so, explain Please see attached explanation.

13. **Trial.** If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

14. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice?

N/A

12. Other issues...

If so, explain...

Certain provisions in Nevada's Ethics in Government Law are unconstitutionally vague under the Fourteenth Amendment to the United States Constitution. These provisions relate to a public officer's duty to abstain from voting on matters where his private relationships rise to the level of a "commitment in a private capacity to the interest of others." Because a public officer has a First Amendment right to vote on matters before his respective governmental body when he does not otherwise have a disqualifying conflict of interest, the vagueness that permeates the Ethics in Government Law has a chilling effect on the free exercise of political speech. This is a substantial issue of first impression because the Nevada Commission on Ethics, Nevada's District Courts and this Honorable Court have provided no guidance as to the boundaries and standards associated with the abstention requirements under the Ethics in Government Law, leaving public officers around the State guessing as to what behavior is lawful and what behavior is not.

The vagueness challenge in this appeal also presents an important issue of public policy in Nevada - whether or not campaign contributions to elected officials constitute a conflict of interest that requires abstention under the Ethics in Government Law, and if they do, at what point the contributions become a de facto limitation on political contribution that is less than the limitation contained in NRS 294A.100.

Finally, the decision of the First Judicial District Court, coupled with the Opinion of the Nevada Commission on Ethics amounts to an unconstitutional system of prior restraint on protected speech. The District Court determined that the vagueness of Nevada's Ethics in Government Law could be cured because elected officials were free to seek a binding advisory opinion from the Commission on Ethics prior to voting on an issue. Accordingly, public officers in the State of Nevada are left in the precarious position of requesting state approval before exercising a constitutionally guaranteed right, or chancing a myriad of penalties by acting without understanding the boundaries of an unconstitutionally vague statute.

TIMELINESS OF NOTICE OF APPEAL

15. **Date of entry of written judgment or order appealed from** May 28, 2008 **. Attach a copy. If more than one judgment or order is appealed from, attach copies of each judgment or order from which an appeal is taken.** See Exhibit "A"

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

.....

.....

16. **Date written notice of entry of judgment or order served** May 30, 2008 **. Attach a copy, including proof of service, for each order or judgment appealed from.** See Exhibit "B"

(a) Was service by delivery ✓ or by mail ..... (specify).

17. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59),**

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

NRCP 50(b) ..... Date served ..... By delivery ..... or by mail ..... Date of filing .....
NRCP 52(b) ..... Date served ..... By delivery ..... or by mail ..... Date of filing .....
NRCP 59 ..... Date served ..... By delivery ..... or by mail ..... Date of filing .....

Attach copies of all post-trial tolling motions.

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration do not toll the time for filing a notice of appeal.

(b) Date of entry of written order resolving tolling motion ..... **Attach a copy.**

(c) Date written notice of entry of order resolving motion served ..... **Attach a copy, including proof of service.**

(i) Was service by delivery ..... or by mail ..... (specify).

18. **Date notice of appeal was filed** June 23, 2008 .

(a) If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

19. **Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a), NRS 155.190, or other** NRAP 4(a)(1) .

SUBSTANTIVE APPEALABILITY

20. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

NRAP 3A(b)(1) ✓ NRS 155.190 (specify subsection)
NRAP 3A(b)(2) NRS 38.205 (specify subsection)
NRAP 3A(b)(3) NRS 703.376
Other (specify)

Explain how each authority provides a basis for appeal from the judgment or order:

The District Court's Order denying Appellant's Petition for Judicial Review is a final appealable determination pursuant to NRAP 3A(b)(1).

COMPLETE THE FOLLOWING SECTION ONLY IF MORE THAN ONE CLAIM FOR RELIEF WAS PRESENTED IN THE ACTION (WHETHER AS A CLAIM, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM) OR IF MULTIPLE PARTIES WERE INVOLVED IN THE ACTION. Attach separate sheets as necessary.

21. **List all parties involved in the action in the district court:**

Petitioner: Michael A. Carrigan, City Councilman for the Fourth Ward of the City of Sparks
Respondent: Nevada Commission on Ethics

Amicus Curiae: The Nevada Legislature

(a) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

To date, Amicus Curiae has not attempted to join the appeal.

22. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (*i.e.*, order, judgment, stipulation), and the date of disposition of each claim. Attach a copy of each disposition.**

Nevada's Ethics in Government law is unconstitutionally vague.

23. **Attach copies of the last-filed version of all complaints, counterclaims, and/or cross-claims filed in the district court.** See Exhibit "C"

24. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below:**

Yes ✓ No

25. **If you answered "No" to the immediately previous question, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b):

Yes.....No..... **If "Yes," attach a copy of the certification or order, including any notice of entry and proof of service.**

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

Yes.....No.....

26. **If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):**

N/A

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Michael A. Carrigan
Name of appellant

June 30, 2008
Date

Washoe County, Nevada
State and county where signed

Chester H. Adams; Douglas R. Thornley
Name of counsel of record

Douglas R. Thornley, Esq.

CERTIFICATE OF SERVICE

I certify that on the 30th day of June, 2008, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☑ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

Adriana Fralick, Esq.
Nevada Commission on Ethics
3476 Executive Pointe Way, Suite 10
Carson City, NV 89706

The Honorable Catherine Cortez Masto
State of Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701-4717

Brenda J. Erdoes, Legislative Counsel
Kevin C. Powers, Sr. Principal Deputy Legislative Counsel
Legislative Counsel Bureau
401 S. Carson Street
Carson City, NV 89701

Dated this 30th day of June, 2008

Shawna L. Liles

Shawna L. Liles

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. CARRIGAN, Fourth Ward City Council Member, of the City of Sparks,

Appellant,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent. /

Docket No. 51920

District Court No. 07-OC-012451B

* * * * * * * * * * * * * * * * *

APPELLANT CITY OF SPARKS'

APPENDIX TO

DOCKETING STATEMENT CIVIL APPEALS

VOLUME I

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Attorneys for Appellant
MICHAEL CARRIGAN

INDEX OF EXHIBITS

Volume I

Exhibit A	Order and Judgment Denying the Petitioner's Petition for Judicial Review and Affirming the Final Decision of the Nevada Commission on Ethics, dated May 28, 2008
Exhibit B	Notice of Entry of Order, dated May 30, 2008

Volume II

Exhibit C	Petitioner's Corrected Opening Brief in Petition for Judicial Review, dated February 28, 2008

A

Case No.: 07-OC-012451B

Dept. No.: II

REC'D & FILED

2008 MAY 28 PM 4:36

ALAN GLOVER
BY J. HIGGINS CLERK

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

MICHAEL A. CARRIGAN, Fourth Ward City Council Member of the City of Sparks,

Petitioner,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent.

ORDER AND JUDGMENT DENYING THE PETITIONER'S PETITION FOR JUDICIAL REVIEW AND AFFIRMING THE FINAL DECISION OF THE NEVADA COMMISSION ON ETHICS

JUN 03 2008

PROCEDURAL HISTORY

On October 9, 2007, Petitioner MICHAEL A. CARRIGAN, a member of the Sparks City Council, filed a Petition for Judicial Review pursuant to the Administrative Procedure Act (NRS 233B.130-233B.135) asking the Court to reverse a final decision of Respondent NEVADA COMMISSION ON ETHICS (Commission). In the Commission's final decision, which it issued on October 8, 2007, the Commission found that Councilman Carrigan violated the Nevada Ethics in Government Law (Ethics Law) when he failed to abstain from voting upon the application of Red Hawk Land Company (Red Hawk) for tentative approval of its Lazy 8 resort and casino project (Lazy 8 project). Specifically, the Commission determined that, at the time of the vote, Councilman Carrigan had a disqualifying conflict

EXHIBIT A

of interest under subsections 2 and 8 of NRS 281A.420 because his campaign manager, political advisor, confidant and close personal friend, Mr. Carlos Vasquez, was a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the Lazy 8 project.[1]

In support of his Petition for Judicial Review, Councilman Carrigan filed an Opening Brief on January 7, 2008. The Commission filed an Answering Brief on February 25, 2008. In addition, on February 25, 2008, the Legislature of the State of Nevada (Legislature) filed a Motion for Leave to File an Amicus Curiae Brief and for Permission to Participate as Amicus Curiae in any Oral Argument or Hearing on this matter. The Legislature conditionally filed its Amicus Curiae Brief along with its Motion. The Amicus Curiae Brief was limited to addressing Councilman Carrigan's claims that subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of the First and Fourteenth Amendments. On March 20, 2008, the Court granted the Legislature's Motion and permitted the Legislature to file its Amicus Curiae Brief and to participate as Amicus Curiae in any oral argument or hearing on this matter.

On March 26, 2008, Councilman Carrigan filed a Reply Brief and also filed a Request for Hearing on this matter pursuant to NRS 233B.133(4). On April 16, 2008, the Court set a hearing date of May 12, 2008, to receive oral argument from the parties and Amicus Curiae regarding the Petition.

On May 12, 2008, the Court commenced the hearing on the Petition shortly after 9:00 a.m. in the courtroom of Department No. II. The following counsel were present in the courtroom: CHESTER H. ADAMS, Sparks City Attorney, and DOUGLAS R. THORNLEY, Assistant City Attorney, who appeared on behalf of the Petitioner; ADRIANA G. FRALICK, General Counsel for the Nevada

---

[1] At the time of the City Council meeting on August 23, 2006, the Ethics Law was codified in NRS 281.411-281.581. In 2007, the Legislature enacted Senate Bill No. 495, which directed the Legislative Counsel to move the Ethics Law into a new chapter to be numbered as NRS Chapter 281A. See Ch. 195, 2007 Nev. Stats. 641, § 18. Because the relevant events in this case occurred before the recodification of the Ethics Law into NRS Chapter 281A, the Commission's final decision and the briefs of the parties cite to NRS 281.411-281.581. Nevertheless, for purposes of consistency with the Ethics Law as presently codified, the Court's order and judgment will cite to the appropriate provisions of NRS Chapter 281A.

Commission on Ethics, who appeared on behalf of the Respondent; and KEVIN C. POWERS, Senior Principal Deputy Legislative Counsel, Legislative Counsel Bureau, who appeared on behalf of the Legislature as Amicus Curiae.

Having considered the pleadings, briefs, documents, exhibits and administrative record on file in this case and having received oral argument from the parties and Amicus Curiae, the Court enters the following findings of fact and conclusions of law pursuant to N.R.C.P. 52 and enters the following order and judgment pursuant to N.R.C.P. 58 and NRS 233B.135:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Michael A. Carrigan is the Petitioner herein. He is a member of the Sparks City Council.

2. The Nevada Commission on Ethics is the Respondent herein. The Commission is charged with the statutory duty of administering and enforcing the Ethics Law, which is codified in the Nevada Revised Statutes as NRS Chapter 281A.

3. On August 23, 2006, the Sparks City Council held a special meeting to determine whether to grant Red Hawk tentative approval for its Lazy 8 project, which would be built within a planned development in the City commonly known as Tierra Del Sol. (ROA000002-4, 170-171, 176-209.)[2] All five members of the City Council were present at the meeting and actively participated in the discussion regarding the merits of Red Hawk's application. (ROA000175, 202-209.)

4. At the time of the meeting, Councilman Carrigan was a candidate for reelection to a third term on the City Council, and Mr. Carlos Vasquez was his campaign manager. (ROA000002-4, 23, 43-44.) Vasquez started serving as campaign manager in January or February 2006, and he served in that capacity until Councilman Carrigan was reelected at the November 2006 general election. Id. In prior elections, Vasquez served as Councilman Carrigan's campaign manager for at least 3 months in both

---

[2] Parenthetical citations are to the Administrative Record on Appeal (ROA), which the Commission transmitted to the Court pursuant to NRS 233B.131(1) and which consists of Bates Pages Nos. ROA000001 to ROA000570, inclusive.

1999 and 2003, when Councilman Carrigan was elected to his first and second terms on the City Council. (ROA000002-4, 21-23.) Vasquez and Councilman Carrigan also have a close personal friendship that has been ongoing since 1991. (ROA000002-4, 20-21, 41.)

5. Vasquez has served as campaign manager for at least 50 to 60 candidates since 1999. (ROA000041.) For some candidates, Vasquez was paid compensation for his services as campaign manager, but for Councilman Carrigan's three consecutive campaigns, Vasquez was not paid compensation. (ROA000002-4, 21-23, 41.) However, several companies owned by Vasquez were paid for providing printing, advertising and public relations services for Councilman Carrigan's three campaigns. (ROA000002-4, 24, 33-34, 51.) These services were provided at cost, and Vasquez and his companies did not make any profit from these services. Id.

6. Councilman Carrigan would routinely discuss political matters with Vasquez throughout his terms in office, not just during political campaigns, and he considered Vasquez to be a trusted political advisor and confidant. (ROA000022-23, 25, 31, 35.) In fact, Councilman Carrigan would confide in Vasquez regarding political matters that he would not normally discuss with members of his own family such as siblings. (ROA000035.) When Vasquez was asked by the Commission to describe the kind of political matters he discussed with Councilman Carrigan from 1999 to 2006, he responded: "Everything. When you are running a campaign you have to take a look at all the factors that could affect that candidate and that community." (ROA000046.)

7. During Councilman Carrigan's 2006 reelection campaign, the predominant campaign issue was the Lazy 8 project, and the public and the media focused most of their attention on that project. (ROA000023-24, 47.) As campaign manager, Vasquez actively solicited campaign contributions for the benefit of Councilman Carrigan. (ROA000043-44.) As part of that solicitation, Vasquez relied on his many community and business contacts, and he sent fund-raising letters to approximately 700 potential donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were

otherwise directly interested in the success of the Lazy 8 project. Id.

8. Vasquez's primary occupation is to act as a paid public relations political advocate and strategist. (ROA000042.) In that capacity, Vasquez is paid to provide political consulting, lobbying and public relations services, and one of his specialties is providing such services to developers who are seeking approval from local governments for their planned developments. (ROA000041-53.)

9. Vasquez was hired by Red Hawk or one of its affiliates to provide political consulting, lobbying and public relations services for the Lazy 8 project. (ROA000029, 42.) Vasquez was paid to oversee public relations regarding the project, and he was actively and openly involved in efforts to manage information in the media and to influence and improve the public's opinion regarding the project. (ROA000042-46.) Vasquez also was actively and openly involved in efforts to secure the City Council's approval of the project. Id.

10. Councilman Carrigan testified before the Commission that Vasquez never asked him to vote a particular way on the Lazy 8 project. (ROA000035-37, 42-46.) However, the record reflects that Vasquez's efforts were instrumental in securing support for the project from Councilman Carrigan. Id. For example, Vasquez met numerous times with Councilman Carrigan and other council members to discuss the project. Id. At those meetings, Vasquez sought support for the project through discussions and negotiations regarding the specific details of the project that Red Hawk could change to satisfy the concerns of the council members. Id. As a result of his discussions and negotiations, Vasquez conveyed information directly to Red Hawk, which then changed the specifications of the project to obtain the support of Councilman Carrigan and other council members. Id.

11. At the beginning of the City Council meeting on August 23, 2006, Councilman Carrigan made the following disclosure, as found in the transcripts of the meeting:

> Thank you Mayor. I have to disclose for the record something, uh, I'd like to disclose that Carlos Vasquez, a consultant for Redhawk, uh, Land Company is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight.

> [T]herefore according to NRS 281.501 [now codified as NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue. Thank you.

(ROA000507.)

12. At the City Council meeting, Vasquez appeared and testified as a paid consultant and representative for Red Hawk, and he actively and openly lobbied and advocated on behalf of Red Hawk and urged the City Council to approve the Lazy 8 project. (ROA000187-190.)

13. After receiving additional testimony at the meeting from supporters and opponents of the Lazy 8 project, the City Council took action on Red Hawk's application. (ROA000190-209.) Councilman Carrigan made a motion to grant tentative approval for the Lazy 8 project. (ROA000206-209.) That motion failed by a vote of two in favor (Carrigan and Schmitt) and three opposed (Mayer, Salerno and Moss). Id. Councilman Mayer then made a motion to deny tentative approval for the Lazy 8 project. (ROA000209.) That motion passed by a vote of three in favor (Mayer, Salerno and Moss) and two opposed (Carrigan and Schmitt). Id.

14. In September 2006, four members of the public filed separate but similar ethics complaints against Councilman Carrigan. (ROA000075-107.) Each complaint alleged that Councilman Carrigan's participation in the City Council meeting violated the Ethics Law because, at the time of the meeting, Councilman Carrigan's campaign manager, political advisor, confidant and close personal friend was acting as a paid consultant and lobbyist for Red Hawk and was urging the City Council to approve the Lazy 8 project. Id.

15. On August 29, 2007, the Commission held a hearing and received testimony and evidence concerning the ethics complaints. (ROA000016-71.) On October 8, 2007, the Commission issued its final decision finding that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted upon the Lazy 8 project. (ROA000001-13.) However, because the Commission found that Councilman Carrigan's violation was not willful, the Commission did not impose a civil penalty against Councilman

Carrigan. (ROA000012-13.)

16. Subsection 2 of NRS 281A.420 provides in relevant part:

> [I]n addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
>
> (a) His acceptance of a gift or loan;
>
> (b) His pecuniary interest; or
>
> (c) His commitment in a private capacity to the interests of others.
>
> ➥ It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

17. In its final decision, the Commission determined that when Councilman Carrigan voted upon the Lazy 8 project, Councilman Carrigan improperly voted upon "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others." NRS 281A.420(2)(c). (ROA000011-13.)

18. In reaching its conclusion, the Commission relied upon the statutory definition of "commitment in a private capacity to the interests of others," which is found in subsection 8 of NRS 281A.420:

> 8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:
>
> (a) Who is a member of his household;
>
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
>
> (c) Who employs him or a member of his household;
>
> (d) With whom he has a substantial and continuing business relationship; or
>
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

(Emphasis added.) (ROA000006-8.)

19. The Commission found that Councilman Carrigan's relationship with Vasquez came within the scope of paragraph (e) of subsection 8 of NRS 281A.420, as "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection." (ROA000006-8.) In particular, the Commission determined that "[t]he sum total of their commitment and relationship equates to a 'substantially similar' relationship to those enumerated under NRS 281.501(8)(a)-(d) [now codified as NRS 281A.420(8)(a)-(d)], including a close personal friendship, akin to a relationship to a family member, and a 'substantial and continuing business relationship.'" (ROA000008.)

20. Because the Commission found that the independence of judgment of a reasonable person in Councilman Carrigan's situation would be materially affected by his commitment in a private capacity to the interests of his campaign manager, political advisor, confidant and close personal friend, the Commission concluded that Councilman Carrigan was required by subsection 2 of NRS 281A.420 to abstain from voting. Specifically, the Commission stated:

> Under the Woodbury analysis, the burden was appropriately on Councilman Carrigan to make a determination regarding abstention. Abstention is required where a reasonable person's independence of judgment would be materially affected by his private commitment.
>
> A reasonable person in Councilman Carrigan's position would not be able to remain objective on matters brought before the Council by his close personal friend, confidant and campaign manager, who was instrumental in getting Councilman Carrigan elected three times. Indeed, under such circumstances, a reasonable person would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment.

(ROA000012.)

Petitioner's Claims

21. In his Petition for Judicial Review, Councilman Carrigan raises multiple claims challenging the Commission's final decision.

22. First, Councilman Carrigan contends that the Commission's final decision should be

reversed under the Administrative Procedure Act because the final decision is in violation of constitutional provisions. NRS 233B.135(3)(a). Specifically, Councilman Carrigan contends that subsections 2 and 8 of NRS 281A.420 are unconstitutional because they: (1) impermissibly restrict protected speech in violation of the First Amendment; and (2) are overbroad and vague in violation of the First and Fourteenth Amendments.

23. Second, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is affected by error of law. NRS 233B.135(3)(d). Specifically, Councilman Carrigan contends that the Commission improperly interpreted and applied subsection 2 of NRS 281A.420 because it ignored the presumption contained in that subsection without receiving any evidence that rebutted the presumption.

24. Third, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is not supported by reliable, probative and substantial evidence on the whole record. NRS 233B.135(3)(e).

25. Fourth, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision is arbitrary and capricious and characterized by abuse of discretion. NRS 233B.135(3)(f).

26. Finally, Councilman Carrigan contends that the Commission's final decision should be reversed under the Administrative Procedure Act because the final decision violates his constitutional rights to due process and was made upon unlawful procedure. NRS 233B.135(3)(a) & (c). Specifically, Councilman Carrigan contends that his constitutional rights to due process were violated because Commissioner Flangas and Commissioner Hsu each had conflicts of interest which created an appearance or implied probability of bias and which disqualified them from participating in the Commission's hearing regarding the ethics complaints against Councilman Carrigan.

27. Having reviewed each of Councilman Carrigan's claims, the Court finds that the claims do

not have merit and, therefore, the Court denies the Petition for Judicial Review and affirms the final decision of the Commission pursuant to NRS 233B.135(3).

Standard of Review

28. Under the Administrative Procedure Act, Councilman Carrigan bears the burden of proof to show that the final decision of the Commission is invalid. NRS 233B.135(2); Weaver v. State, Dep't of Motor Vehicles, 121 Nev. 494, 498 (2005). To meet his burden of proof, Councilman Carrigan must prove that substantial rights have been prejudiced by the final decision of the Commission because the final decision is:

> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3).

29. In reviewing the final decision of the Commission, the standard of deference accorded to the Commission's determinations turns largely on whether the determinations are more appropriately characterized as findings of fact or conclusions of law. S. Nev. Operating Eng'rs v. Labor Comm'r, 121 Nev. 523, 527 (2005).

30. The Commission's findings of fact are entitled to a deferential standard of review. Id. at 527-28. Under that deferential standard, the Court may not look beyond the administrative record or substitute its judgment for that of the Commission as to the weight of evidence on any findings of fact. NRS 233B.135(3); Weaver, 121 Nev. at 498. Thus, the Court must uphold the Commission's findings of fact if they are supported by substantial evidence in the record, regardless of whether the Court would have reached the same view of the facts as the Commission. Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 125 (2005). For purposes of this standard, substantial evidence is defined as evidence

which a reasonable mind might accept as adequate to support a conclusion. Id. Substantial evidence need not be voluminous, and it may be shown inferentially by a lack of certain evidence. Id.

31. In addition to giving deference to the Commission's findings of fact, the Court must give deference to the Commission's conclusions of law when they are closely tied to the Commission's view of the facts. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005). However, on pure questions of law, such as the Commission's interpretation of the ethics statutes, the Court is empowered to undertake an independent de novo review, and the Court is not required to defer to the Commission's legal conclusions. Bacher v. State Eng'r, 122 Nev. ---, 146 P.3d 793, 798 (2006); Nev. Tax Comm'n v. Nev. Cement Co., 117 Nev. 960, 964 (2001).

32. Under NRS Chapter 281A, the Commission is the agency expressly charged with the statutory duty of administering and enforcing the ethics statutes. NRS 281A.440 & 281A.480; Comm'n on Ethics v. JMA/Lucchesi, 110 Nev. 1, 5-6 (1994). As a result, the Commission is clothed with the power to interpret the ethics statutes as a necessary precedent to its administrative action and "great deference should be given to that interpretation if it is within the language of the statute." Nev. Tax Comm'n, 117 Nev. at 968-69; JMA/Lucchesi, 110 Nev. at 5-6; Cable v. State ex rel. Employers Ins. Co., 122 Nev. ---, 127 P.3d 528, 532 (2006). Thus, the Court will give great deference to the Commission's interpretation of the ethics statutes and will not readily disturb that interpretation if it is within the language of the statutes and is consistent with legislative intent. JMA/Lucchesi, 110 Nev. at 5-7; City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900 (2002).

Subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment.

33. Councilman Carrigan contends that legislative voting is protected speech under the First Amendment and that he had a constitutional right as an elected public officer to engage in such protected speech when he voted on the Lazy 8 project. Because the Commission concluded that

subsections 2 and 8 of NRS 281A.420 prohibited Councilman Carrigan from voting on the Lazy 8 project, Councilman Carrigan argues that the statutory provisions are unconstitutional on their face and as applied to him because they impermissibly restrict his protected speech in violation of the First Amendment. In response, the Legislature raises several arguments in opposition to Councilman Carrigan's constitutional challenge to the validity of the statutory provisions.

34. First, the Legislature contends that the First Amendment was not applicable under the circumstances that existed when Councilman Carrigan voted on the Lazy 8 project. Specifically, the Legislature argues that: (1) the City Council meeting regarding the Lazy 8 project was not a legislative proceeding, but was an administrative proceeding at which the City Council and its members were required to comply with the Due Process Clause; (2) under the Due Process Clause, Councilman Carrigan was prohibited from voting on the Lazy 8 project because he had a substantial and continuing political, professional and personal relationship with Vasquez which created an appearance or implied probability of bias and which resulted in a disqualifying conflict of interest; and (3) because the Due Process Clause prohibited Councilman Carrigan from voting on the Lazy 8 project, the First Amendment was not applicable under the circumstances and, therefore, subsections 2 and 8 of NRS 281A.420 are not subject to review under the First Amendment based on the particular facts of this case.

35. Second, the Legislature contends that even if subsections 2 and 8 of NRS 281A.420 are subject to review under the First Amendment in this case, the balancing test established by the United States Supreme Court in Pickering v. Board of Education, 391 U.S. 563 (1968), is the proper standard of review. The Legislature argues that under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan because the state's vital interest in ethical government outweighs any interest Councilman Carrigan has to vote upon a matter in which he has a disqualifying conflict of interest.

36. Finally, the Legislature contends that even if strict scrutiny is the proper standard of review

under the First Amendment, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan because: (1) the state has a compelling interest in promoting ethical government and guarding the public from biased decisionmakers; and (2) the statutory provisions requiring disqualified public officers to abstain from voting constitute the least restrictive means available to further the state's compelling interest.

37. Although the Legislature makes a cogent argument that the First Amendment was not applicable under the circumstances, it is not necessary for the Court to resolve that issue in this case. Instead, even assuming that the First Amendment was applicable under the circumstances, the Court finds that under the Pickering balancing test, any interference with protected speech is warranted because of the state's strong interest in either having ethical government or the appearance of ethical government. Therefore, the Court holds that subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan.

38. Although public officers and employees do not surrender their First Amendment rights as a result of their public service, it is well established that the free speech and associational rights of public officers and employees are not absolute. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973). Because the free speech and associational rights of public officers and employees are not absolute, states may enact reasonable regulations limiting the political activities of public officers and employees without violating the First Amendment. Clements v. Fashing, 457 U.S. 957, 971-73 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 606-07 (1973).

39. Several cases from the First Circuit have found that "[v]oting by members of municipal boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the status of public officials' votes as constitutionally protected speech [is] established beyond peradventure of doubt." Stella v. Kelley, 63 F.3d 71, 75 (1st Cir. 1995); Mihos v. Swift, 358 F.3d 91, 107-09 (1st Cir. 2004); Miller v. Town of Hull, 878 F.2d 523, 532-33 (1st Cir. 1989). Even though the First Circuit

recognizes that voting by public officers is constitutionally protected speech, the First Circuit also recognizes that "[t]his protection is far from absolute," and that when a public officer claims his First Amendment right to vote has been violated, the Pickering balancing test is the proper standard of review to apply to the case. Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002); Stella, 63 F.3d at 74-76; Mihos, 358 F.3d at 102-09. As thoroughly explained by the First Circuit in Mullin:

> We have extended First Amendment protection to votes on "controversial public issues" cast by "a member of a public agency or board." Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir. 1989) ("There can be no more definite expression of opinion than by voting on a controversial public issue."); see also Stella v. Kelley, 63 F.3d 71, 75-76 (1st Cir. 1995). This protection is far from absolute, however. In their capacity as public officials voting on matters of public concern, plaintiffs retain First Amendment protection "so long as [their] speech does not unduly impede the government's interest . . . in the efficient performance of the public service it delivers through" its appointed officials. O'Connor, 994 F.2d at 912 (citing cases). Accordingly, to determine the scope of First Amendment free speech protections applicable to public officials, we have employed a three-part test extracted largely from two Supreme Court opinions, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), and Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

Mullin, 284 F.3d at 37.

40. Thus, the Court finds that the Pickering balancing test, not strict scrutiny, is the proper standard of review for this case. Under the Pickering balancing test, the Court must weigh the interests of public officers and employees in exercising their First Amendment rights against the state's vital interest in "promot[ing] efficiency and integrity in the discharge of official duties." Connick v. Myers, 461 U.S. 138, 150-51 (1983) (quoting Ex parte Curtis, 106 U.S. 371, 373 (1882)); Rankin v. McPherson, 483 U.S. 378, 384 (1987). If a public officer or employee engages in protected speech that has the potential to disrupt or undermine the efficiency or integrity of governmental functions, the state may impose significant restraints on the speech that "would be plainly unconstitutional if applied to the public at large." United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995); Waters v. Churchill, 511 U.S. 661, 671-75 (1994) (plurality opinion). Thus, under the Pickering balancing test, the state is given greater latitude to restrict the speech of public officers and employees to promote

operational efficiency and effectiveness and to prevent the appearance of impropriety and corruption in the performance of governmental functions. City of San Diego v. Roe, 543 U.S. 77, 80-85 (2004); Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 1958-59 (2006).

41. On their face, subsections 2 and 8 of NRS 281A.420 prohibit a public officer from voting upon a matter when he has a "commitment in a private capacity to the interests of others." The purpose of the statutory provisions is to prevent a public officer from voting upon a matter when private interests create an actual conflict of interest or the appearance of a conflict of interest. Under such circumstances, a reasonable person would have a legitimate fear that the public officer's commitment to the private interests of others could potentially disrupt or undermine the public officer's efficiency, effectiveness and integrity in the discharge of his official duties. Thus, on their face, the statutory provisions serve the vital state interest of securing the efficient, effective and ethical performance of governmental functions. See Dunphy v. Sheehan, 92 Nev. 259, 262 (1976) ("The elimination and prevention of conflict of interest is a proper state purpose.").

42. Because the statutory provisions serve such a vital state interest, the balancing of interests under the Pickering test tilts heavily in favor of the state because the state's interests are at their zenith. In contrast, a public officer's interest in voting upon a matter in which he has a disqualifying conflict of interest is entitled to little or no protection under the First Amendment. Indeed, allowing a public officer to vote under such circumstances would seriously erode the public's confidence in ethical government. Therefore, because the state's interest in securing the efficient, effective and ethical performance of governmental functions outweighs any interest that a public officer may have in voting upon a matter in which he has a disqualifying conflict of interest, the Court finds that subsections 2 and 8 of NRS 281A.420 are facially constitutional under the Pickering balancing test.

43. The Court also finds that subsections 2 and 8 of NRS 281A.420 are constitutional as applied to Councilman Carrigan. Given Vasquez's role as Councilman Carrigan's campaign manager, political

advisor, confidant and close personal friend, the record contains substantial evidence that Councilman Carrigan and Vasquez had a substantial and continuing political, professional and personal relationship when the Lazy 8 project came before the City Council for approval. That relationship was sufficient to create an actual conflict of interest or the appearance of a conflict of interest, and a reasonable person would have had a legitimate fear that the relationship could potentially disrupt or undermine Councilman Carrigan's efficiency, effectiveness and integrity in the discharge of his official duties. Under such circumstances, Councilman Carrigan had a disqualifying conflict of interest. Because the First Amendment does not protect the right to vote in the face of a disqualifying conflict of interest, the Commission acted constitutionally when it found that Councilman Carrigan was prohibited from voting upon the Lazy 8 project.

44. Accordingly, the Court holds that under the Pickering balancing test, subsections 2 and 8 of NRS 281A.420 are constitutional on their face and as applied to Councilman Carrigan. Therefore, subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment.

Subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments.

45. Overbreadth and vagueness are "logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983). A statute is unconstitutionally overbroad on its face if the statute prohibits a substantial amount of speech protected by the First Amendment. Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494-97 (1982). A statute is unconstitutionally vague on its face if the statute: (1) fails to provide people of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits; or (2) authorizes or encourages arbitrary and discriminatory enforcement by the officers charged with its administration. Id. at 497-99; Comm'n on Ethics v. Ballard, 120 Nev. 862, 868 (2004).

46. In determining whether a statute is unconstitutionally overbroad or vague, the United States Supreme Court considers whether there are any procedures in place allowing persons with doubts about the meaning of the statute to obtain clarification from the agency charged with its enforcement. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 608 n.7 (1973); Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (plurality opinion); Hoffman Estates, 455 U.S. at 498; cf. Dunphy v. Sheehan, 92 Nev. 259, 264 (1976). The Supreme Court typically will not find the statute to be unconstitutionally overbroad or vague if such persons "are able to seek advisory opinions for clarification, and thereby 'remove any doubt there may be as to the meaning of the law.'" McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003) (citation omitted) (quoting Letter Carriers, 413 U.S. at 580); Groener v. Or. Gov't Ethics Comm'n, 651 P.2d 736, 742-43 (Or. Ct. App. 1982).

47. Under the Ethics Law, a public officer may request an advisory opinion from the Commission regarding "the propriety of his own past, present or future conduct" and receive guidance from the Commission on whether to withdraw or abstain from participating in a matter. NRS 281A.440(1) & 281A.460. Each request so made by a public officer and each advisory opinion rendered by the Commission in response to such a request, and any motion, determination, evidence or hearing record relating to such a request, are confidential unless the public officer who requested the advisory opinion permits the disclosure of the confidential information or acts in contravention of the advisory opinion. NRS 281A.440(5).

48. In this case, Councilman Carrigan failed to seek an advisory opinion from the Commission even though he had ample time and opportunity to do so. The record shows that Vasquez became Councilman Carrigan's campaign manager 6 months or more before the City Council meeting. (ROA000023.) During that period, Councilman Carrigan had actual knowledge of Vasquez's simultaneous service as a paid consultant for Red Hawk regarding the Lazy 8 project. (ROA000029, 42-

43.) Thus, Councilman Carrigan could have requested an advisory opinion from the Commission during this period, but he neglected to do so. Given that Councilman Carrigan failed to seek an advisory opinion and obtain clarification of the statute from the Commission when he had ample opportunity to do so, the Court rejects Councilman Carrigan's claim that the statute is unconstitutionally overbroad or vague. See Groener, 651 P.2d at 742-43 (rejecting a legislator's claim that an ethics statute was unconstitutionally vague where the legislator failed to request an advisory opinion from the state ethics commission regarding the propriety of his conduct).

49. In addition, after reviewing subsections 2 and 8 of NRS 281A.420 in light of the statute's intended scope and purpose, the Court finds that the statute is not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments.

50. The United States Supreme Court has recognized that the overbreadth and vagueness doctrines are "strong medicine" which must be used "sparingly and only as a last resort." Broadrick, 413 U.S. at 613. In addition, a statute should not be invalidated on its face "when a limiting construction has been or could be placed on the challenged statute." Id. Likewise, a statute should not be invalidated on its face if its impact on the First Amendment is so speculative or slight that "[t]he First Amendment will not suffer if the constitutionality of [the statute] is litigated on a case-by-case basis." Clements v. Fashing, 457 U.S. 957, 971-72 n.6 (1982); Broadrick, 413 U.S. at 615-16.

51. Under the overbreadth doctrine, a statute is not overbroad merely because the statute, if construed in abstract or obtuse ways, has some speculative or unrealized potential to prohibit a marginal amount of protected speech. Broadrick, 413 U.S. at 615-17. Rather, for a court to invalidate a statute as overbroad, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615. Therefore, to prevail on an overbreadth challenge, it is not enough for the petitioner to show that there is a possibility of some overbreadth. Instead, the petitioner "bears the burden of demonstrating, 'from the text of [the law] and from actual

fact,' that substantial overbreadth exists." Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 14 (1988)). If the scope of the statute, as construed consistently with its intended purpose, reaches mostly unprotected speech, the statute will be upheld even though it "may deter protected speech to some unknown extent." Broadrick, 413 U.S. at 615; City of Las Vegas v. Dist. Ct., 122 Nev. ---, 146 P.3d 240, 247 (2006).

52. When applying the overbreadth doctrine, a statute is subject to less exacting scrutiny when it regulates political activity in an even-handed and neutral manner and is not attempting to suppress any particular viewpoint. Broadrick, 413 U.S. at 615-16. In this case, subsections 2 and 8 of NRS 281A.420 regulate in an even-handed and neutral manner because they prohibit all disqualified public officers from voting on a matter, regardless of viewpoint and regardless of whether the public officer wants to vote "yes" or "no" on the matter. Thus, because the statute "is not a censorial statute, directed at particular groups or viewpoints," it is subject to less exacting scrutiny for overbreadth. Id. at 616.

53. Applying that scrutiny to subsections 2 and 8 of NRS 281A.420, the Court finds that the scope of the statute, when construed consistently with its intended purpose, reaches mostly unprotected speech. The purpose of the statute is to prevent public officers from voting upon matters when private interests create an actual conflict of interest or the appearance of a conflict of interest. It has been a universal and long-established rule under the common law that members of public bodies are prohibited from voting upon matters in which they have disqualifying conflicts of interest, and this traditional common-law rule "is founded on principles of natural justice and sound public policy." Bd. of Superv'rs v. Hall, 2 N.W. 291, 294 (Wis. 1879); Daly v. Ga. S. & Fla. R.R., 7 S.E. 146, 149 (Ga. 1888); Sec. Nat'l Bank v. Bagley, 210 N.W. 947, 951 (Iowa 1926); Woodward v. City of Wakefield, 210 N.W. 322, 323 (Mich. 1926); Commw. ex rel. Whitehouse v. Raudenbush, 94 A. 555, 555 (Pa. 1915); Pyatt v. Mayor & Council of Dunellen, 89 A.2d 1, 4-5 (N.J. 1952). When there has been a "universal and long-established" tradition under the common law of prohibiting certain conduct, this creates a "strong

presumption" that the prohibition is constitutional under the First Amendment. Republican Party of Minn. v. White, 536 U.S. 765, 785 (2002). Thus, because public officers do not have a First Amendment right to vote upon matters in which they have disqualifying conflicts of interest, subsections 2 and 8 of NRS 281A.420 prohibit only unprotected speech and are not unconstitutionally overbroad.

54. Furthermore, even assuming that subsections 2 and 8 of NRS 281A.420, if construed in abstract or obtuse ways, have some speculative or unrealized potential to prohibit a marginal amount of protected speech, that potential is not enough to make the statute *substantially* overbroad. As explained by the Nevada Supreme Court, "[e]ven if a law at its margins proscribes protected expression, an overbreadth challenge will fail if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" City of Las Vegas, 146 P.3d at 247 (quoting Osborne v. Ohio, 495 U.S. 103, 112 (1990)).

55. In this case, Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. When the Legislature enacted the definition of "commitment in a private capacity to the interests of others" in Senate Bill No. 478 (70th Sess. 1999), it clearly had in mind situations where a public officer's substantial and continuing relationship with his campaign manager would require abstention. In the legislative hearings on S.B. 478, Senator Dina Titus and Scott Scherer, Legal Counsel to the Governor, had the following discussion regarding the definition:

> *Senator Titus questioned:*
> I just have a question of how this would fit with either the existing language or the new language. One of the cases that had a lot of notoriety involved a commissioner and someone who had worked on her campaign. Sometimes people who do campaigns then become lobbyists. If you could not vote on any bill that was lobbied by someone who had previously worked on your campaign, how would all of that fit in here. It is not really a business relationship or a personal relationship, but I don't [do not] know what it is.
>
> Mr. Scherer stated:
> The way that would fit in . . . the new language that the Governor is suggesting is that it would not necessarily be included because it would not be a continuing business relationship. So the relationship would have to be substantial and continuing. Now, if this was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in

cases involving that particular person.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999) (emphasis added).

56. In light of this legislative history, it would be detrimental to society to invalidate the statute on its face when Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. The statute also should not be invalidated on its face because the statute's impact on the First Amendment is so speculative or slight that the First Amendment will not suffer if the constitutionality of the statute is litigated on a case-by-case basis by petitioners whose conduct does not fall so squarely within the confines of the statute.

57. Thus, the Court rejects Councilman Carrigan's overbreadth challenge because: (1) subsections 2 and 8 of NRS 281A.420 are intended to prohibit only unprotected speech and, to the extent that the statute reaches protected speech, if any at all, the statute's reach is marginal and therefore is not *substantially* overbroad; and (2) Councilman Carrigan's conduct falls squarely within the intended scope of the statute and was not protected by the First Amendment. Accordingly, the Court holds that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad in violation of the First Amendment.

58. Under the vagueness doctrine, a statute does not have to be drafted with hypertechnical precision to survive constitutional scrutiny because "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). Thus, it is constitutionally permissible for a statute to be drafted with flexibility and reasonable breadth, rather than meticulous specificity. Id. As explained by the United States Supreme Court:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Letter Carriers, 413 U.S. at 578-79.

59. When applying the vagueness doctrine, a statute is subject to less exacting scrutiny for vagueness if it imposes only civil sanctions, instead of criminal penalties, since the United States Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Hoffman Estates, 455 U.S. at 498-99; Groener, 651 P.2d at 742 (holding that ethics statute which imposed only civil sanctions was subject to less exacting scrutiny for vagueness).

60. In this case, the Commission may impose only civil sanctions for a violation of the Ethics Law. NRS 281A.480. The Ethics Law does not contain any criminal penalties for a violation of its provisions. Therefore, because a violation of subsections 2 and 8 of NRS 281A.420 does not result in criminal penalties, the statute is subject to less exacting scrutiny for vagueness.

61. Councilman Carrigan contends that the Court should apply a higher level of scrutiny to the provisions of the Ethics Law because the Commission may take actions under NRS 281A.480 which could result in severe consequences for a public officer, including referring the matter to the Attorney General or the appropriate District Attorney for a determination of whether a crime has been committed and whether the public officer should be prosecuted under the *criminal laws* of this state. The Court finds that because none of the actions which the Commission is authorized to take under NRS 281A.480 could result in a public officer being criminally prosecuted under the provisions of the *Ethics Law*, it would be inappropriate for the Court to apply a higher level of scrutiny to the Ethics Law.

62. Under NRS 281A.480(4)(a), if the Commission finds that a public officer who is removable from office by impeachment only has committed a willful violation of the Ethics Law, the Commission is required to file a report with the appropriate person responsible for commencing impeachment proceedings. It is well established, however, that impeachment proceedings are not criminal proceedings and that a judgment entered in impeachment proceedings is not a criminal conviction. Nev.

Const. art. 7, § 2; see also 1 Joseph Story, Commentaries on the Constitution of the United States §§ 781-86 (5th ed. 1905); Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924) ("The primary purpose of an impeachment is to protect the state, not to punish the offender.").

63. Under NRS 281A.480(4)(b) & (4)(c), if the Commission finds that a public officer who is removable from office pursuant to NRS 283.440 has committed one or more willful violations of the Ethics Law, the Commission is authorized, and in some cases the Commission is required, to commence removal proceedings in the appropriate court pursuant to NRS 283.440 for removal of the public officer. It is well established, however, that removal proceedings conducted pursuant to NRS 283.440 are civil proceedings and that a judgment of removal entered in those proceedings is not a criminal conviction. Adler v. Sheriff, 92 Nev. 436, 439 (1976) ("The laws for removal of public officers are not criminal statutes nor are the proceedings criminal proceedings.").

64. Under NRS 281A.480(6), a public employee who has committed a willful violation of the Ethics Law is subject to disciplinary proceedings by his employer and must be referred for action in accordance with the applicable provisions governing his employment. It is well established, however, that disciplinary proceedings conducted against public employees are administrative proceedings, not criminal proceedings. Navarro v. State ex rel. Dep't of Human Res., 98 Nev. 562, 563-65 (1982); State, Dep't of Human Res. v. Fowler, 109 Nev. 782, 784-85 (1993).

65. *Finally, NRS 281A.480(7) provides:*

> 7. The provisions of this chapter do not abrogate or decrease the effect of the provisions of the Nevada Revised Statutes which define crimes or prescribe punishments with respect to the conduct of public officers or employees. If the Commission finds that a public officer or employee has committed a willful violation of this chapter which it believes may also constitute a criminal offense, the Commission shall refer the matter to the Attorney General or the district attorney, as appropriate, for a determination of whether a crime has been committed that warrants prosecution.

66. Even though the Commission is required to refer certain matters to the Attorney General or the appropriate District Attorney for a determination of whether criminal prosecution is warranted by a

state or local prosecutor, such a criminal prosecution could not occur under the provisions of the Ethics Law because the Ethics Law does not contain any criminal penalties for a violation of its provisions. Rather, such a criminal prosecution could occur only under the criminal laws of this state.

67. Thus, because the Ethics Law does not contain any criminal penalties for a violation of its provisions, the only direct consequence Councilman Carrigan faced for his violation of the Ethics Law was the imposition of civil sanctions by the Commission. NRS 281A.480. And, in this case based on its view of the facts, the Commission did not impose any civil sanctions against Councilman Carrigan at all. (ROA000012-13.) Accordingly, given that the Commission may impose only civil sanctions for a violation of subsections 2 and 8 of NRS 281A.420, the Court finds that the statute is subject to less exacting scrutiny for vagueness.

68. Furthermore, when the government restricts the speech of its public officers and employees, it may use broad and general language even if such language would create "a standard almost certainly too vague when applied to the public at large." Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion). For example, a federal statute allowed the government to remove a federal employee "for such cause as will promote the efficiency of the service." Arnett v. Kennedy, 416 U.S. 134, 158-62 (1974) (plurality opinion). An employee who was discharged for making public statements critical of his supervisors claimed that the statute was unconstitutionally overbroad and vague. Id. The United States Supreme Court rejected the constitutional challenge, with the plurality opinion stating that "[b]ecause of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal." Id. at 161. The plurality opinion also emphasized "[t]he essential fairness of this broad and general removal standard, and the impracticability of greater specificity," and explained that "it is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited

conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'" Id. at 161 (quoting Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968)).

69. In a case challenging the constitutionality of the rule of judicial conduct which requires judges to recuse themselves when their "impartiality might reasonably be questioned," a federal district court held that the rule was not overbroad or vague. Family Trust Found. v. Wolnitzek, 345 F. Supp. 2d 672, 708-10 (E.D. Ky. 2004). The court found that while the rule is stated in broad and general terms, the rule also contains four specific instances which require recusal: (1) personal bias or prejudice concerning a party or attorney; (2) personal involvement in the controversy; (3) personal or economic interest that could be affected by the controversy; and (4) involvement of a spouse or relative in the controversy. The court held that the rule did not prohibit a substantial amount of protected speech in relation to its many legitimate applications, and that "if the Court were to invalidate the recusal laws based on overbreadth, then the state's ability to safeguard the impartiality or appearance of impartiality of the judiciary would be greatly compromised." Id. at 709-10. The court also held that the rule was not vague because it provided enough guidance for a judge to determine, "in most instances," the circumstances when his "impartiality might reasonably be questioned" so as to require recusal. Id. at 710; see also Kan. Jud. Watch v. Stout, 440 F. Supp. 2d 1209, 1234-35 (D. Kan. 2006); N.D. Family Alliance v. Bader, 361 F. Supp. 2d 1021, 1043-44 (D.N.D. 2005).

70. In a similar vein, the Nevada Supreme Court has held that broad and general terms, like "unprofessional conduct," are not vague when used to define the ethical standards governing various professions. Laman v. Nev. Real Estate Advisory Comm'n, 95 Nev. 50, 55-56 (1979); Meinhold v. Clark County Sch. Dist., 89 Nev. 56, 63 (1973), *cert. denied*, 414 U.S. 943 (1973); Moore v. Bd. of Trustees, 88 Nev. 207, 210-11 (1972), *cert. denied*, 409 U.S. 879 (1972). As explained by the court:

> [T]he variety of forms which unprofessional conduct may take makes it infeasible to attempt to specify in a statute or regulation all of the acts which come within the meaning of the term. The fact that it is impossible to catalogue all of the types of professional misconduct is the very reason for setting up the statutory standard in broad terms and delegating to the

board the function of evaluating the conduct in each case.

Moore, 88 Nev. at 211 (quoting In re Mintz, 378 P.2d 945, 948 (Or. 1963)).

71. In this case, the reasonable catch-all standard of "[a]ny other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection" is designed to capture the infinite variety of factual situations in which private commitments and relationships will cause a public officer to have a disqualifying conflict of interest. Considering that it would have been infeasible for the Legislature to employ exhaustive detail to catalogue every type of disqualifying conflict of interest in the language of the statute, it was appropriate for the Legislature to enact such a reasonable catch-all standard and allow the Commission to apply that standard to specific conduct in each case.

72. Furthermore, because the language of the catch-all provision is expressly tied to the four types of private commitments and relationships already enumerated in the statute, the Legislature has given the Commission and public officers four very specific and concrete examples to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission.

73. Finally, the legislative hearings on S.B. 478 also provide guidance to the Commission and public officers regarding the meaning of the catch-all provision. On March 30, 1999, Scott Scherer, Legal Counsel to the Governor, explained the intent, purpose and scope of the catch-all provision:

> [The new language in NRS 281A.420] would be, 'any substantially similar commitment or relationship.' Because I can tell you what the Governor was trying to get at was actually trying to make the language better by defining 'commitment in a private capacity to the interests of other.' That, I think, is even more vague than the language we have in here, which sets forth some categories. We also, though, on the other hand, did not want to specifically limit it to just these categories. But what we were trying to get at relationships that are so close that they are like family. That they are substantially similar to a business partner. And so, I think if we took out the words 'or personal' in lines 16 and 17, and then we said, 'any substantially similar commitment or relationship.' That would express the view that we are trying to get at which is, it has got to be a relationship that is so close, it is like family, it is like a member of your household, it is like a business partner.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42-43 (Nev. Mar. 30, 1999).

74. On April 7, 1999, Mr. Scherer provided additional commentary regarding the intent, purpose and scope of the catch-all provision:

> Referencing an amendment in Exhibit I, Mr. Scherer drew attention to the issue of personal relationships . . . He suggested the amendment . . . rewrite paragraph (e) to read, "any commitment or relationships that is substantially similar to any one of the relationships set forth in this paragraph." The intent of change, he stated, is to capture a relationship, not listed in paragraphs (a), (b), (c), or (d), but is so close to the extent the individual considers them family. He commented with this change the ethics commission would still have some discretion to require a disclosure and an abstention in those kinds of cases. But, he pointed out, it has to actually be shown that the relationship is substantially similar to one of the four other relationships listed, including a member of one's family, member of one's household, an employment relationship, or a business relationship. The commission, he restated, would have to show the relationship is "as close as" or "substantially similar" . . . He reiterated this would give the ethics commission some discretion for those egregious cases that may slip through the cracks otherwise, while still giving some guidance to public officials who need to know what their obligations are. He declared this language to be an improvement on existing law and an appropriate balance between trying to provide guidance and trying to allow the ethics commission discretion.
>
> Chairman O'Connell concurred stating, "I do not think that that language could leave any doubt in anybody's mind about the relationship. In my looking at it, I think you did a terrific job with that, because it certainly does tell you exactly what kind of relationship you would have with the person and it would make it much easier to determine that before voting."
>
> Mr. Scherer agreed the proposal was superior to the currently undefined, "commitment in a private capacity to the interests of others." He stressed the importance of attempting to give guidance without completely taking away the ethics commission's discretion.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 32-33 (Nev. Apr. 7, 1999).

75. In the face of this legislative history, it is reasonable to expect a public officer of ordinary intelligence to understand the types of private commitments and relationships that are "substantially similar" to those he has with: (1) a member of his household; (2) a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (3) a person who employs him or a member of his household; or (4) a person with whom he has a substantial and continuing business relationship. Through the exercise of ordinary common sense, a reasonable public

officer could readily deduce that the four types of private commitments and relationships that are explicitly described in the statute all involve close, substantial and continuing relationships. It follows by simple logic that the catch-all provision extends to "substantially similar" private commitments and relationships which also constitute close, substantial and continuing relationships akin to those commitments and relationships that are explicitly described in the statute. Because it is not unreasonable to expect a public officer to know when he has a close, substantial and continuing relationship with another person, most public officers should have little difficulty in conforming their conduct to the dictates of the statute. To the extent that public officers and their attorneys are in need of further guidance, they can request advisory opinions from the Commission pursuant to NRS 281A.440(1) and 281A.460.

76. Thus, the Court rejects Councilman Carrigan's vagueness challenge because: (1) Councilman Carrigan failed to seek an advisory opinion and thereby obtain clarification of the statute from the Commission when he had ample opportunity to do so; (2) the statute contains sufficiently clear standards so that a reasonable public officer exercising ordinary common sense can adequately understand the type of conduct that is prohibited by the statute; and (3) the statute contains four very specific and concrete examples of prohibited conduct to guide and properly channel interpretation of the statute and prevent arbitrary and discriminatory enforcement by the Commission. Accordingly, the Court holds that subsections 2 and 8 of NRS 281A.420 are not unconstitutionally vague in violation of the First and Fourteenth Amendments.

The Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in this case.

77. Councilman Carrigan claims that the presumption contained in subsection 2 of NRS 281A.420 was ignored and was not rebutted by any evidence or testimony received by the Commission. The Court disagrees.

78. The presumption contained in subsection 2 of NRS 281A.420 states:

> It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.

79. As illustrated by the following discussion on the record at the hearing, the Commission fully considered the presumption and concluded that it simply did not apply to Councilman Carrigan based on the facts:

> COMMISSIONER HSU: . . . I think people put too much emphasis on this language when I see people argue it when the resulting benefit or detriment accruing to him would not be greater than any accruing to any other member in a general business. There is only one lobbyist hired by Harvey Whittemore's group to do this, at least in terms of what I heard. It's not like the entire business profession of lobbyists are being affected uniformly. That's kind of what that language is there for.
>
> So I just don't see how that applies. I mean, we have one person, Carlos Vasquez is who is the spokesman or paid consultant for the Lazy 8 people, and he certainly gets the professional benefit by having this approved, and of course, the vote was that it got denied, the vote, but I just don't see how that language applies because it is not a broad application.
>
> Again, . . . I just don't see how every—how the entire group of lobbyists is being affected by the passage or failure of this vote. Thanks.
>
> * * *
>
> COMMISSIONER JENKINS: . . . We might consider that Councilman Carrigan is a resident of his ward and the decision to participate in the vote and his bringing the motion and voting for it would not bring him or the project—well, him any greater benefit than any other resident of his ward. But you know, Vasquez just really throws a wrench in the whole thing, doesn't he?
>
> VICE CHAIRMAN HUTCHISON: If I can comment, Commissioner Jenkins . . . [W]e're not talking about [Councilman Carrigan's] pecuniary interest, we're talking about his commitement in a private capacity to the interests of others. So we're not talking about his interest as a citizen, we're talking about the private capacity interest to Mr. Vasquez.
>
> So I think that Commissioner Hsu's reasoning does, I think, apply . . . Mr. Vasquez was in a different position than the general business, profession, occupation or group in terms of the Lazy 8 and the passage of the matter that was before the Council on August 23rd.

So I do think that Commissioner Hsu's reasoning makes sense to me and that paragraph does not necessarily save the day.

COMMISSIONER JENKINS: . . . I can't find any support for that paragraph, you're right, about the benefit being more or less than anyone else in a group.

(ROA000066-67.)

80. Therefore, the Court holds that the Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in Councilman Carrigan's case.

The Commission's decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion.

81. After review of the record, the Court finds that substantial evidence exists to support the Commission's conclusion that Councilman Carrigan violated subsection 2 of NRS 281A.420 when he voted on the Lazy 8 project.

82. "Substantial evidence" is defined as evidence which a reasonable mind might accept as adequate to support a conclusion. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev. 419, 426 (2005).

83. The intent of the Ethics Law is clear. When creating the Ethics Law, the Legislature declared:

To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

NRS 281A.020(2)(b).

84. Accordingly, the disclosure and abstention law holds public officers accountable to the public for complete disclosures of private commitments and for the proper exercise of their judgment to abstain or not to abstain, by requiring them to make that judgment after evaluating their private commitments and the effects of their decision on those private commitments. NRS 281A.420; see also In re Woodbury, Nev. Comm'n on Ethics Op. No. 99-56, at 2 (Dec. 22, 1999).

85. Subsection 2 of NRS 281A.420 states in part:

> [A] public officer shall not vote upon or advocate the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others.

86. "Commitment in a private capacity to the interests of others" is defined in subsection 8 of NRS 281A.420 as:

> [A] commitment to a person:
> (a) Who is a member of his household;
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
> (c) Who employs him or a member of his household;
> (d) With whom he has a substantial and continuing business relationship; or
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

87. The relationship and commitment shared by Councilman Carrigan and Vasquez is the type that the Legislature intended to encompass when adopting the definition of "commitment in a private capacity to the interest of others," specifically, paragraph (e) of subsection 8 of NRS 281A.420. This is evidenced by the testimony given by Schott Scherer, General Counsel to Governor Guinn during the 1999 legislative session.

> [I]t has to actually be shown that the relationship is substantially similar to one of the four other relationships listed, including a member of one's family, member of one's household, an employment relationship, or a business relationship. The commission, he restated, would have to show the relationship is "as close as" or "substantially similar" to one listed in section 15, subsection 7 of the bill. He reiterated this would give the ethics commission some discretion for those egregious cases that may slip through the cracks otherwise, while still giving some guidance to public officials who need to know what their obligations are.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 33 (Nev. Apr. 7, 1999).

88. In response to Senator Titus' question as to how campaign managers fit into the statute, Mr. Scherer responded:

> The way that would fit in . . . if this was one where the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship, yes, you probably ought to disclose and abstain in cases involving that particular person.

Hearing on S.B. 478 before Senate Comm. on Gov't Affairs, 70th Leg., at 42 (Nev. Mar. 30, 1999).

89. The Court agrees with the Commission that the sum total of the relationship shared by Councilman Carrigan and Vasquez equates to a relationship such as those enumerated under NRS 281A.420(8)(a)-(d), including a close, personal friendship akin to family and a "substantial and continuing business relationship."

90. First, in addition to being a close personal friend, Councilman Carrigan would confide in Vasquez on matters where he would not his own family such as siblings. (ROA000035.)

91. Second, as Councilman Carrigan's volunteer campaign manager, Vasquez was instrumental in getting him elected three times to the Council. (ROA000022, 47.)

92. Third, companies owned by Vasquez were paid by Councilman Carrigan's campaign for providing printing, advertising and public relations services. These services were provided at cost, and Vasquez and his companies did not make any profit from these services. (ROA000051.)

93. Finally, as campaign manager, Vasquez actively solicited campaign contributions for the benefit of Councilman Carrigan. As part of that solicitation, Vasquez relied on his many community and business contacts and he sent fund-raising letters to approximately 700 potential donors, including persons who were principals either in Red Hawk or one of its affiliates, or who were otherwise directly interested in the success of the Lazy 8 project. (ROA000044.)

94. The Commission found that "[a] reasonable person in Councilman Carrigan's position . . . would undoubtedly have such strong loyalties to this close friend, confidant and campaign manager as to materially affect the reasonable person's independence of judgment." (ROA00012).

95. In Woodbury, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he sits. Nev. Comm'n on Ethics Op. No. 99-56, at 2. Before abstention is required, a reasonable person's independence of judgment "must be ***materially*** affected" by that private commitment. Id.

96. In the instant case, prior to voting on the Lazy 8 project, Councilman Carrigan sought advice from the Sparks City Attorney, his legal counsel. (ROA000112-114.) Neither Councilman Carrigan nor his legal counsel consulted the Commission or the Woodbury opinion for guidance prior to the vote on the Lazy 8 project. In advising Councilman Carrigan, legal counsel relied on a 1998 Attorney General Opinion (AGO 98-27). (ROA000112.)

97. AGO 98-27 advises that in "difficult or complex matters, the next step is to consider seeking an advisory opinion from the Ethics Commission." (ROA000115.) This opinion also states that abstention is required:

> where it appears from objective evidence that as a result of the acquaintance or friendship, a reasonable person in the public officer's situation would have no choice but to be beholden to someone who has an actual interest in the matter . . . In such circumstances, the public official's independence of judgment would be materially affected.

(ROA000121.)

98. The Court finds that substantial evidence exists to support the Commission's conclusion that at the time of the vote on the Lazy 8 project, Councilman Carrigan had a private commitment to the interest of Vasquez, such that the independence of judgment of a reasonable person in Councilman Carrigan's situation would have been materially affected by that commitment. Therefore, Councilman Carrigan had a disqualifying conflict of interest and was required to abstain pursuant to subsection 2 of NRS 281A.420.

99. Because Councilman Carrigan was required to abstain under the statute, his vote on the Lazy 8 project was a violation of subsection 2 of NRS 281A.420.

100. Therefore, the Court holds that the Commission's final decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion.

Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

101. Commissioners who serve on the Nevada Commission on Ethics are public officers subject to the Ethics Law. As such, a Commissioner must disclose conflicts of interests and abstain on matters where a reasonable person's independence of judgment would be materially affected by a commitment in a private capacity or his pecuniary interests, pursuant to NRS 281A.420.

102. Additionally, the Commission is a quasi-judicial body. As such, it looks to the Nevada Code of Judicial Conduct for guidance on matters concerning conflicts of interest and disqualification. NAC 281.214(3). Canon 3E of the Nevada Code of Judicial Conduct states in part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> * * *
> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> * * *
> (ii) is acting as a lawyer in the proceeding;
> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
> * * *

103. Based on these standards, and the fact that Councilman Carrigan waived any objections to the participation of Commissioners Hsu and Flangas, Councilman Carrigan's constitutional rights to due process were not violated.

Commissioner Hsu

104. Councilman Carrigan argues that Commissioner Hsu was biased due to the apparent representation of The Nugget[3] by his law firm, Maupin Cox & LeGoy. However, there is no evidence that Commissioner Hsu himself ever represented The Nugget or that he knew of his firm's

[3] The Nugget is an opponent of the Lazy 8 project.

representation of The Nugget at the time of Councilman Carrigan's hearing. Additionally, The Nugget was not a party to the matter heard by the Commission.

105. Further, although Commissioner Hsu did vote in favor of a finding in violation of subsection 2 of NRS 281A.420, which was unanimous, he also argued against finding a violation of subsection 4 of NRS 281A.420 and a divided majority agreed. (ROA000061, 68.)

106. Finally, Commissioner Hsu made a detailed disclosure based on his personal involvement in a previous lawsuit brought on behalf of Vasquez's father against Vasquez, and his personal knowledge of his law partner's subsequent representation of Vasquez's business interests. (ROA000017.) After these disclosures, Commissioner Hsu made it clear that he would defer to any motion made by Councilman Carrigan to disqualify him if Councilman Carrigan had any objection. Councilman Carrigan's counsel expressly waived any objections. (ROA000017.)

Commissioner Flangas

107. Councilman Carrigan argues that Commissioner Flangas' familial relationship to Alex Flangas, a purported attorney for The Nugget, and Alex's wife Amanda Flangas, who works for The Nugget, required his disqualification.

108. NRS 281A.420 requires a public officer's disclosure on a matter which would reasonably be affected by his commitment to a person who is related to him by blood, adoption or marriage "within the third degree of consanguinity or affinity." Further, a public officer must abstain where a reasonable person's independence of judgment would be materially affected by such a relationship.

109. During the hearing, Commissioner Flangas disclosed his familial relationship to Alex Flangas. Specifically, Commissioner Flangas disclosed that he was raised by his first cousin once removed (his father's first cousin), who is the grandfather to Alex Flangas. (ROA000055.) Thus, Alex Flangas and his wife Amanda Flangas are not within the third degree of consanguinity or affinity to Commissioner Flangas. Consequently, no disclosure or abstention by Commissioner Flangas was

required based on his familial relationship to Alex and Amanda Flangas because that relationship is not within the third degree of consanguinity or affinity.

110. Furthermore, after Commissioner Flangas' disclosure, Councilman Carrigan's counsel waived any objection to Commissioner Flangas' continued participation in the hearing. (ROA000055.)

111. Therefore, the Court finds that Councilman Carrigan has not established a due process violation based on the participation of either Commissioner Hsu or Commissioner Flangas, especially in light of Councilman Carrigan's express waiver of any objections. Accordingly, the Court holds that Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

ORDER AND JUDGMENT

112. Based on the foregoing, the Court holds that: (1) subsections 2 and 8 of NRS 281A.420 do not unconstitutionally restrict protected speech in violation of the First Amendment; (2) subsections 2 and 8 of NRS 281A.420 are not unconstitutionally overbroad or vague in violation of the First and Fourteenth Amendments; (3) the Commission did not commit an error of law in finding that the presumption in subsection 2 of NRS 281A.420 does not apply in this case; (4) the Commission's decision was supported by reliable, probative and substantial evidence on the whole record and was not arbitrary or capricious or characterized by an abuse of discretion; and (5) Councilman Carrigan's constitutional rights to due process were not violated by the participation of Commissioners Hsu and Flangas in the Commission's hearing.

113. Therefore, the Court denies the Petition for Judicial Review and affirms the final decision of the Commission pursuant to NRS 233B.135(3).

114. All parties shall bear their own costs and attorney's fees.

115. Pursuant to N.R.C.P. 58, the Court hereby designates the Respondent as the party required to: (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order

and judgment, upon each party who has appeared in this case and upon Amicus Curiae; and (2) file such notice of entry with the Clerk of Court.

DATED: This 28th day of May, 2008.

William A. Maddox

WILLIAM A. MADDOX
DISTRICT COURT JUDGE

Submitted by:

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CARSON CITY

MICHAEL A. CARRIGAN, Fourth Ward City Council Member, of the City of Sparks

Petitioner,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA

Respondent.

Case No.: 07-OC-012451B
Department No.: II

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 28th day of May, 2008, an Order and Judgment was entered in the above-entitled action, a copy of which is attached hereto.

DATED this 30th day of May, 2008.

Submitted by:

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada Commission on Ethics and that on this 30th day of May, 2008, I placed a true and correct copy of the foregoing Notice of Entry of Order in an envelope at Carson City, Nevada and caused same to be delivered via Reno Carson Messenger, next business day delivery, to the following:

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An Employee of the Nevada Commission on Ethics

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. CARRIGAN, Fourth Ward City Council Member, of the City of Sparks,

Appellant,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA,

Respondent. /

Docket No. 51920

District Court No. 07-OC-012451B

* * * * * * * * * * * * * * * * *

APPELLANT CITY OF SPARKS'

APPENDIX TO

DOCKETING STATEMENT CIVIL APPEALS

VOLUME II

* * * * * * * * * * * * * * * * *

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Volume II

Exhibit C	Petitioner's Corrected Opening Brief in Petition for Judicial Review, dated February 28, 2008

C

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CLERK

DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CARSON CITY

MICHAEL A. CARRIGAN, Fourth Ward City Council Member of the City of Sparks,

Petitioner,

vs.

THE COMMISSION ON ETHICS OF THE STATE OF NEVADA.

Respondent.

Case No. 07-OC-012451B

Dept. No. 2

PETITIONER'S CORRECTED OPENING BRIEF IN PETITION FOR JUDICIAL REVIEW

COMES NOW, Petitioner Michael A. Carrigan, by and through the undersigned counsel of record, and files his Opening Brief in Petition for Judicial Review.[1]

Respectfully submitted this 27th day of February, 2008.

CHESTER H. ADAMS
Sparks City Attorney

By: **DOUGLAS R. THORNLEY**
Assistant City Attorney

[1] All statutes relevant to this matter and cited herein are accurately reproduced in "Exhibit 1" included in Petitioner's Appendix to the Petition for Judicial Review for the Court's convenience. Petitioner notes that the Nevada Ethics in Government Law has been amended since the conclusion of the proceeding below, and now resides in Nevada Revised Statutes (NRS) Chapter 281A instead of NRS Chapter 281. The body of this pleading employs the former statutory citations because those are the citations contained within the record. The new citations are present and highlighted in Exhibit 1. All of the Exhibits to this Petition for Judicial Review can be found in Petitioner's Appendix to the Petition for Judicial Review attached to this Opening Brief.

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STATEMENT OF RELEVANT FACTS

History of The Case Below

On February 16, 2005, Red Hawk Land Company submitted an application to the City of Sparks Planning Department proposing the transfer of a tourist commercial zoning designation and a gaming entitlement from the Wingfield Springs development in Sparks, Nevada to another Red Hawk development known as Tierra del Sol along the Pyramid Highway in Sparks. This project is known colloquially as the "Lazy 8." The transfer application was based upon a 1994 development agreement that allowed for the future transfer of development credits if the credits remained unused. The Lazy 8 is a source of great public consternation, with a small group of residents of unincorporated Washoe County and the Sparks Nugget, Inc. (John Ascuaga's Nugget) being the most vocal opponents of the project. At an August 23, 2006 public meeting, the Sparks City Council voted three to two to deny tentative approval of Red Hawk's application for tentative approval of the planned development where the Lazy 8 is located, including the transfer of the gaming entitlement. Subsequently, Red Hawk filed a lawsuit against the City on August 25, 2006, alleging that the denial of the application was a breach of the 1994 development agreement and that the breach caused damages in excess of $100 million. (Copy of Complaint attached hereto as "Exhibit 2"). Through negotiations with Red Hawk, and after contemplating its options and assessing the legal obstacles in defending the Red Hawk Complaint, the City elected to settle the lawsuit. The Settlement Order entered by the Second Judicial District Court of Nevada on September 1, 2006 obligated the City to tentatively approve Red Hawk's application. Record on Appeal (ROA) 000519-000536.

Jeannie Adams and Janae Maher filed identical Ethics Complaints against Petitioner Carrigan with the Commission on September 15, 2006. See ROA000075-000090; also see ROA000450-000451. Approximately one month earlier, Beth Cooney, the Executive Director of Marketing for John Ascuaga's Nugget sent an e-mail to several people inquiring whether Roy Adams would be inclined to complete and submit an Ethics Complaint against Petitioner Carrigan. ROA000449. Prior to filing the complaints, Complainant Jeannie Adams contacted Marlene Olsen, a public relations consultant for the Sparks Nugget, Inc., regarding the specific provisions of Nevada's Ethics in Government Law (NRS Chapter 281) allegedly violated by Petitioner Carrigan. ROA000452. In the same e-mail, Jeannie Adams thanked Michonne Ascuaga, the Chief Executive Officer of John Ascuaga's Nugget, for all she had done to help. *Id.* The complaints filed

with the Commission allege that Petitioner Carrigan's vote at the August 23, 2006 meeting of the Sparks City Council was influenced by his relationship with Carlos Vasquez, a paid representative of the Red Hawk Land Company and Petitioner Carrigan's sometime volunteer campaign manager. ROA000075-000090. After conducting a preliminary investigation, the Nevada Commission on Ethics charged Petitioner Carrigan with using his position in government to secure or grant an unwarranted privilege, preference, exemption or advantage to himself or Carlos Vasquez (NRS 281.481(2)); failure to sufficiently disclose his relationship with Carlos Vasquez (NRS 281.501(4)); and failure to abstain from voting on the Lazy 8 matter (NRS 281.501(2)). ROA000001-000002; ROA 000165-000168.

On October 6, 2006, a second lawsuit was filed against the City of Sparks regarding the Lazy 8 – this time by John Ascuaga's Nugget, Roy Adams and Jeannie Adams, and Janae Maher, among others. (Copy of Complaint attached hereto as "Exhibit 3"). In this case, the Plaintiffs alleged that the City's decision to settle the lawsuit was faulty because of a supposed violation of Nevada's planning and zoning laws. The Second Judicial District Court dismissed this lawsuit on jurisdictional grounds, never reaching the merits of the case. (Copy of Order attached hereto as "Exhibit 4"). The Plaintiffs appealed. This lawsuit presently resides at the Nevada Supreme Court, where a briefing schedule has been imposed. All of the various Plaintiffs/Appellants in this lawsuit are all represented by the Hale Lane Peek Dennison and Howard law firm.

Petitioner Carrigan was re-elected to a third term as the Sparks City Council member for the City's Fourth Ward in November, 2006 with just over sixty percent of the popular vote. ROA000504. The Lazy 8 project, and its related fallout, was the predominant issue in the 2006 election. ROA 000023-000024, Transcript Pages 32-34, Lines 9-11.

On August 27, 2007, Red Hawk sought final approval of the application from the Sparks City Council. This time, the City Council voted three to two to grant final approval of the application.

The Nevada Commission on Ethics convened on August 29, 2007, and held a hearing regarding the ethics complaints filed against Petitioner Carrigan. ROA000001. At the conclusion of this hearing, the Commission found that Petitioner Carrigan had not violated NRS 281.481(2) or NRS 281.501(4), but did commit a non-willful violation of NRS 281.501(2). ROA000004-000005.

Thereafter, on September 21, 2007, John Ascuaga's Nugget, Roy Adams and Jeannie Adams, and Janae Maher, among others, filed another lawsuit against the City of Sparks. (Copy of Complaint attached

hereto as "Exhibit 5"). Based on the findings of the Nevada Commission on Ethics, this lawsuit requests that the Second Judicial District Court invalidate the August 27, 2007 vote of the Sparks City Council.

The Commission published a formal opinion regarding its findings at the August 29, 2007 hearing on October 8, 2007. ROA000001-000013.

Finally, on December 14, 2007, John Ascuaga's Nugget, Roy Adams and Jeannie Adams, and Janae Maher, among others, filed a Motion to Intervene in the original lawsuit filed against the City of Sparks by Red Hawk (Exhibit 2) based on the August 29, 2007 decision of the Commission. (Attached hereto as "Exhibit 6"). The motion argues that the September 20, 2006 vote of the Sparks City Council ratifying the September 1, 2006 settlement is invalid because Petitioner Carrigan should not have voted on the issue.

Petitioner Carrigan now seeks this Honorable Court's review of the proceedings in this matter before the Nevada Commission on Ethics and the related published opinion of the Commission.

Parties, Related Persons and Entities

Petitioner Carrigan is the Sparks City Council member elected to represent the City's Fourth Ward.

Respondent Nevada Commission on Ethics (Commission) is the administrative body charged with enforcing Nevada's Ethics in Government Law (NRS Chapter 281).

Mr. Carlos Vasquez is a public relations representative for Wingfield Nevada, and was the sometime volunteer campaign manager for Petitioner Carrigan. Through Wingfield Nevada, Mr. Vasquez is involved in the presentation or advertising of several Wingfield Nevada projects, including the Tierra del Sol project, which includes the Lazy 8. Petitioner Carrigan and Mr. Vasquez have been friends since approximately 1991, when their respective wives met through work.

The Sparks Nugget, Inc. is a Nevada corporation doing business as John Ascuaga's Nugget Hotel Casino in Sparks, Nevada. John Ascuaga's Nugget is presently engaged in two lawsuits against the City of Sparks in this matter.

Ms. Michonne Ascuaga is the Chief Executive Officer of John Ascuaga's Nugget.

Ms. Marlene Olsen was a paid public relations consultant for John Ascuaga's Nugget.

Ms. Beth Cooney is the Executive Director of Marketing for John Ascuaga's Nugget.

Mr. Roy Adams , Ms. Jeannie Adams, and Ms. Janae Maher are residents of Spanish Springs, Washoe County, Nevada. Mr. and Ms. Adams and Ms. Maher are not residents of the City of Sparks and, as such,

cannot vote in City of Sparks elections. Mr. and Ms. Adams and Ms. Maher are named Plaintiffs in two lawsuits against the City of Sparks in this matter. At the believed behest of John Ascuaga's Nugget, Ms. Adams and Ms. Maher filed identical Ethics Complaints against Petitioner Carrigan.

The law firm of Hale Lane Peek Dennison and Howard represents both John Ascuaga's Nugget, and Mr. Roy Adams, Ms. Jeannie Adams and Ms. Janae Maher in the above-described lawsuits they have brought against the City of Sparks relating to the approval of the Lazy 8 project.

Mr. Alex Flangas is a shareholder in the law firm of Hale Lane Peek Dennison and Howard. Mr. Flangas is married to Mrs. Amanda Flangas.

Mrs. Amanda Flangas is the Sales Manager for John Ascuaga's Nugget.

Mr. William Flangas is one of six Commissioners who presided over the August 29, 2007 hearing of the Commission regarding Petitioner Carrigan. Commissioner William Flangas is the uncle of Mr. Alex Flangas.

Mr. Rick Hsu is one of six Commissioners who presided over the August 29, 2007 hearing of the Commission regarding Petitioner Carrigan. Mr. Hsu is a shareholder in the law firm of Maupin Cox and LeGoy.

The law firm of Maupin Cox and LeGoy lists the Sparks Nugget, Inc. on the list of Representative Clients published in the law firm's website. (Copy of webpage attached hereto as "Exhibit 7").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Nevada Commission on Ethics improperly interpreted and applied NRS 281.501(2) during the August 29, 2007 hearing, when the Commission ignored a statutory presumption despite receiving no evidence that sufficiently rebutted the presumption.

Whether the Nevada Commission on Ethics abused its discretion and acted arbitrarily and capriciously when it found that Petitioner Carrigan violated NRS 281.501(2).

Whether NRS 281.501(2) through its reliance on the definitions contained in NRS 281.501(8) violates the First Amendment to the United States Constitution by restricting protected political speech without compelling justification.

Whether NRS 281.501(2) through its reliance on the definitions contained in NRS 281.501(8) is unconstitutionally overbroad by restricting more protected speech than is necessary in violation of the First

and Fourteenth Amendments to the United States Constitution.

Whether NRS 281.501(8) is unconstitutionally vague on its face, in violation of the Fourteenth Amendment to the United States Constitution.

Whether NRS 281.501(2) is unconstitutionally vague as applied to Petitioner Carrigan in violation of the First and Fourteenth Amendments to the United States Constitution.

Whether Petitioner Carrigan was deprived of substantive due process at the hearing before the Nevada Commission on Ethics on August 29, 2007.

STATEMENT OF RELIEF SOUGHT

Petitioner requests that this Court determine that the Nevada Commission on Ethics improperly interpreted and applied NRS 281.501(2) during the August 29, 2007 hearing. Petitioner asks that this Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published Opinion, based on the following Points and Authorities and under the power vested in this Court by NRS 233B.135(3)(d).

Petitioner requests that this Court determine that the Nevada Commission on Ethics abused its discretion and acted arbitrarily and capriciously when it found that Petitioner Carrigan violated NRS 281.501(2). Petitioner asks that this Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published Opinion, based on the following Points and Authorities and under the power vested in this Court by NRS 233B.135(3)(f).

Petitioner respectfully requests that this Honorable Court determine that NRS 281.501(2), through its reliance on the definition contained in NRS 281.501(8) violates the First Amendment and is unconstitutionally overbroad in violation of the Fourteenth Amendment. Petitioner further requests that this Court determine that NRS 281.501(8) is unconstitutionally vague on its face, and that NRS 281.501(2) is unconstitutionally vague as applied to Petitioner Carrigan in this case. Petitioner also seeks a judicial determination that he was deprived of substantive due process at the August 29, 2007 hearing before the Nevada Commission on Ethics, and that the deprivation violates the Fourteenth Amendment. Petitioner asks that this Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published Opinion, based on any or all of the following Points and Authorities and under the power vested in this Court by NRS 233B.135(3)(a).

STATEMENT OF POINTS AND AUTHORITIES

STANDARD OF REVIEW

Questions of law, such as the constitutionality of a statute, adequacy of procedure, and statutory construction are reviewed by the appellate court *de novo*. *City of Las Vegas v. Dist. Ct.*, 146 P.3d 240, 245 (Nev. 2006) (Emphasis added); *Kay v. Nunez*, 146 P.3d 801, 807 (Nev. 2006); *Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002); *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993).

Questions of fact are reviewed by the appellate court to determine whether the tribunal below acted arbitrarily or capriciously, and whether the conclusion below is supported by substantial evidence. *Clark Co. Sch. Dist. v. Bundley*, 148 P.3d 750, 754 (Nev. 2006) (Emphasis added). "Substantial evidence" has been defined as "evidence which a reasonable mind might accept as adequate to support a conclusion." *State of Nevada Employment Security Department v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

THE COMMISSION IMPROPERLY INTERPRETED AND APPLIED NRS 281.501(2) WHEN IT IGNORED THE PRESUMPTION CONTAINED IN THE STATUTE DESPITE RECEIVING NO EVIDENCE THAT REBUTTED THE PRESUMPTION

NRS 281.501(2), requires a public officer to abstain from voting on an issue *only* if there exists *objective evidence* that a reasonable person, in the public officer's situation, would have his independence of judgment materially affected by virtue of having a commitment in a private capacity to the tangible interests of others. (Emphasis added) Attorney General's Opinion (AGO) 98-27 (9-25-1998). In fact, the Nevada Commission on Ethics' own interpretation of NRS 281.501(2) requires each public official to make an independent determination of whether the independence of judgment of a reasonable person in his situation would be materially affected by the circumstances surrounding the situation. *In re Woodbury*, Commission on Ethics Opinion (CEO) 99-56 (12-22-1999).[2]

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[2] The policy espoused in *Woodbury* illogically requires an elected official to make a *subjective* determination about an *objective* standard. Effectively, the elected official is left with nothing more than a Hobson's Choice. Either the elected official must choose to risk prosecution, fines and potential removal from office by making an uninformed decision regarding the applicability of an ambiguous law, or he must abstain from voting and fail to represent the people who elected him. There are simply no standards for an elected official to rely on when making the determination that *Woodbury* requires.

NRS 281.501(2) specifically presumes:

> *...that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.* Exhibit 1.

In this case, the statutory presumption was wholly disregarded by the Commission. The Opinion published by the Commission makes no mention of the presumption, and provides no analysis rebutting the presumption. ROA000011-000012. In fact, during the Commission's deliberation regarding Petitioner Carrigan, one of the Commissioners referenced the presumption and stated, "people put too much emphasis on [this] language," and advocated that the presumption should be ignored in this case. ROA000066, Transcript Page 204, Lines 16-24.

If the Nevada Legislature intended for the presumption contained in NRS 281.501(2) to be ignored, it would not have included it in the statute. See *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179-1180, 969 P2d 938, 940-941 (1998) (treating legislature's exclusion of language from a statute as a "deliberate" choice "intended to provide a different result..."); also see *Banegas v. SIIS*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001) (holding that when statutory language is clear and unambiguous, a reviewing court gives the language its ordinary meaning). Because the Commission ignored the presumption that was specifically made part of NRS 281.501(2) by the Nevada Legislature, and because the presumption is not rebutted by any evidence or testimony received by the Commission in this case, the ultimate finding of the Nevada Commission on Ethics is affected by error of law and cannot stand.

Petitioner respectfully requests that this Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published Opinion, based on the Commission's failure to properly apply the presumption set forth in NRS 281.501(2).

THE DECISION OF THE NEVADA COMMISSION ON ETHICS REGARDING PETITIONER CARRIGAN IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE

This Court is empowered to set aside the Commission's decision in this case because Petitioner Carrigan has been prejudiced by the Commission's final decision which is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. NRS 233B.135(3)(e). As discussed above, absolutely no evidence or testimony was received or considered by the Nevada Commission on Ethics in this

case which rebuts the presumption contained in NRS 281.501(2). Because the presumption has not been rebutted by substantial evidence, it must be given full effect in favor of Petitioner Carrigan. Accordingly, no violation of NRS 281.501(2) can be found in this case.

Because the Commission's decision in this matter is not supported by the reliable, probative, and substantial evidence in this case, it cannot be sustained. Petitioner respectfully requests that this Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published Opinion, based on the foregoing and under the power vested in this Court by NRS 233B.135(3)(e).

THE NEVADA COMMISSION ON ETHICS ABUSED ITS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT FOUND THAT PETITIONER CARRIGAN HAD VIOLATED NRS 281.501(2)

Nearly every opinion published in the last decade by the Nevada Commission on Ethics contains the following Disclaimer:

> *"Note: The foregoing opinion applies only to the specific facts and circumstances described herein. Facts and circumstances that differ from those in this opinion may result in an opinion contrary to this opinion. No inferences regarding the provisions of Nevada Revised Statutes quoted and discussed in this opinion may be drawn to apply generally to any other facts and circumstances."* ROA000013.

The final sentence is of particular concern, not only to Petitioner Carrigan, but to any public official summoned before this Commission. Essentially, this Disclaimer gives the Commission the ability to apply the law arbitrarily, without regard to precedent, even when no discernable factual distinction exists. In this case, the Commission wholly ignored several of its past decisions that are analogous to the facts of Petitioner Carrigan's situation.

Previously, the Commission has found that abstention was not required of a member of a state board who knew two witnesses in a matter before the board, and had received nearly five percent of his income over the previous "several" years from the complaining party. *In re Wright*, CEO 02-21 (12-9-2002). The Commission found that the facts and circumstances of the *Wright* case did not implicate a conflict of interest that would materially affect the public official's independence of judgment *or that of a reasonable person. Id.* (Emphasis added).

The facts of the present matter show that Petitioner Carrigan does not generate income by working for Mr. Vasquez, and Mr. Vasquez does not generate income by working for Petitioner Carrigan. Petitioner pays all of the costs of his campaigns, and Mr. Vasquez simply donates his time to Petitioner's campaign.

Testimony was received by the Commission that Mr. Vasquez donates his time to a number of political figures, and that his donation of time to Petitioner Carrigan is in no way tied to the Lazy 8 project. ROA000041, Transcript Page 102, Lines 23-25; ROA000043, Transcript Page 111, Lines 12-16. Public officers are not required to abstain from voting on matters involving a donor of campaign contributions where no evidence of a *quid pro quo* arrangement or other improper influence exists. *In re Boggs-McDonald*, CEO 01-12 (8-8-2001). There have been no allegations of a *quid pro quo* arrangement between Petitioner Carrigan and Mr. Vasquez. The record unequivocally shows that Petitioner Carrigan accurately and dutifully represented the will of a "majority of the constituents," thus dispelling any semblance of improper influence. Even if Petitioner Carrigan could comfortably rely on the previous opinions of the Commission, it is easy to see that the facts of the present case do not rise to the level of the matter presented in the *Wright* opinion.

The Commission has also previously found that a public officer was not required to abstain from voting in a case where his vote had the effect of reducing economic competition for a business partnership to which he belonged. *In re Glenn*, CEO 01-15 (2-1-2002). In *Glenn*, the Chairman and an elected member of the Humboldt General Hospital Board of Trustees was also a member of a partnership that owned two professional office buildings located near a professional office building owned by the General Hospital. *Id.* The partnership leased office space in its two buildings, as did the General Hospital in the building it owned. *Id.* The Commission found no reason for the public officer in question to abstain from voting to raise the rent charged for leased space in the building owned by the Hospital, even though it would have the effect of reducing economic competition for the partnership to which the public officer belonged. *Id.* The Commission based this decision, in part, on the fact that the decision to increase the rent by the General Hospital was supported by an analysis of fair market rent for the area. *Id.*

The facts of the instant matter show that Petitioner Carrigan did not have an interest in the Lazy 8 project. His only interest was representing the will of his constituents, which the Commission affirmed. ROA000009. "Petitioner Carrigan testified that a majority of constituents in his Ward favored the project. No evidence or testimony was presented in this matter to conclude otherwise." *Id.* The Commission cannot have it both ways; either an objective, fact-based analysis of the issue is sufficient to support a public official's decision to vote on a matter, or it is not. The arbitrary and capricious consideration of certain facts in some cases but not in others is extremely inequitable, and serves to underscore the earlier premise that

based on its Disclaimer, the Commission interprets and applies Nevada's Ethics in Government Law differently across the board, even when the same or similar scenarios appear. This incongruity leaves public officials in this state, and Petitioner Carrigan in this case, guessing at the boundaries of the law and at the mercy of the Commission's interpretation of the law in a particular case.

Pursuant to NRS 281.501, as interpreted by the Commission, a public officer is required to abstain from voting only if there exists objective evidence that a reasonable person in the public officer's situation would have his independence of judgment materially affected by a commitment in a private capacity to the tangible interests of others. AGO 98-27 (9-25-1998). Before a public officer may be required to abstain, there must be *some evidence of a benefit* or detriment which is greater than that experienced by similarly-situated persons. *Id.* In this case, there is none. Petitioner Carrigan and Mr. Vasquez did not stand to reap any financial or professional gain by the passage of the Lazy 8. Petitioner Carrigan had no ties whatsoever to the project, and Mr. Vasquez is an established professional who is on constant retainer with Wingfield Nevada to represent the company in countless endeavors. Accordingly, the decision of the Commission in this matter is characterized by an abuse of discretion and is arbitrary and capricious.

NRS 281.501(2), THROUGH ITS RELIANCE ON NRS 281.501(8), IMPERMISSIBLY RESTRICTS PROTECTED SPEECH AND VIOLATES THE FIRST AMENDMENT

Although no Nevada court has previously answered the question of whether legislative voting is protected speech, all three federal courts that have directly considered the issue concluded that the act of voting on public issues by a member of a public agency or board "comes within the freedom of speech guarantee of the First Amendment." *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989); *Clarke v. United States*, 886 F.2d 404 (D.C.Cir. 1989); *Wrzeski v. City of Madison*, 558 F.Supp. 664 (W.D.Wisc. 1983). A legislator's vote is inherently expressive, *Clarke*, 886 F.2d at 411 (D.C.Cir. 1989), and legislative voting has been recognized by the United States Supreme Court as the "individual and collective expression of opinion." *Hutchison v. Proxmire*, 443 U.S. 111, 133, 99 S.Ct. 2675, 2697, 61 L.Ed.2d 411 (1978). Indeed, there can be no more definite expression of opinion than by voting on a controversial public issue, *Miller*, 878 F.2d at 532 (1st Cir. 1989), and the status of public officials' votes as constitutionally protected speech is established beyond peradventure of doubt. *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir. 1995).

Here, Petitioner was found to have violated the provisions of NRS 281.501(2), despite an incongruous

finding that he had not otherwise misused his elected position. ROA000004-000005. The issue in this case, is that NRS 281.501(2) restrains public officials from freely expressing the will of their constituents in a legislative forum, despite the fact that there is no compelling government interest to be served. The provisions of NRS 281.501(2) are evaluated under a "reasonable person" standard, which allows the Commission to force public officials to abstain, or punish them for not abstaining, from voting on legislative matters, even when the Commission has specifically found that the public official has done nothing wrong. Effectively, NRS 281.501(2) restricts protected speech on the grounds that some other hypothetical person, in a similar situation, *may* be tempted to abuse his position as a public official.[3]

It is undisputed that the preservation of ethics in government is both admirable and necessary, however, mere speculation of harm does not constitute a compelling governmental interest justifying a limitation on the exercise of the right to free speech. *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 543, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). The application of any rule, regardless of its facial validity or invalidity which trespasses on pure speech, or important associational rights like voting, "egregiously violates the First Amendment," unless the government can justify such application by demonstrating a "clear and present danger" to society which overrides the individual's fundamental First Amendment interests. *Kucinich v. Forbes*, 432 F.Supp. 1101, 1110 (N.D.Ohio 1977). In the instant situation, the government has not met its burden. There has been absolutely no showing that the over-regulation of legislative voting serves a compelling State interest or is otherwise intended to address a "clear and present danger". This is especially true in cases like this where a public official has been found to have done nothing wrong. An un-tenable dichotomy exists because the Commission evaluates whether a legislator can "speak" (i.e. vote) on behalf of their constituents - or be silenced by a mandate of abstention. The dichotomy is amplified by the countervailing view discouraging abstention in Nevada. It is well established in Nevada that a public official's abstention from voting is disfavored except in cases of absolute necessity. Public officials are dissuaded from abstaining for four reasons: (1) abstention deprives the public, and specifically

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[3] The reasonable person standard is an inapposite tool to determine whether a particular official would be influenced by a particular relationship. The statutory language inexplicably employs an objective standard which is wholly inapplicable to the subjective mental process which the statute seeks to measure or restrict.

an elected official's constituents, of a voice in matters which come before public officers and employees; (2) public officers and employees should have an opportunity to perform the duties for which they were elected or appointed, except where objective evidence exists that private commitments would materially affect one's independence or judgment; (3) compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment; and (4) in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or appointing authority. *In re Woodbury*, Commission on Ethics Opinion (CEO) 99-56 (12-12-1999), *In re Montandon*, CEO 01-11 (12-14-2001); *In re Boggs-McDonald*, CEO 01-12 (8-8-2001); *In re Glenn*, CEO 01-15 (2-1-2002); *In re Griffen*, CEO 01-27, 01-28 (2-25-2002); *In re Wright*, CEO 02-21 (12-9-2002); *In re Eklund-Brown*, CEO 02-23 (2-27-2003). In cases such as this, where recognized policies dissuade public officials from abstaining but authorizes the Commission to restrict the ability of a legislator to exercise his First Amendment right to vote, the protection afforded to the legislator by the First Amendment must be at its absolute zenith.

The extent of the First Amendment protection afforded to conduct varies with the form the conduct takes, and the time and place during which it occurs. *Kucinich*, 432 F.Supp. at 1111 (N.D.Ohio 1977). The scrutiny applied to statutes restricting the exercise of First Amendment rights is reduced when the prohibited behavior is merely expressive conduct. *State v. Colosimo*, 142 P.3d 352, 356 (Nev. 2006). If the conduct takes the form of simply and unobtrusively communicating an idea, with the physical action element of the conduct limited to the extent necessary to transmit the idea, then the conduct is "pure speech" and is entitled to the highest degree of protection. *Kucinich*, 432 F.Supp. at 1111 (N.D.Ohio 1977). In this case, the conduct in question was the exercise of legislative prerogative and discretion by Petitioner Carrigan at a regular City Council meeting. The physical element of the conduct was limited to an ordinary vote and was therefore absolutely limited to the extent necessary to unobtrusively communicate the idea; accordingly, the conduct of Petitioner is "pure speech," and is entitled to the highest degree of protection under the First Amendment.

To restrict pure speech, the government must show: (1) a clear and present danger is presented to society by the pure speech; (2) the individual's interest in allowing pure speech conduct is insufficient when balanced against the danger presented to society by allowing the conduct; and (3) the government has used the narrowest restriction on pure speech consistent with the furtherance of the governmental interest involved.

Schenk v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919); *City of Madison, etc. v. Wis. Emp. Rel. Com'n.*, 429 U.S. 167, 173-176, 97 S.Ct. 421, 425-26, 50 L.Ed.2d 376 (1976); *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175, 180, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968); *Dennis v. United States*, 341 U.S. 494, 505, 71 S.Ct. 857, 95 L.Ed. 1137 (1951); *Keyishian v. Board of Regents of U. of the St. of N.Y.*, 385 U.S. 589, 602, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

The Nevada Commission on Ethics made absolutely no finding during its hearing regarding Petitioner Carrigan, or in the related published Opinion, that a clear and present danger existed warranting the Commission's mandate of abstention in this case. As noted above, speculation of harm has never been a compelling governmental interest justifying a limitation on the exercise of the right to free speech. *Consolidated Edison Co. of N.Y.*, 447 U.S. at 543, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). In Petitioner Carrigan's case the Commission specifically found that no harm occurred when Petitioner voted on August 23, 2006 because he accurately and dutifully represented the will of his constituents. ROA000009.

Petitioner is simply requesting that he be allowed to vote on matters of importance to his constituents in cases where he has done nothing wrong. Unless a clear and present danger is presented to society, elected officials must be allowed to exercise their First Amendment rights and represent their constraints by voting in a legislative forum. In fact "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir.1994). Courts have consistently recognized the significant public interest in upholding First Amendment principles. See *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir.2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression."); *Iowa Right to Life Comm'e, Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir.1999) (finding that a district court did not abuse its discretion in granting a preliminary injunction because "the potential harm to independent expression and certainty in public discussion of issues is great and the public interest favors protecting core First Amendment freedoms."); *Suster v. Marshall*, 149 F.3d 523, 530 (6th Cir.1998) (holding candidates for judicial office were entitled to preliminary injunction of expenditure limit given likelihood of success on the merits, irreparable harm and lack of public interest in enforcing a law that curtailed political speech.); *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir.1997)

(stating, in context of a request for injunctive relief, that "[t]he public interest ... favors plaintiffs' assertion of their First Amendment rights."); *Cate v. Oldham*, 707 F.2d 1176, 1190 (11th Cir.1983) (holding the "strong public interest in protecting First Amendment values" favored preliminary injunctive relief.). The irrational enforcement of NRS 281.501(2), through its reliance on NRS 281.501(8), infringes on not only the free expression interests of Petitioner Carrigan, but also the interests of the voters of Sparks.[4] Accordingly, the only danger presented to society in this case is the unfettered intrusion on protected speech that affects the public at large and not the phantom misdeeds of a hypothetical, "reasonable person".

Finally, due to its reliance on NRS 281.501(8) for a definition of "commitment in a private capacity to the interests of others," NRS 281.501(2) is not narrowly tailored to restrict the least amount of protected speech. In this case, the Nevada Commission on Ethics did not allege that Petitioner had accepted a gift or loan (NRS 281.501(2)(a)) and did not believe that Petitioner had any type of pecuniary interest (NRS 281.501(2)(b)) related to the August 23, 2006 vote of the Sparks City Council. ROA00008; ROA000064, Transcript Page 193, Lines 4-13. The Commission relied on a *supposed* "commitment in a private capacity to the interests of others" (NRS 281.501(2)(c)) when it found Petitioner to be in violation of the statute. *Id.* The statutory definition for "commitment in a private capacity to the interests of others" is provided by NRS 281.501(8). Exhibit 1. The first four subsections of NRS 281.501(8) delineate specific types of relationships that rise to the level of an unacceptable commitment in a private capacity. In this case, however, the Nevada Commission on Ethics employed the fifth subsection of NRS 281.501(8) to find that Petitioner had violated the provisions of NRS 281.501(2). ROA000008. NRS 281.501(8)(e) allows the Nevada Commission on Ethics to find *any relationship* it deems to be "substantially similar" to any of the other relationships listed in NRS 281.501(8)(a)-(d) to rise to the level of a "commitment in a private capacity to the interests of others." The matter is exacerbated by the fact that there are no statutory guidelines for evaluating the "substantial

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[4] In *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp.2d 1224, 1239 (2000) a federal court granted a temporary restraining order on behalf of an Alabama Supreme Court Justice against the enforcement of a Canon of Judicial Ethics and a state constitutional provision prohibiting a judge from carrying out his duties while an ethics complaint was pending, when the enforcement of the Canon "irreparably harmed" *voters* by its "inescapable chilling effect" on protected First Amendment rights. (Emphasis added). The court held: "public interest is well served when the application of potentially unconstitutional laws is enjoined and when duly elected officials are not hindered from performing their duties by such laws." *Id.* at 1240.

similarity" of relationships. The "substantially similar" provision of NRS 281.501(8)(e), is not narrowly drawn, and allows the Commission to enforce NRS 281.501(2) expansively and capriciously with no regard to the First Amendment. Simply put, NRS 281.501(8)(e) is an expansive mechanism by which the Nevada Commission on Ethics is able to freely restrict protected speech by requiring legislators to abstain from voting. The statute lacks specific boundaries, and is being used to proscribe otherwise protected activity based on the subjective and unknown proclivities of the Commission.

Based on the foregoing, it is respectfully submitted that NRS 281.501(2) is not narrowly tailored to restrict the least amount of protected speech and therefore violates the First Amendment to the United States Constitution. The statute impacts fundamental, pure political speech, and cannot withstand strict scrutiny and must therefore be declared invalid. Petitioner Carrigan respectfully requests that this Honorable Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published Opinion, based on this constitutional infirmity and under the power vested in this Court by NRS 233B.135(3)(a).

NRS 281.501(2), THROUGH ITS RELIANCE ON NRS 281.501(8), IS UNCONSTITUTIONALLY OVERBROAD AND VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

A statute is unconstitutionally overbroad and void on its face if it "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of" protected First Amendment rights. *City of Las Vegas v. Eighth Judicial Dist. Ct.*, 118 Nev. 859, 863, 59 P.3d 477, 480 (2002).

The overbreadth doctrine invalidates laws, such as NRS 281.501(2), that infringe upon First Amendment rights. Even minor intrusions on First Amendment rights will trigger the overbreadth doctrine. *Silvar v. Eighth Judicial Dist. Ct. ex rel. County of Clark*, 122 Nev. 289, 129 P.3d 682, 688 (Nev. 2006). The "First Amendment freedoms need breathing space to survive, [so] government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Because an it has a chilling effect on free expression and thus impacts the "breathing space" of First Amendment rights, an overbroad law is unconstitutional. *Silvar*, 122 Nev. 289, 129 P.3d at 688 (Nev. 2006).

Claims of overbreadth are also entertained in cases where the reviewing court is of the opinion that rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). That is precisely the case at hand.

The definition of "commitment in a private capacity to the interests of others" set forth in NRS 281.501(8) by and through its vague and ambiguous employment of the phrase "substantially similar" (NRS 281.501(8)(e), deprives both the electorate of the City of Sparks and their elected officials of their First Amendment rights to speak on matters of exceptional political and social importance based solely on the Commission's subjective interpretation of an unconstitutionally vague clause in the statute. To punish or otherwise prohibit a legislator from voting on matters because of an undefined commitment or relationship - loosely described as "substantially similar" to other commitments and relationships - flies in the face of the First Amendment. There are no statutory guidelines or standards by which a commitment or relationship is evaluated, nor have administrative interpretations been published or provided by the Nevada Commission on Ethics.

The United States Supreme Court has forbidden the imposition of stricter "free speech" standards on legislators than on the general public. See *Bond v. Floyd*, 385 U.S. 116 (1966). Indeed, NRS 281.501(2), through its association with and reliance on NRS 281.501(8), forecloses an elected official's ability to act on particular subjects, simply because a person or group associated with that subject had a "relationship" with that official, effectively killing constitutionally protected political speech and associational freedoms. "Governmental restraint on political activity must be strictly scrutinized and justified only by a compelling state interest." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 637-638, 46 L.Ed.2d 659, 691 (1976). Mere speculation or the possibility of harm has always been an insufficient justification for governmental restrictions on protected speech. *Consolidated Edison Co. of N.Y.*,447 U.S. at 543, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). Relationships between the citizenry and elected officials ought to be encouraged as the foundational underpinnings of representative government. Preventing elected officials from voting, based solely on some undefined existing relationship, has a substantial chilling effect on First Amendment rights. Here, Petitioner Carrigan, exercising his First Amendment rights, voted on a matter of local concern in conformance with what his constituents wanted, and thereby accurately represented the will of the citizens of Sparks. ROA000009. The Nevada Commission on Ethics is now punishing Petitioner Carrigan because of his vote, based upon a subjective evaluation of a relationship that has no bearing upon what the majority of voters wanted.

In this case, the "substantially similar" phrase used in NRS 281.501(8)(e) gives the Nevada

Commission on Ethics free reign to require abstention of any public officer under NRS 281.501(2) that has any type of relationship the Commission deems to be "substantially similar" to a commitment or relationship enumerated in NRS 281.501(8). This statute provides no notice of what standards are used to evaluate the relationship in question. Due to the broad and unfettered discretion exercised by the Commission in interpreting NRS 281.501(8), the Nevada Commission on Ethics has the ability to, and is, regulating more political speech and association than is constitutionally permissible. Consequently, elected officials in the State of Nevada are left to guess at the legality of their actions. NRS 281.501(2), through its association with NRS 281.501(8), restrains activities that under ordinary circumstances constitute an exercise of protected First Amendment rights. Accordingly, NRS 281.501(2), because of its reliance on NRS 281.501(8), is unconstitutionally overbroad and restricts more protected speech than is necessary - a direct violation of the First and Fourteenth Amendments to the United States Constitution.

Petitioner Carrigan respectfully requests that this Honorable Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published Opinion, based on this constitutional infirmity and under the power vested in this Court by NRS 233B.135(3)(a).

NRS 281.501(8) AND NRS 281.501(2) ARE UNCONSTITUTIONALLY VAGUE

NRS 281.501(8) is unconstitutionally vague because the terms "substantially similar" (NRS 281.501(8)(e)), "business relationship" (NRS 281.501(8)(d)) and "substantial and continuing" (NRS 281.501(8)(d)) do not have statutory, well-settled or commonly understood definitions. Therefore, the terms of this statute are not sufficiently clear to give fair notice of what conduct is prohibited and invite arbitrary and discriminatory enforcement.

The constitutionality of a statute may be challenged both facially,[5] and on an "as applied" basis. A facial attack against the validity of a statute is appropriate in cases where the statute in question prohibits "the

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[5] Prior to 2002, questions of constitutionality of statutes that did not implicate the First Amendment could only be brought on an as applied basis. However, in *City of Las Vegas*, 118 Nev. at 863, 59 P.3d at 480 (2002), the Nevada Supreme Court clarified, and modified previous decisions to reflect that "a facial vagueness challenge is appropriate, even where no substantial First Amendment concerns are implicated, if the penal statute is so imprecise, and vagueness so permeates its text, that persons of ordinary intelligence cannot understand what conduct is prohibited, and the enactment authorizes or encourages arbitrary and discriminatory enforcement."

understood meanings for the words employed when viewed in the context of the entire statutory provision." *Woofter v. O'Donnell*, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975).

The term "substantially similar", contained in NRS 281.501(8)(e), fails to specify or describe the circumstances under which a commitment or relationship described in the subsection becomes "substantially similar". This provision of the subsection establishes no clear standards to guide public officers, the public at large, and, ultimately, the Nevada Commission on Ethics as to the boundaries of lawful behavior. Additionally, no definitive characteristics exist to clarify the terms "business relationship" or "substantial and continuing" found in NRS 281.501(8)(d). There is no well-settled or commonly understood meaning for any of these terms[6] - leaving public officers to guess at the boundaries of the law. Where terms contained in a statute are so poorly defined as to leave persons "guessing" at what behavior is, or is not, lawful, statutes are held void-for-vagueness. *Childs v. State*, 107 Nev. 584, 585, 816 P.2d 1079, 1079-1080 (1991).

In this case, the Nevada Commission on Ethics found that Petitioner Carrigan violated the terms of NRS 281.501(2) when he voted on a matter that was before the Sparks City Council. ROA000011-000012. In order to find a violation of NRS 281.501(2), the Commission must find that the public officer had a pecuniary interest, had accepted a gift or loan, or, as they did in this case, that the public officer in question had a "commitment in a private capacity to the interests of others" as defined in NRS 281.501(8). Exhibit 1.

Without a statutory or well-settled and commonly understood definition of the terms "substantially similar," "business relationship," and "substantial and continuing," public officers must rely on their own best guesses and advice from similarly confused attorneys, while the Nevada Commission on Ethics is left to their own personal predilections to determine whether a relationship described in NRS 281.501(8) exists, and thus whether a violation of NRS 281.501(2) has occurred.

Because of the subjective nature of the "substantially similar" standard, the undefined "business

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[6] At what point is one relationship substantially similar to another? Does a business relationship require the exchange of money? Are business relationships primarily about making a profit? When does a business relationship become substantial? There is no single or common answer for any of these questions. Ten people would give ten different responses, each littered with that individual's set of conditions. The interpretation and implementation of NRS 281.501(8) is predicated on the personal predilections of the sitting members of the Nevada Commission on Ethics, and is therefore subject to standardless, arbitrary and discriminatory enforcement.

doing of an act in terms so vague that people of common intelligence [were required to] necessarily guess as to its meaning." *Cunningham v. State*, 109 Nev. 569, 570, 855 P.2d 125, 125 (1993). A statute may also be attacked on an as applied basis if it is impermissibly vague in its application to a party in question. *Hernandez v. State*, 118 Nev. 513, 524, 50 P.3d 1100, 1108 (2002); *Lyons v. State*, 105 Nev. 317, 320, 775 P.2d 219, 221 (1989); *Republic Entertainment v. Clark County*, 99 Nev. 811, 816, 672 P.2d 634, 638 (1983). Based on the following, it is respectfully submitted that NRS 281.501(8) is unconstitutionally vague on its face *and* as applied to Petitioner Carrigan. Additionally, due to its reliance on the definitions contained in NRS 281.501(8) in this case, NRS 281.501(2) is unconstitutionally vague as applied to Petitioner Carrigan.

The void-for-vagueness doctrine derives from the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (Nev. 2006). A statute is unconstitutionally vague and facially invalid if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited, and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement. *Id.*; *City of Las Vegas*, 118 Nev. at 862, 59 P.3d at 480 (2002). In particular, questions of "vagueness must be more closely examined where" First Amendment rights are implicated. *Ashton v. Kentucky*, 384 U.S. 195, 200, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966); see also *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-72, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (noting that even if a statute is not so vague as to violate due process, it may be impermissibly vague under the First Amendment if it chills protected speech).

Due to its Reliance on NRS 281.501(8), NRS 281.501(2) Fails to Provide Sufficient Notice of What Conduct Is Prohibited

The focus of the first prong of the vagueness test is to protect "those who may be subject to potentially vague statutes," *Silvar*, 122 Nev. 289, 129 P.3d at 688 (Nev. 2006), and to "guarantee that every citizen shall receive fair notice of conduct that is forbidden." *City of Las Vegas*, 118 Nev. at 864, 59 P.3d at 481 (2002). The notice required under the first prong "offers citizens the opportunity to conform their... conduct to that law." *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (2006). While absolute precision in drafting statutes is not necessary, the Legislature "must, at a minimum, delineate the boundaries of unlawful conduct." *City, of Las Vegas*, 118 Nev. at 863, 59 P.3d at 480. Additionally, where the Legislature does not define each term it uses in a statute, the statute will only survive a constitutional challenge "if there are well settled and ordinarily

relationship" test, and the ambiguous "substantial and continuing" term espoused in NRS 281.501(8), it is impossible for a person of ordinary intelligence to discern which relationships fall within the purview of the statute and therefore require abstention under NRS 281.501(2). When evaluating the constitutionality of statutes that apply only to a specific group, the enactment must give "fair notice to those to whom it is directed." *Matter of Halverson*, 123 Nev. 48, ___ P.3d ___ (November 1, 2007) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112, 92 S. Ct. 2294, 33 L.Ed.2d 222 (1972)). In this matter, the specific group (public officers and employees) is comprised of "general everyday citizens," who cannot be presumed to have formalized legal training. ROA000062, Transcript Page 185, Line 4. The reality in this case is that even members of the Commission, *many of whom are lawyers*, struggled with the interpretation and application of the statutes in question: "...but I don't see any evidence that he knew or should have known that his conduct was going to violate the statute... But I think this is a particularly difficult one." ROA000068, Transcript Page 211, Lines 14-21. Petitioner Carrigan is not a lawyer and has no formal legal training. ROA000026, Transcript Page 42, Lines 20-24. As one of the Commissioners noted, there is no evidence that Petitioner Carrigan should have even known that his actions would violate NRS 281.501(2), therefore, it is conclusively shown that NRS 281.501(2), through its connection with NRS 281.501(8), fails to provide sufficient notice of what conduct is prohibited. Therefore, NRS 281.501(8) fails to satisfy the first prong of the vagueness test.

NRS 281.501(8), and by Association NRS 281.501(2), Lacks Specific Standards

Under the second prong of the vagueness test, a statute is unconstitutional if it "lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *City of Las Vegas*, 146 P.3d at 245 (Nev. 2006). The concern under this prong is the scope of discretion left to a body charged with enforcing the law. A particular fear of the Nevada Supreme Court is that absent adequate guidelines, a statute may permit standard-free application, which would allow the enforcing body to pursue "personal predilections." *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (2006), (quoting *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

In *Silvar*, the Nevada Supreme Court analyzed and struck down a Clark County loitering ordinance under the second prong because law enforcement officers had too much discretion in determining whether the ordinance had been violated. *Id.* at 295-296, 129 P.3d 682, 129 P.3d at 686-687. Like the ordinance in

Silvar, NRS 281.501(8) is susceptible to arbitrary and discriminatory enforcement. When faced with the issue of whether or not a commitment or relationship in question is "substantially similar" to any other commitment or relationship described in NRS 281.501(8), the Nevada Commission on Ethics is forced to rely on its broad and unfettered discretion, rather than an applicable, understandable definition. NRS 281.501(8) fails to provide the clear language necessary to bridle that discretion. Due to the lack of a clear definition of the term "substantially similar," coupled with the disclaimer found at the end of nearly every recently published opinion of the Nevada Commission on Ethics, NRS 281.501(8) impermissibly encourages, authorizes, or at least fails to prevent its own arbitrary and discriminatory enforcement. Accordingly, NRS 281.501(8) fails to satisfy the second prong of the vagueness test set forth by both the Supreme Court of Nevada and the Supreme Court of the United States.

Based on the foregoing, it is respectfully submitted that NRS 281.501(8) is unconstitutionally vague and violates the Due Process Clause of the Fourteenth Amendment. Additionally, NRS 281.501(2), is similarly unconstitutionally vague and violative of the Fourteenth Amendment when applied to the facts of this case due to its reliance on NRS 281.501(8) for the definition of an element required to find a violation of NRS 281.501(2). Requiring public officials to guess at whether or not the relationships they enjoy violate the Ethics in Government Law affords no criterion by which a public official may measure his specific conduct and violates due process. Petitioner Carrigan respectfully requests that this Honorable Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published opinion, based on this constitutional infirmity and under the power vested in this Court by NRS 233B.135(3)(a).

PETITIONER CARRIGAN WAS DEPRIVED OF SUBSTANTIVE DUE PROCESS AT THE HEARING BEFORE THE NEVADA COMMISSION ON ETHICS ON AUGUST 29, 2007

The United States Supreme Court has held that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). This standard applies to administrative agencies which adjudicate, as well as to courts. *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (citing *Murchison*, 349 U.S. at 136, 75 S.Ct. 623). An adjudicator's actual bias against a party is constitutionally unacceptable and, in some situations, an implied probability of bias constitutes a deprivation of due process. *Withrow*, 421 U.S. at 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (citing *Murchison*, 349 U.S. at 136, 75 S.Ct. 623). Essentially, the Due Process Clause of the Fourteenth

Amendment requires that "justice must satisfy the appearance of justice." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243, 100 S.CT. 1610, 64 L.E.d2d 182 (1980) (quoting *Offut v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954)).

In Nevada, the standard for assessing judicial bias is "whether a reasonable person, *knowing all the facts*, would harbor reasonable doubts about [a judge's] impartiality. *In re Varain*, 114 Nev. 1271, 1278, 969 P.2d 305 (1998); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 438, 894 P.2d 337, 341 (1995) (Emphasis added). Whether a judge's impartiality "can reasonably be questioned under an objective standard" is a question of law that this Court should review *de novo*. *Berosini*, 111 Nev. at 437, 894 P.2d at 341 (citing *Flier v. Superior Court*, 23 Cal.App.4th 165, 28 Cal.Rptr.2d 383, 386 (Ct.App. 1994); *State v. Rochelt*, 165 Wis.2d 373, 477 N.W.2d 659, 661 (Wis.Ct.App.1991). Petitioner Carrigan is not required to show actual bias on behalf of the tribunal in order to prevail on this claim. *Brown v. Vance*, 637 F. 2d 272, 284 (C.A. Miss 1981) (holding that an analysis of judicial bias is leveled at the system, not the individual judge, and that a violation of due process occurs when the system creates the possibility that judges will fail to hold "the balance nice, clear and true").

On August 29, 2007, the Nevada Commission on Ethics conducted a hearing regarding whether or not Petitioner Carrigan had violated various sections of Nevada's Ethics in Government Law. ROA000001. Commissioner William Flangas and Commissioner Rick Hsu were two of the six members of the Commission who presided over the hearing. ROA000001. Prior to the hearing, the Commission requested and was provided with an Exhibit Book from Petitioner Carrigan that prominently featured John Ascuaga's Nugget. ROA000443-000535. In fact, three of the four witnesses subpoenaed by the Commission on behalf of Petitioner Carrigan were explicitly anticipated to demonstrate the involvement of John Ascuaga's Nugget in the ethics complaints filed against Petitioner Carrigan in this case. ROA000444-000445.

Commissioner Flangas' step-brother is the father of Alex Flangas. ROA000055, Transcript Page 158, Lines 1-6. Therefore, Commissioner Flangas is the uncle of Alex Flangas. Alex Flangas is a partner in the litigation division at Hale Lane Dennison Peek and Howard, the law firm that is representing both John Ascuaga's Nugget and various private citizens in a lawsuit against the City of Sparks regarding the decision to approve the planned development project proposed by Red Hawk Land Company, known as the Lazy 8. It is the subject of that lawsuit which ultimately spawned the ethics complaints in this case. ROA000054,

Transcript Pages 155-157. In fact, two of the ethics complaints in this case were filed by citizens who are named plaintiffs in the aforementioned lawsuit, and are represented in this matter by the law firm in which Alex Flangas is a partner. Alex Flangas is married to Amanda Flangas, who is the Sales Manager for John Ascuaga's Nugget. ROA000055, Transcript Page 157, Lines 15-20. Accordingly, Commissioner Flangas, has two familial connections to John Ascuaga's Nugget and the ongoing litigation against the City of Sparks and Petitioner Carrigan, yet Petitioner Carrigan had to make a motion for Commissioner Flangas to disclose his relationships, after discovering the connection during a break in the proceeding, and after the hearing was effectively over. ROA000054-000055, Transcript Pages 155-158. Commissioner Flangas failed to voluntarily make the disclosure when provided the opportunity at the beginning of the proceeding. *Id.*

Commissioner Hsu is a shareholder at the law firm of Maupin Cox and Legoy, which lists John Ascuaga's Nugget on its list of representative clients. Exhibit 7. It is unclear exactly what type of work Commissioner Hsu's law firm does for John Ascuaga's Nugget, but the relationship is apparently significant enough to the firm that it warrants publication on the firm's website. *Id.* Despite making a long disclosure at the beginning of the hearing on August 29, 2007, and being on notice that John Ascuaga's Nugget was involved in the matter, Commissioner Hsu did not make any disclosure or mention of his firm's relationship with John Ascuaga's Nugget. ROA000017, Transcript Pages 5-7.

The Ninth Circuit has held that where one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the proceedings, in their entirety, violate due process. *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995). "Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings and violates due process." *Id.* A single member's bias is likely to have a profound impact on the decision-making process of an administrative board, particularly when the board is relatively small. *Cf. Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1560 (9th Cir. 1994) (evidence of racial and gender bias on the part of one member of *fifteen-person* faculty precluded summary judgment in a Title VII case) (Emphasis added). While the influence of a single participant in an adjudicatory proceeding cannot be measured with absolute precision, The United States Supreme Court and federal courts around the country have found that each member's involvement plays a part in shaping the ultimate result of the proceeding. *Aetna Life v. Lavoie*, 475 U.S. 813, 831, 106 S.Ct. 1580, 1590, 89 L.Ed.2d 823 (1986). In *Cinderella Career and Finishing Schools v. Federal Trade Comm'n*, 425 F.2d 583, 592 (D.C.Cir. 1970),

the Circuit Court expressed its view that there is no way of determining the extent to which one biased member's views affect the deliberations of a supposedly impartial tribunal. Accordingly, that Court vacated the decision of an administrative tribunal, even though the biased member's vote was not necessary for a majority. In *Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991), the Tenth Circuit similarly concluded that the plaintiff could make out a due process claim by showing bias on the part of only one member of the tribunal. Relying on *Cinderella*, the Tenth Circuit concluded that the presence of one biased member on a six-person tribunal would "taint the tribunal" and thereby violate due process, regardless of whether that member cast the deciding vote. *Id.* Finally, in *Wilkerson v. Johnson*, 699 F.2d 325, 328-29 (6th Cir. 1983), the Sixth Circuit held that barbershop license applicants were denied due process, although only one member of the four-person board had a competitive interest in denying the plaintiff's license application.

At the August 29, 2007 hearing before the Nevada Commission on Ethics, Commissioner Flangas asked that he be allowed to initiate the deliberations by reading into the record a pre-prepared written statement to "get this thing in perspective." ROA000057, Transcript Page 166, Lines 18-24. In finding that Petitioner Carrigan had willfully violated three sections of Nevada's Ethics in Government Law, Commissioner Flangas informed the other Commissioners that during the hearing certain facts had "bubbled out." *Id.* Transcript Page 168, Lines 16-17. However, the "facts" that Commissioner Flangas recited are remarkably absent from any portion of the testimony or evidence received by the Commission on August 29, 2007. Instead, Commissioner Flangas' remarks tracked the allegations contained in the pleadings filed in the ongoing litigation against the City of Sparks by the law firm that employs Commissioner Flangas' nephew.

Reading from his pre-prepared written statement, Commissioner Flangas declared:

> *...and in spite of a three to two City Council vote on August 23 opposing the Lazy 8, and in spite of a shameful and in my opinion ill-advised* ***illegal****, grossly unethical and* ***secret meeting*** *on September 1st to settle a* ***bullying*** *and* ***tyrannical mega-lawsuit threat****, Mike Carrigan caved into the lawsuit threat of September 19th.* ROA000058, Transcript Page 170, Lines 2-10. (Emphasis added).

In the pleadings prepared and filed against the City by the law firm employing Commissioner Flangas' nephew, on behalf of the employer of the nephew's wife, the following allegations were made:

> The City of Sparks, "*secretly* settled" the case. "Exhibit 8," Page 10, Lines 16-17. (Emphasis added).

> "Petitioners could not have acquiesced to the terms of the Settlement that was *secretly* negotiated." *Id.*, Page 13, Lines 1-2. (Emphasis added).

"The Settlement was reached in a *shroud of secrecy* beyond public view." *Id.*, Page 10, Lines 12-13. (Emphasis added).

Settlement "was embodied in an *unlawful* Stipulation that the City had no authority to sign and later approve." *Id.*, Page 12, Lines 7-8. (Emphasis added).

"This lawsuit stems from the Respondent City of Sparks' (the "City") *unlawful decision to settle a lawsuit.*" *Id.*, Page 2, Lines 4-5. (Emphasis added).

The City "decided to settle the matter privately." Exhibit 3, Page 3, Line 4.

"The tentative approval was obtained solely as a result of Red Hawk suing the City and *strong-arming the City Council into a secret settlement* within six days." *Id.* Page 23, Lines 22-24. (Emphasis added).

The only mention of a "secret meeting" during the August 29, 2007 hearing was when Commissioner Flangas began to ask a question of Petitioner Carrigan, and was thereafter admonished by Vice Chairman Hutchison for drawing improper conclusions. ROA000027, Transcript Page 45, Lines 9-24. When given the opportunity to ask other questions, Commissioner Flangas declined. ROA000028, Transcript Page 50, Lines 3-5.

Moreover, Commissioner Flangas' pre-prepared written remarks evoke speculative conclusions about a lawsuit that the Nevada Commission on Ethics received absolutely no evidence on at any point during the proceedings. Instead, Commissioner Flangas' statement is eerily similar to the pleadings filed by his nephew's law firm against the City of Sparks:

"The City *buckled under pressure* and privately reversed itself once Red Hawk alleged damages of $100 million in a lawsuit filed against the City." Exhibit 3, Page 2, Lines 11-13 (Emphasis added). "Red Hawk responded to the City's decision to deny the Application by filing a *grossly exaggerated lawsuit...*" Exhibit 8, Page 2, Lines 14-15. (Emphasis added).

A "*trumped-up* lawsuit." *Id.*, Page 10, Lines 4-5. (Emphasis added).

The Nevada Commission on Ethics received absolutely no evidence concerning either the merits of the Red Hawk lawsuit or the prudence of the City's decision to settle the matter. Nevertheless, the lawsuit against the City of Sparks was described to the Commission by Commissioner Flangas as "a bullying and tyrannical mega-lawsuit threat" to which Petitioner Carrigan "caved" when he voted to settle the matter.

Commissioner Flangas' conclusion that Petitioner Carrigan violated Nevada law is completely unfounded and evinces at the very least, unsworn testimony and at the most, bias and/or pre-judgment of this matter. There is absolutely nothing contained in Nevada's Ethics in Government Law that contemplates an ethics violation based upon the number of citizens who attend a City Council meeting and speak either for

or against an agenda item, a prior vote of the City Council on a collateral matter, the consideration of a prior attorney/client session lawfully conducted under Nevada's Open Meeting Law (NRS 241.015(2)(b)(2)) which Commissioner Flangas declared to be a shameful, illegal, "grossly unethical and secret meeting," or whether Petitioner Carrigan "caved" when he voted to settle a "bullying and tyrannical mega-lawsuit."

By asking to speak first, Commissioner Flangas had considerable influence over the remainder of the Commission during its deliberations on Petitioner Carrigan's matter. Using a pre-prepared written statement, Commissioner Flangas made accusatory remarks against Petitioner Carrigan. These accusatory remarks were not based upon any evidence presented to the Commission, and therefore could not possibly have "bubbled out" during the hearing as Commissioner Flangas asserted.[7] Instead, Commissioner Flangas' pre-prepared written remarks appear to have come from the pleadings submitted by the law firm employing Commissioner Flangas' nephew as a stockholder. Commissioner Flangas' written, pre-prepared, demeaning and accusatory remarks indicated that he had either pre-judged this matter and wholly ignored the testimony and evidence introduced in this matter, or otherwise harbored an actual or perceived bias against Petitioner Carrigan.[8] In either event, Commissioner Flangas' actions tainted the entire proceeding.

An administrative hearing conducted by the Nevada Commission on Ethics, along with the potential consequences therefrom, "must be attended, not only with every element of fairness, but with the very

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[7] Commissioner Flangas argued to the Commission that Petitioner Carrigan "aided and abetted what a substantial citizen opposition did not want," when he voted to approve the Lazy 8. ROA000058, Transcript Page 169, Lines 14-15. Curiously, the published opinion of the Commission found that "Councilman Carrigan testified that a majority of constituents in his Ward favored the project. No evidence or testimony was presented in this matter to conclude otherwise." ROA000009. Indeed, Commissioner Flangas appears to have been unhappy with the *way* that Petitioner Carrigan voted, not the mere fact *that* he voted. Commissioner Flangas' statement has all the hallmarks of a content-based restriction on protected speech.

[8] The foregoing presents an inescapable feeling that Commissioner Flangas never intended to consider the Carrigan matter in good faith. His pre-prepared written statement that passes judgment on both the merit of a lawsuit filed against the City of Sparks and the prudence of the City's decision to settle that lawsuit, neither of which were issues before the Commission, or upon which the Commission received evidence, evinces an undeniable sense of bias and prejudgment. An administrative hearing "must be attended, not only with every element of fairness but with the appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process." *Amos Treat & Co. v. Securities and Exchange Comm'n*, 113 U.S.App.D.C. 100, 107, 306 F.2d 260, 267 (1962).

appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process." *Texaco, Inc. v. Federal Trade Commission*, 336 F.2d 754, 760 (U.S. App. D.C. 1964) (citing *Amos Treat & Co. v. Securities and Exchange Comm'n*, 306 F.2d 260, 267 (1962)). In this case, by relating his personal feelings regarding the merits of the Red Hawk lawsuit and the prudence of the City's decision to settle it, Commissioner Flangas essentially became an unsworn witness who was not subject to cross-examination by Petitioner Carrigan. Because Commissioner Flangas explicitly considered issues that were outside the scope of both the investigation conducted by the Commission and the evidence and testimony received at the August 29, 2007 hearing, it is respectfully submitted that the remarks contained in Commissioner Flangas' pre-prepared statement evinces the "earmarks of pre-judgment," *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 589-90 (D.C. Cir. 1970), and therefore invalidate the entire proceeding.

In *Ward v. City of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), the Supreme Court explained that in the context of a *tribunal*, the test for bias is whether the situation is "one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused..." *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. (1927)). The Court held that such "possible temptation" might exist, even in the absence of any direct, personal pecuniary interest on the part of the adjudicator, when his other responsibilities may make him partisan in the matter before the adjudicative body. *Ward*, 409 U.S. at 60, 93 S.Ct. at 83.

During the Commission's consideration of the statutory language of NRS 281.501(2), Commissioner Jenkins struggled with a statutory presumption that is present at the tail end of the subsection. ROA000066, Transcript Page 203, Lines 12-24. Commissioner Jenkins noted that NRS 281.501(2) presumes independence of judgment in a reasonable person when the resulting benefit or detriment accruing to him or to others is not greater than that accruing to any other member of the general business, profession, occupation or group. *Id.* However, when asked to explore the statutory presumption, Commissioner Hsu stated that he believed "people put too much emphasis on [this] language," and advocated that the presumption should be ignored in this case. ROA000066, Transcript Page 204, Lines 16-24.

Commissioner Hsu has a particular responsibility and duty to protect the interests of his law firm and

its clients. That responsibility and duty cannot be insulated from his role as an adjudicator in this case. It is the potential impact of this responsibility and duty upon his ability as a fact-finder "to hold the balance nice, clear and true" which was of concern to the Supreme Court in *Ward* and which is at issue here. It is important to note that the challenge to Commissioner Hsu's participation is based on the premise that "any tribunal permitted to try cases and controversies not only must be unbiased, but must also avoid even the appearance of bias." *Commonwealth Coat. Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150, 89 S.Ct. 337, 340, 21 L.Ed.2d 301 (1968). In the end, Commissioner Hsu may be the victim of a poorly executed conflict check, but the significant appearance of potential for bias in this case absolutely renders the August 29, 2007 proceeding before the Nevada Commission on Ethics constitutionally infirm.

The United States Supreme Court has made it clear that the fullest review by an appellate court cannot "cure" a defective adjudicatory proceeding below: a "trial court proceeding [may not] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Ward*, 409 U.S. at 61-62, 93 S.Ct. at 83-84. Ultimately, the sum of the various relationships and connections involving the Nevada Commission on Ethics, Commissioner Flangas, Commissioner Hsu and John Ascuaga's Nugget in this case are simply too significant to ignore. The potential for bias and the effect of either Commissioner Flangas' prepared statement or Commissioner Hsu's interpretation of NRS 281.501(2) on the deliberations of the remainder of the tribunal is unquantifiable, therefore tainting the entire proceeding. Accordingly, Petitioner Carrigan has been denied his right to a fair trial before an impartial tribunal, and the August 29, 2007 decision of the Nevada Commission on Ethics, and the subsequent published Opinion, must be reversed.

Petitioner asks that this Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published Opinion, based on these constitutional infirmities and under the power vested in this Court by NRS 233B.135(3)(a).

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CONCLUSION

Based on the Commission's improper interpretation and application of NRS 281.501(2), the arbitrary and capricious nature of the Commission's decision, and the various constitutional infirmities revealed in this case, Petitioner requests that this Honorable Court set aside the August 29, 2007 decision of the Nevada Commission on Ethics, and the related published opinion.

Respectfully submitted this 27th day of February, 2008.

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APPENDIX INDEX

Exhibit 1	NRS 281.501; NRS 241.015; NRS 233B.135
Exhibit 2	Complaint for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing; Petition for Judicial Review Pursuant to NRS 278.0233, Declaratory Relief and Damages filed by Plaintiff Red Hawk Land Company, et al.
Exhibit 3	Verified Petition for Judicial Review, Writ of Certiorari, and Writ of Mandamus filed by Petitioners Roy Adams, et al.
Exhibit 4	Second Judicial District Court Order Granting Respondent's Motion to Dismiss Petition for Judicial Review
Exhibit 5	Summons and Writ of Certiorari and Petition for Judicial Review filed by Petitioners Roy Adams, et al.
Exhibit 6	Motion to Intervene and Motion to Consolidate Related Cases filed by Defendants-in-Intervention, Roy Adams, et al.
Exhibit 7	Affidavit of Timothy Saathoff and printout of Maupin, Cox and Legoy website
Exhibit 8	Opposition to Motion to Dismiss Petitioners' Petition for Judicial Review, Writ of Certiorari, and Writ of Mandamus filed by Petitioners Roy Adams, et al.

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Opening Brief, and to the best of my knowledge, information, and belief, it is not frivilous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 27th day of February, 2008.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Sparks City Attorney's Office, Sparks, Nevada, and that on this date, I am serving the foregoing document(s) entitled **Petitioner's Opening Brief** on the person(s) set forth below by placing a true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Sparks, Nevada, postage prepaid, following ordinary business practices to:

Adriana Frallick
Nevada Commission on Ethics
3476 Executive Pointe Way, Suite 10
Carson City, NV 89706

The Honorable Catherine Cortez Masto
State of Nevada Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

Dated this 27th day of February, 2008.

Shawna Liles

Shawna L. Liles

NRS 281.501 (Presently codified as NRS 281A.420) Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum; Legislators authorized to file written disclosure.

1. Except as otherwise provided in subsection 2, 3 or 4, a public officer may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.

2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

3. In a county whose population is 400,000 or more, a member of a county or city planning commission shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His direct pecuniary interest; or

(c) His commitment to a member of his household or a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his direct pecuniary interest or his commitment described in paragraph (c) where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection

EXHIBIT

does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the direct pecuniary interest or commitment.

4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest,

without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 or any contributions to a legal defense fund that the public officer reported pursuant to NRS 294A.286 in a timely manner.

5. Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that he will abstain from voting because of the requirements of this section, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.

6. After a member of the Legislature makes a disclosure pursuant to subsection 4, he may file with the Director of the Legislative Counsel Bureau a written statement of his disclosure. The written statement must designate the matter to which the disclosure applies. After a Legislator files a written statement pursuant to this subsection, he is not required to disclose orally his interest when the matter is further considered by the Legislature or any committee thereof. A written statement of disclosure is a public record and must be made available for inspection by the public during the regular office hours of the Legislative Counsel Bureau.

7. The provisions of this section do not, under any circumstances:

(a) Prohibit a member of the legislative branch from requesting or introducing a legislative measure; or

(b) Require a member of the legislative branch to take any particular action before or while requesting or introducing a legislative measure.

8. As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:

(a) Who is a member of his household;

(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs him or a member of his household;

(d) With whom he has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

(Added to NRS by 1977, 1106; A 1987, 2095; 1991, 1597; 1995, 1083; 1997, 3326; 1999, 2738; 2003, 818, 1735, 3389; 2007, 3372)—(Substituted in revision for NRS 281.501)

NRS 241.015 Definitions.

As used in this chapter, unless the context otherwise requires:

1. "Action" means:

(a) A decision made by a majority of the members present during a meeting of a public body;

(b) A commitment or promise made by a majority of the members present during a meeting of a public body;

(c) If a public body may have a member who is not an elected official, an affirmative vote taken by a majority of the members present during a meeting of the public body; or

(d) If all the members of a public body must be elected officials, an affirmative vote taken by a majority of all the members of the public body.

2. "Meeting":

(a) Except as otherwise provided in paragraph (b), means:

(1) The gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

(2) Any series of gatherings of members of a public body at which:

(I) Less than a quorum is present at any individual gathering;

(II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and

(III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

(b) Does not include a gathering or series of gatherings of members of a public body, as described in paragraph (a), at which a quorum is actually or collectively present:

(1) Which occurs at a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

(2) To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

3. Except as otherwise provided in this subsection, "public body" means any administrative, advisory, executive or legislative body of the State or a local government which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405. "Public body" does not include the Legislature of the State of Nevada.

4. "Quorum" means a simple majority of the constituent membership of a public body or another proportion established by law.

(Added to NRS by 1977, 1098; A 1993, 2308, 2624; 1995, 716, 1608; 2001, 1123, 1836)

NRS 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.

1. Judicial review of a final decision of an agency must be:

(a) Conducted by the court without a jury; and

(b) Confined to the record.

Ê In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

2. The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3.

3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or

in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

(a) In violation of constitutional or statutory provisions:

(b) In excess of the statutory authority of the agency:

(c) Made upon unlawful procedure:

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

(Added to NRS by 1989, 1650)

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Attorneys for Plaintiff
Red Hawk Land Company

T. Huber

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

RED HAWK LAND COMPANY, LLC, a Nevada Limited Liability Company, formerly known as Loeb Enterprises, Limited Liability Company, a Nevada Limited Liability Company.

Plaintiff - Petitioner,

vs.

CITY OF SPARKS, a municipal corporation and political subdivision of the State of Nevada; GENO MARTINI, in his individual capacity as Sparks City Mayor; JOHN MAYER, in his individual capacity as Sparks City Councilman; PHIL SALERNO, in his individual capacity as Sparks City Councilman; JUDY MOSS, in her individual capacity as Sparks City Councilwoman; MIKE CARRIGAN, in his individual capacity as Sparks City Councilman; and RON SCHMITT, in his individual capacity as Sparks City Councilman; and DOE DEFENDANTS I THROUGH IX.

Defendants - Respondents.

CV96 02073

Case No.
Dept. No. 10

COMPLAINT FOR BREACH OF CONTRACT, BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING; PETITION FOR JUDICIAL REVIEW PURSUANT TO NRS 278.0233, DECLARATORY RELIEF AND DAMAGES

Comes now Red Hawk Land Company, LLC, hereinafter referred to as "Red Hawk" by

EXHIBIT 2

and through its counsel, E. Leif Reid, LEWIS AND ROCA, LLP, and Stephen Mollat PREZANT AND MOLLATH, and complains against the City of Sparks, hereinafter referred to "Sparks" as follows:

THE PARTIES

1. Red Hawk is a Nevada Limited Liability Company, engaged in the business of re estate development and resort operations in Sparks, Nevada.

2. Sparks is a municipal corporation and a political subdivision of the State c Nevada. Under the provisions of NRS Chapter 278 and provisions of the Sparks Municipal Code Sparks is charged with the duty to receive and review zoning and planning applications, carry ou the provisions of Development Agreements and act in good faith in connection therewith.

GENERAL ALLEGATIONS

3. Sparks entered into a Development Agreement with Loeb Enterprises Limited Liability Company, now known as Red Hawk, setting forth parameters for development of the Wingfield Springs Planned Community ("Wingfield Springs PC") dated November 7, 1994 (the "Development Agreement"). Sparks and Red Hawk also agreed to be bound by the related Development Agreement Handbook dated October 20, 1994, and amendments thereto (collectively, the "Wingfield Development Agreement Handbook"). The Wingfield Development Agreement and Wingfield Development Agreement Handbook are at times referred to herein as the "Development Agreements".

4. The Wingfield Development Agreements contemplated that Red Hawk would be entitled to a Tourist Commercial ("TC") designation in the Wingfield Springs PC to develop a resort complex, anticipated to include, among other facilities, a hotel and casino with limited nonrestricted gaming (the "resort hotel/casino").

5. The approved Wingfield Development Agreements also allowed Red Hawk the right to transfer unused development approvals and credits outside of the Wingfield Springs PC

but within the City of Sparks. Specifically, Section 3.08(d) of the Wingfield Development Agreement provides in relevant part:

> 3.08 Supplemental Development Agreements:
> The City agrees to enter into Supplemental Development Agreements with the Owner on the following matters:
> d. Agreement Providing for Transfer of Unused Development Approvals regarding the transfer and use of development credits outside Wingfield Springs PC but within the City.

6. On November 30, 1994, Truckee Meadows Regional Planning Commission ("TMRPC") unanimously approved the Wingfield Agreements as an amendment to the Northern Sparks Sphere of Influence Plan ("NSSOI") as an element of the Sparks Master Plan and a project of regional significance. At this time, TMRPC unanimously adopted a policy for "Limited Resort Gaming," which policy defined the appropriate circumstances for nonrestricted gaming outside the downtown areas of Reno and Sparks. Such gaming was determined not to compete with downtown casinos. Red Hawk's proposal for a resort hotel/casino was found to comply with this policy.

7. Red Hawk has not yet developed the resort/hotel casino.

8. Red Hawk owns that certain development and real property located adjacent to Pyramid Highway (State Route 445) commonly known as "Tierra Del Sol."

9. The NSSOI Plan serves as the Sparks Master Plan for both Tierra Del Sol and Wingfield Springs. TMRPC found the NSSOI Plan in conformance with the Regional Plan on January 8, 1992. The NSSOI Plan is included in the Master Plan document for Sparks which was in effect at the time of the approval of the Wingfield Development Agreements.

10. The NSSOI Plan was intended to identify general land uses to guide future development in the planning area. The NSSOI Plan contemplated a single node, not to exceed 37 acres, of Tourist Commercial use ("TC") within the planning area. The TC designation anticipated uses such as a resort hotel with gaming. At the time the Wingfield Springs PC was

approved and the Wingfield Development Agreements were adopted, the TC designation envisioned, among its locational criteria, major arterial streets outside of the downtown corridor appropriate locations for the PC Node. For these reasons, locating limited nonrestricted gaming operations on the Tierra Del Sol property is consistent with the Sparks Master Plan.

11. Tierra Del Sol is zoned Planned Development ("PD"), which classification was changed to New Urban District ("NUD") pursuant to City of Sparks Ordinance 2129 (February 1 2002). All uses consistent with the Planned Development Review Chapter ("PDRC") are permitted in the NUD zone classification. PDRC allows any uses permitted in any zone classification provided that any combination of uses is planned in a manner consistent and compatible to each and to the surrounding environment. Because nonrestricted gaming is a permitted use in the NUD zone classification, a change in zoning is not necessary to allow limited nonrestricted gaming in a resort hotel/casino to be located at Tierra Del Sol upon relocation of the TC designation to the property.

12. Since the approval of the Wingfield Development Agreements, Sparks has approved numerous projects within the northern portion of the City of Sparks and the NSSOI resulting in a material increase in General Commercial and Business Park zoning along the Pyramid Highway corridor, thereby making Pyramid Highway the primary commercial arterial within the Spanish Springs Valley.

13. Because the Pyramid Highway arterial has since the date of the approval of the Wingfield Development Agreements become primarily commercial, while the Vista Boulevard arterial has remained primarily residential, Sparks City Staff required Red Hawk to provide traffic studies which determined that Tierra Del Sol is a more desirable site for a hotel/casino linked to Red Hawk's golf operations at Wingfield Springs than a site contained within the Wingfield Springs residential neighborhoods themselves. Sparks City Staff also concluded that relocation of the resort hotel/casino from Wingfield Springs to Tierra del Sol would have favorable traffic

impacts.

14. Sparks specifically agreed and recognized that the Wingfield Development Agreement was a lawful and appropriate method to provide inducement and reasonable guarante to Red Hawk to begin the development of the Wingfield Springs PC. Red Hawk, in reliance on such agreements and inducements, committed the necessary land and financial resources to develop the Wingfield Springs PC. In addition, because the cost of infrastructure improvements t be constructed by Red Hawk would be substantial and incurred by Red Hawk well in advance of any private income producing components that would provide the economic return required to justify and offset the investment of infrastructure improvements, Sparks and Red Hawk agreed that these guarantees were required to provide maximum flexibility to Red Hawk through the term of the Wingfield Development Agreement (expiring December 31, 2020) as provided in Section 9.01 of the Wingfield Development Agreement.

15. Red Hawk committed the necessary land and financial resources and diligently developed the Wingfield Springs PC in accordance with the Wingfield Development Agreements. Red Hawk's reasonable expected return on its multi-million dollar investment has not been achieved over eleven (11) years, even though Red Hawk has developed and marketed an award-winning development in a commercially reasonable manner during a period of sustained growth.

16. Sparks and Red Hawk have known from the inception of the development plan that the resort hotel/casino approved pursuant to the Wingfield Development Agreements has always been and remains an integral part of Red Hawk's fiscal plan.

17. Red Hawk has approached a number of regional and national resort hotel/casino operators to develop the resort hotel casino. These operators have reviewed both the Tierra Del Sol and the Wingfield Springs PC sites as part of their initial due diligence. The consensus was, and is, that the Tierra Del Sol site is a more desirable location for a resort hotel/casino. This is due in part to the commercial nature of the area along the Pyramid Highway corridor compared to the

residential nature of the area along Vista Boulevard from Los Altos Parkway to Wingfield Spring Parkway.

18. Peppermill Hotel and Casino ("Peppermill"), a recognized regional hotel casino operator, has been selected as Red Hawk's partner to develop and operate the Lazy 8 Ranch ("Lazy 8 Resort and Casino") on the Tierra Del Sol site. Upon the transfer of Red Hawk's resort hotel casino entitlement to its Tierra Del Sol property, Peppermill will become a minority member of Red Hawk. As a result of this assignment and transfer, Red Hawk's golf courses and related banquet and recreational facilities at Wingfield Springs (collectively, the "Red Hawk Golf Course") will be affiliated with and a complimentary annex of the Lazy 8 Resort and Casino, thereby establishing a resort-style development with limited resort gaming supported by major recreational facilities within the Spanish Springs Valley.

19. Red Hawk has determined that the limited nonrestricted gaming within the resort facility is an essential and necessary accessory to the success of the entire resort development.

20. The highest, best, and most profitable use of the unused resort/hotel casino entitlement will be achieved by transferring the entitlement from a site within the residential neighborhoods of the Wingfield Springs PC to the Tierra Del Sol site located within the predominantly commercial area along Pyramid Highway and outside the Wingfield Springs PC, but within the City of Sparks. There is no requirement under the Development Agreement to develop entitlements in a manner which is designed to create moderate profit. In fact, the Development Agreement was intended to allow Red Hawk to develop its entitlements in a manner which will maximize its profit and income.

21. Subsequent to October 1, 2004, Red Hawk filed appropriate Development Applications with Sparks to amend the Planned Development Handbooks for Tierra Del Sol and Wingfield Springs to transfer the unused resort/hotel casino entitlement from Wingfield Springs to Tierra Del Sol. The Application was designated PH.PCN 05073.

22. As part of its review, Sparks Planning Staff was required to making findings regarding whether the Application was in the public interest. Sparks Planning Staff made 21 Planned Development Findings, each of which favored approval of the Application.

23. Specifically, Sparks Planning Staff found that the proposed transfer conformed to the Sparks Master Plan at Finding 18 and that the transfer furthered the interest of the City and preserved the integrity of the Sparks Master Plan at Finding 21.

24. On July 17, 2006, the Application came before the Sparks Planning Commission ("SPC") for a vote with a Staff recommendation of approval. The SPC improperly refused to accept the Staff recommendation and recommended denial of the Application by a narrow margin

25. On August 23, 2006, the Application came before the Sparks City Council. The City Council also improperly refused to accept the original Staff recommendation of approval and instead, following the SPC's recommendation, denied the Application.

FIRST CLAIM FOR RELIEF
(Petition for Judicial Review)

26. Red Hawk repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 above as if set forth herein in full.

27. On July 17, 2006, upon a narrowly split 4-3 vote, the SPC recommended denial of Red Hawk's Application to transfer its resort hotel/casino entitlement from the Wingfield Springs *PC to the Tierra Del Sol Planned Development.*

28. In order to support the denial, the SPC unlawfully found that the graphical depictions of land use designations in the Plan prevail over the Plan's textual provisions, and allow resort hotel gaming only in the area designated as Tourist Commercial on Plate 15 of the NSSOI Plan. The SPC also unlawfully found that, because the proposed action was inconsistent with the Sparks Master Plan, the project does not further the interests of the City.

29. On August 23, 2006, upon another narrowly split 3-2 vote, the Sparks City Council

affirmed the findings of the SPC, and unlawfully found again that the resort hotel/cas entitlement could not be transferred because the graphical depictions of land use designati prevail over the text of the NSSOI Plan, and allow resort hotel gaming only in the area designa as Tourist Commercial on Plate 15 of the NSSOI Plan.

30. Sparks's denial of Red Hawk's Application was clearly erroneous and was i supported by substantial evidence in the record. Further, Sparks's denial of Red Hawk application was arbitrary, capricious, characterized by an abuse of discretion, and had the effect benefiting a non-party to the Development Agreement, John Ascuaga's Nugget. On at least o prior occasion, Sparks allowed Red Hawk to move the location of the TC designation with Wingfield Springs to a site different than that appearing on Plate 15 of the NSSOI Land Use Pla without requiring Red Hawk to submit a Master Plan Amendment application and upon a findin by the City that the relocation of the TC designation was in conformance with the Sparks Maste Plan.

31. Evidence in the record clearly demonstrated that relocation of the resort hotel/casino from Wingfield Springs to Tierra del Sol would have favorable traffic impacts and result in fewer average daily vehicle trips. Despite this clear and uncontroverted evidence in the record, the City Council concluded that negative traffic impacts prevented approval of the project. Such finding was arbitrary and capricious, unsupported by substantial evidence in the record, and contrary to law, to include NRS 278B in ordinances and interlocal agreements adopted pursuant thereto.

32. The City Council also made findings as to matters which were legal issues, and did so in direct contradiction of the advice of its legal counsel, the Sparks City Attorney. Additionally, the City Council's findings were unsupported by substantial evidence in the record. The City Council's findings further directly contradicted the findings of City Staff. Staff, after review and consideration of the application and supporting evidence, determined that the proposed

transfer was both consistent with the Sparks Master Plan at Finding 18 and that the trans benefited the public interest at Finding 21.

33. The City Council's findings are arbitrary and capricious and constitute an abuse of discretion because they directly contradict the evidence contained in the record. The TC node contemplated by the NSSOI is not affixed to a particular geographical area by the NSSOI Land Use Plan, which graphically depicts the location of a TC node in the Wingfield Springs Planned Development ("Wingfield Springs PD"). In fact, the textual description of the NSSOI Land Use Plan expressly states: "The Master Plan Map designates the general location, distribution, and extent of uses. The mapping of land uses [sic] delineations are done with a 'broad brush' and are not intended to be so detailed as to apply to a [sic] specific parcels or lot lines. The map is a generalized look at land use distribution."

34. In contrast, the NSSOI's text, which was reviewed and approved by both the Regional Planning Commission and the Sparks City Council, requires only that the Touris Commercial node be located near a major arterial within the NSSOI Plan Area.

35. Sparks's findings are erroneous as a matter of law and further constitute an abuse of discretion because the TC designation on the Land Use Plan is nowhere near a major arterial roadway, is not 37 acres in size, directly conflicting with the textual language of the NSSOI Plan, and renders meaningless the text of the NSSOI Plan and the map itself, which states that it is a "conceptual" map that does not apply to specific parcels or lot lines.

36. Sparks's findings also ignore the fact that the language of the NSSOI Plan specifically provides that "[t]he proposed land use plan is included in this document as Plate 15 (Land Use Plan)." The very language of the NSSOI Plan, therefore, demonstrates that Plate 15 is conceptual only, and that the textual provisions of the NSSOI Plan should not be ignored. Where the graphical depiction specifically notes that it is merely conceptual, and the location of the TC node on the graphical depiction contradicts the locational criteria contained in the text of the

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NSSOI Plan, the City's denial of Red Hawk's Application is an abuse of discretion and is n supported by substantial evidence.

37. Sparks's denial also constitutes an abuse of discretion because Sparks failed consider the binding effect of the Development Agreement. Section 3.08(d) of the Developme Agreement contemplated that transfers of unused development approvals would occur and th such transfers could involve movement outside Wingfield Springs, but within the City of Spark Specifically, in Section 3.08(d) of the Development Agreement, Sparks agreed to enter int Supplemental Development Agreements with Red Hawk on various matters, including a "Agreement Providing for the Transfer of Unused Development Approvals regarding the transfe and use of development credits outside the Wingfield Springs PC but within the City."

38. The Development Agreement was approved in 1994, not only by Sparks, but alsc by the TMRPC, which approval pursuant to NRS 278.026 *et. seq.* required a finding that it was compatible with the NSSOI Plan. By reviewing and approving the 1994 Development Agreement, the TMRPC already expressly found that the Development Agreement was – in its entirety and including the provision allowing relocation of the gaming node – consistent with the NSSOI Plan and with the comprehensive Regional Plan.

39. Sparks's denial of Red Hawk's application constitutes an abuse of discretion where the City's own staff, who are neutral parties and must evaluate any application to determine whether it is in the public interest, found on every point that the application was in the public interest and conformed to the Master Plan. On at least one prior occasion, Sparks allowed Red Hawk to move the location of the TC designation within Wingfield Springs to a location different than that appearing on Plate 15 of the NSSOI Land Use Plan without requiring Red Hawk to submit a Master Plan Amendment application and upon a finding by the City that the relocation of the TC designation was in conformance with the Sparks Master Plan. On information and belief, Sparks transferred the TC designation to an area outside the City's boundaries when the

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Development Agreement was signed.

40. The actions taken by the Sparks City Council, upon facts and evidence presente are unreasonable and in violation of the provisions of NRS Chapter 278 and Sparks Municip Code. Said decision was arbitrary, capricious, and was not supported by substantial evidence i that the proposed project is consistent with the Sparks Master Plan, zoning and all plannin policies, regulations and required findings under Sparks Municipal Code and the developmer project.

41. The actions taken by Sparks are in violation of Red Hawk's due process and equa rights protections under the Nevada and United States Constitutions, and constitutes a taking Sparks ignored the evidence before it, and made findings contrary to law, in order to protect a third party, John Ascuaga's Nugget, from competition in the Sparks casino gaming market.

42. Sparks officials acted arbitrarily and capriciously when they denied Red Hawk's Application. Instead, Sparks's officials rendered a decision beneficial to John Ascuaga's Nugget. Doe Defendants conspired with and utilized coercive threats and racketeering acts to interfere with Red Hawk's contractual relations with Sparks pursuant to the Development Agreement.

43. Red Hawk has performed all of its obligations relative to said application, has no other adequate remedy at law, and will sustain irreparable injury and pecuniary loss unless such denial is not appropriately reviewed and reversed.

SECOND CLAIM FOR RELIEF
(Breach of Development Agreement)

44. Red Hawk repeats and realleges each and every allegation set forth in Paragraphs 1 through 44 above as if set forth herein in full.

45. On November 7, 1994, Red Hawk entered into the Development Agreement with Sparks, under which both parties have operated for the last twelve years.

46. Section 3.08(d) of the Development Agreement specifically contemplated that

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Sparks would allow Red Hawk to transfer unused entitlements from the Wingfield Springs PC to other property within the City of Sparks.

47. The Development Agreement, including Section 3.08, was approved by the SPC, the Sparks City Council and the TMPRC, and was found by each governing body on each occasion to be in conformance with the NSSOI Plan.

48. Red Hawk has faithfully and timely performed all of its obligations under the Development Agreement by obtaining financing and constructing the Wingfield Springs PC, including all infrastructure supporting and serving the Planned Development. Red Hawk has invested more than one hundred fourteen million dollars ($114,000,000.00) in infrastructure and improvements that benefit Sparks, in detrimental reliance upon the covenants contained in the Development Agreement.

49. Pursuant to Paragraph 3.08 of the Development Agreement, Red Hawk sought approval from Sparks to transfer its unused entitlement to develop a limited resort hotel/casino facility within the Wingfield Springs PC to the Tierra Del Sol Planned Development along Pyramid Highway, which is also located in the Spanish Springs Valley and within the NSSOI.

50. Tierra Del Sol is located adjacent to Pyramid Highway, and is a more appropriate site for the TC node than in the midst of the residential planned development at Wingfield Springs.

51. Although Sparks enjoyed oversight to ensure that the relocation of the TC entitlement remained within the NSSOI Plan Area, Sparks denied the Application arbitrarily, and did not act in good faith, as City Staff, in reviewing the Application, provided twenty-one separate findings supporting the relocation, and determined that the proposed transfer was consistent with the objective of furthering the public health, safety, morals and general welfare of the citizens of Sparks. Included in Staff's report was a finding that that the proposed transfer complied with the locational criteria governing the transfer contained in the NSSOI Plan.

52. Upon information and belief, Sparks's officials refused to allow the relocation of

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the TC node in order to protect John Ascuaga's Nugget from competition in the Sparks gaming market.

53. Sparks has breached its obligation to cooperate with Red Hawk and to enter into a supplemental agreement for the transfer of the TC node to a location outside of Wingfield Spring but within the City of Sparks, as Sparks capriciously and arbitrarily denied Red Hawk's application to transfer the node, in spite of Staff's findings that the transfer complied with all twenty-one factors to be considered in such a transfer request. Additionally, on at least one occasion, Sparks has previously allowed Red Hawk to move the location of the TC designation within Wingfield Springs to a location different than that appearing on Plate 15 of the NSSOI Land Use Plan without requiring Red Hawk to submit a Master Plan Amendment application and upon a finding by Sparks that the relocation of the TC designation was in conformance with the Sparks Master Plan.

54. Red Hawk has been denied its reasonable expectations under the Development Agreement and has suffered damages as a result, in excess of one hundred million dollars ($100,000,000.00).

THIRD CLAIM FOR RELIEF
(Breach of Covenant of Good Faith and Fair Dealing)

55. Red Hawk repeats and realleges each and every allegation set forth in Paragraphs 1 *through 54 above as if set forth herein in full.*

56. An implied covenant of good faith and fair dealing exists in all contracts, including those between political subdivisions and private developers. Accordingly, Sparks owed Red Hawk a duty of good faith and fair dealing. Additionally, a special element of reliance and a special fiduciary relationship existed as between Sparks and Red Hawk.

57. The implied covenant of good faith and fair dealing obligated Sparks to act in a manner that is faithful to the purpose of the contract and the justified expectations of Red Hawk.

58. Sparks breached this covenant by acting in a manner that was unfaithful to the purpose of the Development Agreement and which has thwarted Red Hawk's justified expectat under the Development Agreement to develop a viable gaming facility. The intentional breach this covenant entitles Red Hawk to an award of punitive and exemplary damages against Sparks as well as against the above-named individual defendants who acted against the advice of their legal counsel, in tortious breach of Sparks's contractual obligations and in derogation of the law.

59. Sparks deliberately contravened the intention and spirit of the Development Agreement in order to satisfy the desires of a third party, John Ascuaga's Nugget, to prevent gaming competition in Sparks.

60. Sparks has no right to refrain from cooperation in a contract, or to act in bad faith, and in a manner calculated to destroy the benefit of the Development Agreement to Red Hawk.

61. Because Sparks deliberately acted contrary to the spirit and intention of the Development Agreement, Sparks is liable for breach of the implied covenant of good faith and fair dealing.

62. Red Hawk has been denied its reasonable expectations under the Development Agreement and has suffered damages in excess of one hundred million dollars ($100,000,000.00) as a result.

PRAYER FOR RELIEF

WHEREFORE, Red Hawk prays the Court:

1. That the actions of Sparks be reviewed pursuant to the provisions of NRS 278.0233, that the issues thereof be adjudicated, and that Sparks be ordered to approve the Application (Application No. PH RN 05073), subject to the conditions recommended by Staff.

2. The rights and obligations of the parties be adjudicated pursuant to NRS Chapter 30, to include a determination that the Development Agreement was abrogated by Sparks.

3. For costs of suit and attorney's fees herein incurred pursuant to NRA 278.0237.

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4. For such relief as to the Court deems just and proper.

5. For damages in excess of $10,000, pursuant to the provisions of NRS 278.0233.

6. For exemplary damages.

7. That Sparks file with this Court the official record of this file and proceedings before the City Council.

DATED: This 25th day of August, 2006.

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By: _____
E. Leif Reid, #5750

PREZANT & MOLLATH

By: _____
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RONALD A. LONGTIN, JR.

BY J. Ames
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ROY ADAMS and JEANNIE ADAMS; RYAN BOREN and BRYAN BOREN; MELISSA T. CLEMENT; JOSEPH DONAHUE and ROSE MARIE DONOHUE; IAN GRIEVE and CASSANDRA GRIEVE; BOBBY HENDRICKS and DINA HENDRICKS; DAVID MAHER and JANAE MAHER; EUGENE TRABITZ and KATHRYN TRABITZ; and SPARKS NUGGET, INC., a Nevada corporation,

Petitioners,

vs.

CITY OF SPARKS, a municipal corporation of the State of Nevada, and THE CITY COUNCIL thereof, and RED HAWK LAND COMPANY, LLC, a Nevada Limited Liability Company.

Respondents.

CV06 02410

Case No.

Dept No. 4

VERIFIED PETITION FOR JUDICIAL REVIEW, WRIT OF CERTIORARI, AND WRIT OF MANDAMUS

Petitioners Roy Adams, Jeannie Adams, Ryan Boren, Bryan Boren, Melissa T. Clement, Joseph Donohue, Rose Marie Donohue, Ian Grieve, Cassandra Grieve, Bobby Hendricks, Dina Hendricks, David Maher, Janae Maher, Eugene Trabitz, Kathryn Trabitz, and Sparks Nugget, Inc., (collectively, the "Petitioners"), by and through their undersigned counsel of record, Hale Lane Peek Dennison and Howard, hereby petition this Court for (i) judicial review of the City of Sparks' (the "City") decision to enter into a settlement agreement (the "Settlement") with the Red Hawk Land

EXHIBIT 13

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Company, LLC ("Redhawk"), pursuant to which the City must approve Redhawk's application (the "Application") to transfer an alleged nonrestricted gaming entitlement from Wingfield Springs to Tierra del Sol; (ii) a writ of certiorari declaring the Settlement null and void, and (iii) judicial review and writ of mandamus, reinstating the City's August 23/24, 2006 decision, denying Redhawk's Application. In support of this Petition, the Petitioners allege the following:

STATEMENT OF FACTS

1. Introduction.

This petition results from the City's improper and unsustainable reaction to a lawsuit brought by Redhawk after the City properly denied Redhawk's request to transfer tourist commercial zoning and an alleged gaming entitlement from Wingfield Springs to the Pyramid Highway. Despite the legal authority overwhelmingly supporting the City's decision to deny Redhawk's request, the City buckled under pressure and privately reversed itself once Redhawk alleged damages of $100 million in a lawsuit filed against the City. The City's private decision to settle the lawsuit, and then subsequent public approval of the Settlement, was arbitrary and capricious and beyond the scope of the City's authority because neither the Application nor the Settlement can be reconciled with the applicable land use laws the City is bound to follow. As a result, the instant Petition should be granted, the Settlement should be declared null and void, and the City's August 23, 2006 decision denying Redhawk's Application should be reinstated.

In July 2006, the City's Planning Staff (the "Staff") initially recommended approval of Redhawk's Application. After forwarding the recommendation to the City of Sparks Planning Commission (the "Planning Commission"), the Planning Commission, at two public hearings, disagreed with the Staff's findings. In particular, the Planning Commission found, inter alia, that the Application conflicted with the City of Sparks' Master Plan (the "Master Plan"), and as a result, the Planning Commission recommended denial of the Application to the City Council. At an August 23, 2006 public meeting, the City adopted the Planning Commission's recommendation and denied the Application. The City agreed that the Application conflicted with the Master Plan and could not therefore be approved.

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Redhawk immediately responded to the City's well-reasoned decision with a trumped-up lawsuit, alleging that the denial of the Application caused damages in excess of $100 million. The City, despite its previous findings concerning the Master Plan and without fully considering its legal options to defend itself against Redhawk's lawsuit, decided to settle the matter privately in less than one week's time. The Settlement notably ordered the City to approve Redhawk's Application, despite the fact that the City had previously concluded that the Application conflicted with the Master Plan. After a public uproar, and a warning letter from the Nevada Attorney General's office regarding the City's potential violation of Nevada's Open Meeting Law, the City conducted a public meeting and approved the Settlement; however, the Settlement cannot be reconciled with governing law and must be declared null and void by this Court.

Pursuant to Sparks Municipal Code section 20.18.090, "[a]ny decision of the city under [the planned development review] chapter granting or denying tentative or final approval of the plan or authorizing or refusing to authorize a modification in a plan is a final administrative decision and is subject to judicial review in properly presented cases." Because the City's approval of the Settlement constitutes an authorization to modify two planned development handbooks, it is a final administrative decision subject to judicial review.

In entertaining this petition, this Court's task is to determine (i) whether the City abused its discretion when it approved the Settlement, and (ii) whether substantial evidence supports the City's decision to proceed with the Settlement and resulting approval of the Application.[1] As demonstrated below, the City abused its discretion when it approved the Settlement, thereby reversing the Planning Commission's and its own original decision to deny Redhawk's Application, because neither the Settlement nor the Application can be reconciled with the Master Plan. In addition, the City's decision to approve the Settlement, and therefore necessarily the Application, was not supported by substantial evidence. Accordingly, this Court should grant the instant Petition, declare the Settlement void, and

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[1] See City of Reno v. Lars Andersen & Assocs., Inc., 111 Nev. 522, 525, 894 P.2d 984, 986 (1995) ("If the act is supported by substantial evidence, the courts will not disturb it."); see also Nevada Contractors v. Washoe County, 106 Nev. 310, 792 P.2d 31 ("If this discretionary act is supported by substantial evidence, there is no abuse of discretion. Without an abuse of discretion, the grant or denial of a special use permit shall not be disturbed.").

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reinstate the City's August 23 24, 2006, decision denying Redhawk's Application.

2. The Parties and Related Persons.

Petitioner, the Nugget, is a Nevada corporation doing business as John Ascuaga's Nugget Hotel Casino in Sparks, Nevada.

Petitioners Ryan and Bryan Boren, Ian and Cassandra Grieve, Joseph and Rose Marie Donohue, and Eugene and Kathryn Trabitz are residents of the City of Sparks, Nevada.

Petitioners Roy and Jeannie Adams, Melissa T. Clement, Bobby and Dina Hendricks, and David and Janae Maher are residents of Spanish Springs, Washoe County, Nevada.

Respondent City is a municipal corporation under the laws of the State of Nevada; the City's Mayor is currently Geno Martini; and the City's councilmembers are currently John Mayer, Phil Salerno, Judy Moss, Mike Carrigan, and Ron Schmitt.

Respondent Redhawk is a Nevada limited liability company engaged in the business of real-estate development and resort operations in Sparks, Nevada. Redhawk is, upon information and belief, the successor to Loeb Enterprises under the development agreement described below.

Non-Party Loeb Enterprises is a Nevada limited liability company and was the original party to the development agreement with the City.

3. Factual Background.

a. The City's Master Plan and the Northern Sparks Sphere of Influence Plan.

The Master Plan governs land use planning and development for the City. See NRS 278.0284. The Northern Sparks Sphere of Influence Plan ("NSSOI Plan") is an element of the City's Master Plan, and it encompasses the southerly portion of the Spanish Springs Planning Area, including more than 7,000 acres of land in public and private ownership. See **Exhibit 1**, Sparks Master Plan/NSSOI Plan at page 2.199.[2] According to the NSSOI Plan, "[t]he area is intended to provide for a mix of residential, general commercial, restricted industrial/business park and recreational opportunities with an emphasis on master planned developments." Id. at page 2.200. The NSSOI Plan also provides the following:

[2]The Exhibits to this Petition for Judicial Review can be found in the Appendix to the Petition for Judicial Review filed concurrently with this Petition.

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"[a] small tourist commercial node is anticipated in the area. Uses in such a node could include a resort hotel with gaming focused around recreational uses such as a golf course. The extent of gaming allowed in a resort facility shall be in accordance with Nevada Revised Statues on gaming limited by the City of Sparks."

Id. at page 2.205. Accompanying the NSSOI Plan text provisions is a Land Use Plan Map ("Land Use Map"), attached as **Exhibit 2**, which depicts the envisioned locations of the different land uses within the area and specific developments. The Land Use Map shows that the single Tourist Commercial node ("TC node") is within the Wingfield Springs development.

Both the Master Plan and the NSSOI Plan must comport with the Truckee Meadows Regional Plan (the "Regional Plan"). The Truckee Meadows Regional Planning Agency ("TMRPA"), under NRS 278.0278, has the authority to approve and must approve all Master Plan amendments. In addition to approving Master Plan amendments, the TMRPA must also review projects of regional significance. Under NRS 278.026(5), and guidelines the TMPRA has adopted pursuant to NRS 278.0277, a project of regional significance includes those projects that require

> a change in zoning, a special use permit, an amendment to a master plan, a tentative map or other approval for the use of land which, if approved, would have the effect on the region of increasing: (1) employment by not less than 938 employees; (2) housing by not less than 625 units; (3) hotel accommodations by not less than 625 rooms; (4) sewage by not less than 187,500 gallons per day; (5) water usage by not less than 625 acre feet per year; or (6) traffic by not less than an average of 6,250 trips daily.

b. The Wingfield Springs Proposal and Development Agreement.

In October 1994, Loeb entered into an agreement with the City for the development of a large planned development ("PD") in northeast Sparks, commonly known as Wingfield Springs, through the submission of the Wingfield Springs Development Agreement Handbook (the "Wingfield Handbook"), attached as **Exhibit 3**, and the Wingfield Springs Development Agreement (the "Development Agreement"), attached as **Exhibit 4**. The land uses within a PD, such as Wingfield Springs, are limited to those set forth in the PD's handbook, but a PD's handbook may include any use allowed in any other zone, provided the PD's uses are compatible with each other and the surrounding environment. See SMC 20.18.030. In the case of a development handbook that does not permit a particular use, such as a hotel/casino, the handbook must be amended to allow for that use before the use is allowed within the PD.

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The Wingfield Handbook originally called for the development of approximately 2,242 residential lots, a neighborhood commercial development, a golf course, and a related golf complex. The Development Agreement and the Wingfield Handbook contemplated that Wingfield Springs would be entitled to a Tourist Commercial ("TC") designation[3] within Wingfield Springs in order for Loeb to develop a resort complex, which was anticipated to include, among other facilities, a hotel and casino with limited nonrestricted gaming (the "resort hotel casino"). See Exhibit 3 at pages V-26, 27. The Development Agreement also included considerations for Loeb's personal and investor resources in the event the Wingfield Springs development was unsuccessful. In particular, section 3.08 of the Development Agreement contemplated supplemental development agreements for Loeb's benefit, with the understanding that the terms of the Development Agreement were broad and could require clarification. See Exhibit 4 at paragraph 3.08. Such supplemental development agreements would have to be consistent with the Development Agreement and were "intended only to supplement with more specific terms the subject matter of [the Development] Agreement." Id.

Section 3.08(d) of the Development Agreement stated that Loeb and the City could enter into a supplemental development agreement "Providing Transfer of Unused Development Approvals regarding the transfer and use of development credits outside Wingfield Springs PD but within the City." Id. at paragraph 3.08(d). The Development Agreement did not, however, define the terms "Unused Development Approvals" or "development credits," or provide any details regarding the types of situations that could trigger the application of Section 3.08(d).

Through the development process, Loeb presented its Wingfield Springs project to TMRPA to ask for review of the project's conformance to the Regional Plan, as a project of regional significance. TMRPA deemed Wingfield Springs a project of regional significance in Sparks at the Regional Planning Commission ("RPC") meetings of July 22, 1992 and April 28, 1993.

On November 9, 1994, Loeb again went before the RPC, this time requesting, among other things, an amendment to the Wingfield Handbook for the inclusion of a limited resort gaming facility. The RPC postponed the November 9 meeting in order to further consider the definitions of limited

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[3]SMC 20.86.020, governing TC zoning, is the only zoning designation that allows transient occupancy.

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gaming in the context of rural gaming and resort-related gaming; however, the RPC reconvened on November 30, 1994, in a special session to complete its review of Loeb's proposed resort amendment for Wingfield Springs. In anticipation of this November 30 meeting, RPC staff prepared a report on limited gaming, including a history of limited gaming in the Regional Plan and the request for the adoption of a new "Limited Resort Gaming" policy. See **Exhibit 5**, Regional Staff Report of Nov. 30, 1994 at page 1.

In relevant part, the policy provided that varying amounts of casino square footage would be "permissible in association with resort-style developments. A resort-style development includes hotel and convention facilities, one or more restaurants, retail shops, and a major recreational amenity or amenities generating 300 or more resort customers a day, such as a golf course or a ski area." For an 18,000 square foot casino, the minimum baseline requirements would be "resort-type amenities, at least 200 hotel rooms, and over 2000 residential units." See id., Attachment 1. Based on this policy, the RPC made the specific finding that

> [t]he development of limited gaming of not greater than 18,000 square feet will be an accessory limited resort use rather than a primary component of the Wingfield Springs project and the Development Agreement Handbook will contain provisions to assure that the project will conform to the requirements set forth in the 'Limited Resort Gaming' policy. See id. at page 5.

As a result, the TMRPA approved the Development Agreement and Loeb's proposed amendment to the Wingfield Handbook.

Loeb proceeded with the development of Wingfield Springs, which currently consists of approximately two thousand two hundred forty two (2,242) residential lots; however, neither a hotel nor a casino was ever built in connection with the development. In fact, while "resort condominium" units were built and the Resort at Redhawk rents such units for transient use, neither actual hotel rooms nor a resort were built, resulting in the current transient use being a non-conforming use in Wingfield Springs.

c. Redhawk's Applications to Amend the Wingfield and Tierra del Sol Handbooks.

Loeb's successors-in-interest, Redhawk, also failed to construct any type of gaming establishment to accompany the resort amenities at Wingfield Springs. Instead, Redhawk decided to exercise what it interpreted to be its right under section 3.08(d) of the Development Agreement, and

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transfer its purported right to build a casino at Wingfield Springs to another one of its properties, Tierra del Sol.

The Tierra del Sol property is located along State Route 445, commonly known as the Pyramid Highway, approximately 1.5 miles from Wingfield Springs. The City first approved the development handbook for Tierra del Sol, a multi-use development, on August 7, 2000. Neither the application nor the approval for Tierra del Sol included a TC zoning designation that would allow nonrestricted gaming. See **Exhibit 6**, Tierra Del Sol Community Project Description; **Exhibit 7**, Tierra del Sol PD Design Standards & Guidelines at page 7. Instead, the Master Plan's designation for Redhawk's property at Tierra del Sol is General Commercial ("GC"), a designation within which a hotel/casino use is not allowed. See SMC 20.85.020. In other words, the Master Plan designation for Redhawk's property at Tierra del Sol is not tourist commercial and is not compatible with and does not permit non-restricted gaming.

The SMC includes provisions relating to the initial approval of development handbooks, but it does not identify any procedure by which development plans may be modified or amended. Nonetheless, in amending a development handbook, the City follows the same process used for initial approval of a development handbook, which is set forth in SMC 20.18.030. Additionally, state law provides specific standards by which the modification of a development handbook must be judged. In particular, under Section 278A.380 of the Nevada Revised Statutes, modification of a development handbook must (i) "further the mutual interest of residents and owners of the planned unit development and of the public in the preservation of the integrity of the plan as finally approved," and must not (ii) "impair the reasonable reliance of the residents and owners upon the provisions of the plan or result in changes that would adversely affect the public interest."[4]

In October 2004, Redhawk submitted its Application to the City. The Application consisted of

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[4] NRS 278A.410 further provides that the provisions of a handbook may be modified only if the modification (i) does not affect the rights of the residents of the PD to maintain and enforce those provisions, and (ii) the City finds the following facts at a public hearing: (a) the modification is consistent with the efficient development and preservation of the entire PD, (b) the modification *does not adversely affect either the enjoyment of land abutting upon or across the street from the PD*, (c) the modification *does not adversely affect the public interest*, and (d) the modification *is not granted solely to confer a private benefit upon any person*. (emphasis added). Application of this statute depends on whether one views the amendment in this case as one being brought by the City. To the extent the City claims it is compelled to consider Applicant's request per the Agreement (defined below), it would seem the amendment is being brought in part by the City, and NRS 278A.410 must apply.

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two handbook amendments: the first was an amendment to the Wingfield Handbook, eliminating the resort hotel casino for Wingfield Springs; and the second was an amendment to the Tierra del Sol Handbook, adding the exact language that was removed from the Wingfield Handbook to allow a hotel casino to be developed in Tierra del Sol.[5] Redhawk did not seek an amendment to the Master Plan as part of its Application.

Upon review of the Application, the City's Planning Staff recommended approval. In its recommendation, the Staff adopted twenty-one planned development findings ("PD Findings") and set forth the facts that allegedly supported the findings in its report. Of particular importance were PD Findings 18 and 21. PD Finding 18 stated that "[t]he project, as submitted and conditioned, is consistent with the City of Sparks Master Plan." The Staff relied on the Tourist Commercial description in the NSSOI Plan to conclude that "[a]s long as the tourist commercial in Tierra del Sol is 37 acres or less and is accompanied by the removal of the tourist commercial use (i.e. one node) in Wingfield Springs, the handbook amendment is consistent with the NSSOI." See **Exhibit 8**, Staff Report, at page 15.

Further, PD Finding 18 provided that the project could alternatively be found consistent with the Master Plan under the density bonus statues found at NRS 278.250(4) and (5). The Staff reasoned as follows:

> [t]his statute envisions the possibility of exceptions to the master plan in exchange for certain socially desirable contributions by the developer for the benefit of the City. In this case the developer has agreed to construct, at no cost to the City, a community services facility. The applicant has also agreed, in principle, to contribute $300,000 towards developing an area which will include a certain proportion of affordable housing, to be spelled out in a supplemental development agreement to be approved by the City Council prior to Final Approval of the handbook by the City Council.

PD Finding 21 stated that

> [t]he Tierra del Sol Planned Development provides a mix of uses with residential, commercial, resort, and public facility uses. The commercial, resort, and public facility uses will benefit the residents in the Tierra del Sol community as well as those within the surrounding communities in all directions by providing convenient services and retail establishments to help meet day-

[5]While the Application was being reviewed, the City established an Ad Hoc Committee on Gaming (the "Committee"). The Committee consisted of a number of residents and businesses of Sparks and considered gaming and how it relates to traffic, citizen opinion and use, tourism, economic growth, bankruptcy, in addition to alcoholism, crime, and property values. The Committee ultimately decided that gaming in Sparks is most desirable on major arterial roadways along the downtown corridor.

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today needs. The transfer of previously approved density from Wingfield Springs under the terms of the original 1994 Wingfield Springs Development Agreement to the Tierra del Sol Planned Development is consistent with the City of Sparks Master Plan. See id. at pages 16-17.

Pursuant to the Planned Development Review provisions of SMC 20.18 *et seq.*, the Staff forwarded the Application and its recommendation to the Planning Commission.[6]

d. The Planning Commission's and City's Denial of the Application.

On July 6, 2006, the Planning Commission heard the Staff's recommendation to approve the Application. Due to the volume of questions and testimony from the public concerning the Application, the Planning Commission was forced to continue the meeting.

At the continuance of the meeting on July 17, 2006, Commissioner Mattina, who stated she was present in 1994 when the City entered into the Development Agreement for Wingfield Springs, recalled that the gaming portion of the Resort at Redhawk was to be the secondary focus of the development, not the primary focus. Commissioner Mattina added: "And it was always the intent that if it was moved, if that component was moved, it would be moved within the Wingfield Springs development." See **Exhibit 9**, July 17, 2006, Planning Commission Meeting at page 4. Commissioner Lokken stated that "the approval by Regional Planning [of Wingfield Springs] back in 1994 seems to repeatedly and clearly focus on the notion of [Wingfield Springs] being a tourist-generating Tourist Commercial [zone] as a destination resort." Id. at page 8.

Commissioner Mattina went on to clarify that the Regional Planning Commission was:

> clearly linking [the gaming portion] to some type of recreational activity and when you had the resort connected to the golf course in Wingfield Springs, it was clearly linked to a recreational activity. [Tierra del Sol] is a piece of property that wants to be developed as Tourist Commercial that is not even within the Wingfield Springs perimeter, so it is hard to say . . . I mean, it is clearly an independent standing facility, whether a casino, hotel, or whatever. Yes. Can people get in their car and drive to Wingfield Springs? Certainly. But it is not tied to Wingfield Springs; it is not connected to the Resort at Wingfield Springs or at Red Hawk. Page 8.

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[6] No evidence has been found in the record that the required procedures of SMC 20.07.050 were followed and that proper notice was given by mail to residents located within 300 feet of the area affected. Further, there is no evidence that required notice was given for any of the Planning Commission meetings, any of the public City Council meetings, or the closed session City Council meeting.

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