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

STATE OF NEVADA ex rel. THE NEVADA DEPARTMENT OF TAXATION; THE HONORABLE KATE MARSHALL, in her official capacity as TREASURER OF THE STATE OF NEVADA; and THE LEGISLATURE OF THE STATE OF NEVADA,

Petitioners,

vs.

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for CARSON CITY; and THE HONORABLE JAMES TODD RUSSELL, District Judge,

Respondents, and

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,

Real Party in Interest.

**Supreme Court Case No. 62050**

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# ANSWERING BRIEF TO PETITION FOR WRIT OF MANDAMUS

Submitted by:

Joshua J. Hicks, Nevada Bar No. 6679
jhicks@bhfs.com
Clark V. Vellis, Nevada Bar No. 5533
cvellis@bhfs.com
Sean D. Lyttle, Nevada Bar No. 11640
slyttle@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
50 West Liberty St., Suite 1030
Reno, Nevada 89501
Telephone: (775) 622-9450

Brandi L. Jensen, Nevada Bar No. 8509
Fernley City Attorney
OFFICE OF THE CITY ATTORNEY
595 Silver Lace Blvd.
Fernley, Nevada 89408

*Attorneys for Real Party in Interest, City of Fernley, Nevada*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES.....PAGE**

## TABLE OF AUTHORITIES

**(continued)**

## TABLE OF AUTHORITIES

**(continued)**

## TABLE OF AUTHORITIES

**(continued)**

### STATUTES

# ANSWERING BRIEF TO PETITION FOR WRIT OF MANDAMUS

Real Party in Interest the City of Fernley, Nevada ("Fernley") hereby responds to the Court's Order Directing Answer dated November 13, 2012. The Court therein ordered that Fernley shall file an answer, including authorities, against issuance of the writ of mandamus requested by Petitioners the State of Nevada ex rel. the Nevada Department of Taxation (the "Department"); the Honorable Kate Marshall, in her official capacity as Treasurer of the State of Nevada (the "Treasurer"; together with the Department, the "State"); and the Legislature of the State of Nevada (the "Legislature"; together with the State, "Petitioners"). The Court therein also ordered Petitioners to file a supplement to their petition setting forth certain relevant legislative deadlines. Petitioners so supplemented on November 15, 2012.

## I. INTRODUCTION

The issue presented in this petition for writ of mandamus ("Petition") is whether mandamus should issue where the district court in its discretion granted Fernley's motion for a continuance of Petitioners' motions to dismiss, particularly where the State *did not even oppose* the motion for a continuance and where the District Court made it clear that Petitioners could renew their motions to dismiss at a later date.

Mandamus is, by definition, an "extraordinary" remedy, and, as such, Petitioners' burden in seeking mandamus relief is a heavy one. Petitioners must demonstrate that the district court had an unwavering obligation to grant their motions to dismiss (despite the fact that only the intervenor Legislature even attempted to oppose Fernley's motion for a continuance of those motions), or otherwise acted in an arbitrary or capricious fashion. *City of N. Las Vegas v. Eighth Jud. Dist. Ct.*, 122 Nev. 1197, 1202, 147 P.3d 1109, 1113 (2006).

For all of the reasons described below, Petitioners have not satisfied and cannot satisfy that burden and, accordingly, their Petition should be denied. In allowing the parties to conduct discovery prior to adjudicating Petitioners' dispositive motions in a very complicated and important case, the district court acted well within its discretion. Respectfully, this Court should not disturb the district court's discretion nor order the district court to entirely foreclose Fernley's claims at this premature juncture.

**A. Procedural Background**

On June 6, 2012, Fernley filed its Complaint (PA 1:1)[1] alleging a variety of legal defects in the construction and administration of the Consolidated Tax ("C-Tax") system utilized in Nevada to provide partial funding for local governments. The C-Tax system was implemented in 1997, and is a means by which revenues from six different taxes are distributed to local governments, including counties and municipalities, among others (PA 1:1).

On August 3, 2012, the State filed a Motion to Dismiss (PA 1:15), and the Legislature filed a Motion to Intervene (RA 4).[2] The State's Motion to Dismiss included an exhibit outside the pleadings (PA 1:15).

On August 16, 2012, the Legislature filed a forty-one page Joinder in the State's Motion to Dismiss (PA 1:33). The Joinder included an exhibit of over 200 pages that was outside the pleadings (PA 1:75, PA 2:213). The Joinder duplicated arguments raised by the State in its Motion to Dismiss, and also included new arguments not raised by the State (PA 1:15, PA 1:33).

On August 20, 2012, Fernley filed its Opposition to the State's Motion to Dismiss and contemporaneously made a Motion for a Continuance pursuant to NRCP 56(f), and served that Opposition and Motion on both the State and

[1] References to "PA" are to volume and page numbers of Petitioners' Appendix.
[2] References to "RA" are to page numbers of Respondent's Appendix.

Legislature (PA 2:295, PA 3:439). The State thereafter filed a Reply brief, but did not address, file, or otherwise make any opposition to Fernley's Motion for a Continuance (PA 3:590).

On September 4, 2012, the district court over Fernley's objections, granted the Legislature's Motion to Intervene (PA 3:605). The parties thereafter stipulated to treat the Legislature's August 16 Joinder as a separate Motion to Dismiss (PA 3:615).

On September 28, Fernley submitted its Motion for a Continuance pursuant to NRCP 56(f) and also notified the district court that neither the State nor the Legislature had filed an opposition to that motion (RA 1-2).

On October 8, 2012, the Legislature filed its Reply brief in support of its Joinder/Motion to Dismiss (PA 6:1274). In this brief, the Legislature for the first time opposed Fernley's Motion for a Continuance pursuant to NRCP 56(f).[3]

In an order dated October 12, 2012, the district court, Hon. James T. Russell presiding, ruled that Fernley's Motion for a Continuance was granted in order to allow for discovery, and that Petitioners' Motions to Dismiss were therefore denied without prejudice (PA 6:1298). Specifically, the district court clarified that Petitioners could renew their Motions to Dismiss or for Summary Judgment upon the completion of a reasonable discovery period (PA 6:1298). To date, Petitioners have not filed Answers and therefore there has been no discovery in the underlying case.

[3] Fernley's Motion for a Continuance Pursuant to NRCP 56(f) was served on both the State and the Legislature on August 20, 2012. (PA 2:314). Although the Legislature was not an intervenor at the time, it had taken an active role in the case, having filed a forty-one page joinder in the State's motion to dismiss on August 16, 2012. Thereafter, the Legislature was granted intervenor status on September 4, 2012, but did not address Fernley's Rule 56(f) motion until it filed its Reply brief on October 8, 2012, forty-nine days after Fernley's motion was filed and served and thirty-four days after the Legislature was granted intervenor status. First Judicial District Court Rule 15(3) provides that a party has 10 days to oppose a motion.

Despite the lack of any objection whatsoever by the State to Fernley's Motion for a Continuance (RA 1), and the Legislature's belated objection to that Motion (PA 6:1274), the Petitioners thereafter filed a petition for a writ of mandamus with this Court, asking that the district court's simple order granting a continuance be undone and that the underlying case be dismissed (Petition).

**B. Substantive Background**

The C-Tax system in Nevada was implemented in 1997 as a way to collect and distribute six taxes from and to counties and local government entities. (PA 2, ¶¶ 4-6). At the time the system was implemented, Fernley was an unincorporated town with a population of approximately 8,000 people. (PA 2, ¶4). Fernley incorporated in 2001 and is the only municipality in Nevada to incorporate since the C-Tax system has been in place. (PA 3, ¶9). Fernley's population today is approximately 19,000 people, making it the seventh most populous city in Nevada. (PA 3, ¶10).

Despite the population boom, Fernley's C-Tax distributions are relatively unchanged since 1997. (Id.). Specifically, in 1997 Fernley received $86,000 in C-Tax distributions, in 2001 (the year of incorporation) Fernley received $110,685 in C-Tax distributions, and in 2011 Fernley received $143,143 in C-Tax distributions. (PA 3, ¶9). In other words, Fernley today receives approximately $7 in C-Tax distributions on a per capita basis. (PA 4, ¶13).

Even a cursory examination of C-Tax distributions to comparably sized jurisdictions in Nevada is striking. For example, 2010-2011 C-Tax distributions include: Fallon at $1,409,664; Boulder City at $7,935,323; Elko at $11,015,989; West Wendover at $2,275,011, Winnemucca at $3,552,393; Mesquite at $7,046,690 and Ely at $4,910,571. (PA 4, ¶12). Again, Fernley received $143,143 that same year. (Id.).

On just a per capita basis, Mesquite and Boulder City, both of which are less populous than Fernley, received between $450 and $550 per resident, compared to $7 for Fernley. (PA 4, ¶13).

Fernley has alleged that the C-Tax system is designed to maintain the status quo from 1997 and to prevent any meaningful adjustments, particularly to a city such as Fernley, which is the only city to incorporate in Nevada since the C-Tax system was put in place in 1997. (Generally, PA 1-12). Fernley has alleged that the inflexibility of the C-Tax system and its impact on Fernley's C-Tax distributions has given rise to various Federal and State constitutional violations, including the Equal Protection and Due Process clauses of the United States Constitution, and Article 3, Section 1 and Article 4, Sections 20 and 21 of the Nevada Constitution. (*Id.*).

In their Petition, Petitioners provide their own background (Petition, at 3-13), and, while much of the mechanical description of the C-Tax system is accurate, some aspects deserve comment as set forth below.

The Legislature's Joinder set forth a history of the C-Tax system, beginning with a study of local government financing in 1997. (PA 36-40). As an initial matter, it is interesting to observe that the Legislature commented that the C-Tax system was enacted "to rectify problems with the prior formula of revenue distribution to local governments which did not follow the growth of population and the resulting greater demand for services." (PA 36). When the C-Tax system was implemented in 1997, Fernley had a population of 8,000. (PA 3, ¶4) Today, Fernley has a population of approximately 19,000. (PA 3, ¶10). Fernley is the only municipality to incorporate since the inception of the C-Tax System. (PA 3, ¶9). Yet, Fernley's C-Tax distributions from 1997 to today are effectively unchanged. (PA 3, ¶9). Ironically, despite experiencing a "growth of population and the resulting greater demand for services," or exactly what the Legislature claims the

C-Tax system was designed to address, Fernley's C-Tax distributions have not increased in any meaningful fashion.

The Petitioners also rely on quotes from testimony taken during the 1997 study in an apparent attempt to show that the C-Tax system is set up in a fair and equitable fashion. (PA 117-119, 134-137). However, much of the quoted testimony comes not from a Legislator but a contract lobbyist for Carson City. That same individual today is a contract lobbyist for Lyon County and Carson City and, as discovery is expected to show, has been vocal in her opposition to Fernley's efforts to obtain a greater C-Tax distribution from either the State or Lyon County. See Lobbyist Information for Mary Walker: http://www.leg.state.nv.us/AppCF/Lobbyist/reports/LobbyistDetail.cfm?lobbyist=540&Session=76). As such, the objectivity of that testimony is at issue and Fernley should have the opportunity to explore further in discovery, as the district court has now rightfully allowed.

The Legislature also claims that the C-Tax system "was intended to decrease the competition among local governments for tax revenue." (Petition, at 8). In reality, the system has gone so far to decrease competition that it has effectively frozen the status quo from 1997 in place, which has inordinately impacted Fernley as the only municipality in Nevada to incorporate since 1997. As noted in Fernley's Opposition to the State's Motion to Dismiss, and as unrefuted by the Petitioners, there has been only one non-minor adjustment to the C-Tax system since its implementation, when the City of Henderson, who was represented by the Speaker of the Assembly at the time, received a $4,000,000 base adjustment. (PA 646).

The Legislature also claims that Fernley's police services "are provided by Lyon County, and fire-protection services are provided by the North Lyon County Fire Protection District" (Petition, at 12). However, as discovery is expected to show, Fernley and its residents still pay for police and fire protection in other ways,

and moreover, police protection in the City of Fernley is woefully inadequate (PA 660-676 (Exhibit 2 to Fernley's Opposition to the Legislature's Joinder) (noting that Fernley's law enforcement per capita is well below national averages)). Furthermore, and as discovery is expected to further develop, Fernley has other financial pressures that require a redistribution of C-Tax revenues, including significant and growing needs to refurbish and maintain its roads. (*Id.*) (noting that Fernley has significant outstanding road projects, and has only addressed a fraction of the road projects identified as necessary in 2007).

Finally, only by going through discovery will the district court be able to ascertain whether other local governments truly utilize C-Tax revenues to support public safety or any other specific services. Although the Legislature has made repeated claims that the provision of public safety is paramount to the distribution of C-Tax revenues (without any citation to authority or evidence), even a cursory review of comparably sized local governments raises serious questions about the accuracy of that claim. For example, several municipalities and local governments receiving significantly more in C-Tax revenues than Fernley have no public safety expenses, such as the town of Gardnerville (Population 5,000, C-Tax Revenues $233,000, no listed public safety costs), the town of Minden (Population 3,000, C-Tax Revenues $308,000, no listed public safety costs), and the town of Battle Mountain (Population 3,000, C-Tax Revenues $182,000, no listed public safety costs) (PA 677-930 (Exhibits 3 – 5 to Fernley's Opposition to the Legislature's Joinder) (Numbers for Fiscal year 2010-2011 and all numbers approximated)).

Other local governments receive more in C-Tax revenues than they list in public safety costs, so even assuming that 100% of C-Tax revenues were allocated to public safety, as the Legislature seems to suggest is somehow required, these local governments still receive significantly more than Fernley, particularly on a per capita basis. These local governments include the City of Carlin (Population 2,300,

C-Tax Revenues $1,300,000, public safety costs of $800,000), the town of Tonopah (Population 2,500, C-Tax Revenues $210,000, public safety costs (fire only) of $87,000), the City of Elko (Population 19,000, C-Tax Revenues $9,000,000, public safety costs of $8,700,000), the town of Jackpot (Population 1,200, C-Tax Revenues $1,000,000, public safety costs of $800,000), the City of Caliente (Population 1,100, C-Tax Revenues $135,000, public safety costs of (excluding fire) $100,000) (PA 676-930 (Exhibits 6 – 10 to Fernley's Opposition to the Legislature's Joinder) (Numbers for Fiscal year 2010-2011 and all numbers approximated; public safety numbers are projections)).

Yet, other local governments may have greater public safety costs than they have in C-Tax distributions, but there are supplemental sources of funding for their public safety costs that are outside of the C-Tax scheme. For example, the City of Mesquite received $6,450,000 in C-Tax revenues for fiscal year 2011-2012. (Id. (Exhibit 11 to Fernley's Opposition to the Legislature's Joinder)). While Mesquite spends almost half of its $18,660,000 budget on public safety, part of its law enforcement costs are paid for by a 2005 sales tax initiative that created a special revenue fund. (Id., pg. 4). It does not appear that the Legislature has ever decreased Mesquite's C-Tax distribution based upon its decision to add law enforcement personnel, which would seem logical if the Legislature's argument that public safety services are paramount to the distribution of C-Tax revenues were accurate.

Ultimately, what this means is that, in reality, there is no requirement that C-Tax distributions be linked to public safety, nor to any particular category or type of expense at all. Despite the Petitioners repeated suggestions that the level of C-Tax distributions is tied to the provision of certain services and particularly public safety, nowhere has the Petitioner cited to any statute, nor any other authority, to suggest that the use of C-Tax revenues is tied to the provision of particular services

or that local government service levels were examined in 1997 or at any time thereafter to ensure that C-Tax revenues were adequate for services provided or needed. Exhibit 1 to the Legislature's Joinder (PA 79-88), while a comprehensive study of what would become the C-Tax system, glaringly omitted any indication that service levels of existing participants were examined in setting up the C-Tax system. The argument that C-Tax distributions are tied to services and appropriated in a careful and considered fashion is a red herring and is designed to do nothing more than ensure the preservation of the status quo put into place in 1997. At the very least, discovery is necessary to determine whether C-Tax distributions are truly tied to the provision of specific services. Such discovery is precisely what the district court has now expressly allowed, and that determination should be left undisturbed.

## II. DISCUSSION

All that the district court has done in the underlying case here is to recognize that some discovery must take place before it can properly consider the State's and Legislature's Motions to Dismiss. While the district court, in the context of granting Fernley's motion for a continuance, has denied the Petitioners' respective Motions to Dismiss, it has also given them express authority to renew those motions after the completion of a reasonable discovery period (PA 6:1298). These rulings by the district court hardly represent an abuse of its discretion, and instead evidence a careful exercise of the trial court's discretion in an attempt to ensure that Fernley has a full and fair opportunity to have its day in court. The Petition should be denied.

### A. The Issuance Of A Writ Of Mandamus Is Neither Necessary Nor Appropriate In This Case.

The well-settled principles that have long guided this Court in deciding whether to exercise jurisdiction in original writ proceedings require the denial of

the Petition in its entirety. A writ of mandamus is an "'extraordinary'" remedy that "'will not issue'" when the petitioner has a "'plain, speedy and adequate remedy at law.'" *See Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev.Adv.Op. 15, at 3, 252 P.3d 676, 678 (2011); *see also* NRS 34.170. Writ relief is available only to "compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse or arbitrary or capricious exercise of discretion." *See State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev.Adv.Op. 84, at 3, 267 P.3d 777, 779 (2011); *see also* NRS 34.160. An arbitrary or capricious exercise of discretion is one "'founded on prejudice or preference rather than on reason' or 'contrary to the evidence or established rules of law'" while a manifest abuse of discretion "'is one exercised improvidently or thoughtlessly and without due consideration'" and "'does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.'" *See Armstrong*, 127 Nev.Adv.Op. 84, at 3, 267 P.3d at 780. A petitioner therefore has a "heavy burden" to prove that extraordinary relief is warranted. *See Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)("the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations").

In this case, Petitioners have not made, and cannot make, the substantial showing required to obtain the issuance of a writ of mandamus for at least *four* reasons. *First*, the district court has not yet ruled on the merits of Petitioners' motions to dismiss (PA 6:1298). *Second*, the district court properly exercised its discretion, and complied with the plain language of NRCP 12(b), when it treated Petitioners' motions to dismiss as motions for summary judgment and granted Fernley a continuance to conduct discovery necessary to support its claims. *Third*,

Fernley has stated claims upon which relief can be granted. *Fourth*, no urgency exists that would militate in favor the Court's consideration of Petitioners' request for extraordinary relief. On each of these separate and independent grounds, the Court should decline to exercise its discretion to consider the Petition at this time. *See Walters v. Eighth Jud. Dist. Ct.*, 127 Nev.Adv.Op. 66, at 4, 263 P.3d 231, 233 (2011)("whether a petition for extraordinary relief will be considered is solely within this court's discretion").

### 1. Extraordinary Relief Is Unwarranted Because The District Court Has Not Yet Ruled On The Merits Of Petitioners' Motions To Dismiss.

Petitioners' request for extraordinary relief from this Court is, at best, premature because the district court has not yet even ruled on their motions to dismiss. This Court has made clear that it "normally will not decide an issue not litigated in the trial court." *See Coast To Coast Demolition & Crushing, Inc. v. Real Equity Pursuit, LLC*, 126 Nev.Adv.Op. 10, at 2, 226 P.3d 605, 607 (2010); *see also Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981)("an appellate court is not an appropriate forum in which to resolve disputed questions of fact"). This principle should prevail here because, until the district court decides the underlying motions on their merits, it will remain unknown whether Petitioners have been aggrieved in any way. Petitioners will have the opportunity to renew their motions to dismiss, and thereby obtain a decision on the merits, upon the conclusion of the discovery ordered by the district court. (PA 6:1298).

### 2. The District Court Properly Exercised Its Discretion, And Complied With The Plain Language Of NRCP 12(b), When It Treated Petitioners' Motions To Dismiss As Motions For Summary Judgment And Granted A Continuance For Discovery Purposes.

Petitioners' notion that the district court manifestly abused its discretion in treating their motions to dismiss as motions for summary judgment and then granting a continuance pursuant to NRCP 56(f) is patently erroneous. (Petition, at 19-21). It is undisputed that Petitioners supported their motions with materials outside Fernley's complaint. *See id*. at 20. Because of this submission, the district court acted well within its discretion, and in compliance with the mandate of Nevada law, when it decided to proceed under NRCP 56 and ordered the parties to engage in discovery before it would rule on the merits of Petitioners' motions. *See Schneider v. Cont'l. Assurance Co.*, 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994)("[a] district court must treat a motion to dismiss as one for summary judgment '[w]here materials outside of the pleadings are presented to and considered by the district court'"). To reach this conclusion, the Court has to look no further than the plain language of NRCP 12(b), which states in relevant part:

> If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, ***the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.***

*See* NRCP 12(b) (emphasis added). On this basis, and contrary to Petitioners' assertion otherwise, the district court would have manifestly abused its discretion and acted in direct contravention of NRCP 12(b) if it had not converted their motions to dismiss into motions for summary judgment and allowed Fernley sufficient time to conduct discovery related to its claims.

Petitioners make an unavailing attempt to escape this conclusion, which is compelled by the plain language of NRCP 12(b), by suggesting that the district court should not have treated their motions to dismiss as motions for summary judgment on the purported basis that their attached exhibits were public records

subject to judicial notice. (Petition, at 20-21) Not only do Petitioners overlook that the decision to grant or deny a request for judicial notice is discretionary, [*see Mack v. Estate of Mack*, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009)], they ignore that they never formally requested that the district court take judicial notice of any of their exhibits. Fernley opposed Petitioners' motions to dismiss and moved for a continuance pursuant to NRCP 56(f) because Petitioners had relied on exhibits that raised significant factual questions, which made discovery necessary. (PA 1:75-2:294).

Although the Legislature (the intervenor below) opposed a continuance by belatedly arguing in its Reply in support of its motion to dismiss that the district court could take judicial notice of its exhibits in order to avoid having to treat the motion as a motion for summary judgment, it made no formal request for such relief.

By contrast, the State (the defendants below) did not object to a continuance, did not claim that the exhibit attached to their motion to dismiss was appropriate for judicial notice, and did not make a formal request for judicial notice.[4] (PA1:15). Moreover, the exhibit attached to the State's motion to dismiss does not even appear to be a public document, but instead appears to have been created specifically for the State's motion to dismiss. (PA 30). The Petitioners actually

[4] Fernley filed a notice of non-opposition by the Petitioners to the motion for a continuance. (RA 1). The State is now arguing, for the first time in this writ proceeding, that the district court abused its discretion in granting a continuance and failing to take judicial notice of the exhibits submitted in support of Petitioners' motions to dismiss. (Petition, at 19-21); *see also Durango Fire Prot., Inc. v. Troncoso*, 120 Nev. 659, 661, 98 P.3d 691, 693 (2004)("we generally will not address an issue raised for the first time on appeal"). At a minimum, given the silence of the State when this matter was pending below, the district court properly exercised its discretion and fulfilled the mandate of NRCP 12(b) by treating their motion to dismiss as a motion for summary judgment and granting Fernley's discovery request.

dance around the fact that the State's exhibit was not a public record in their Petition. (Petition, at 20). ("With the State's motion to dismiss, the State presented information concerning the C-Tax system obtained from the public records of the Department of Taxation."). Of course, it is one thing to say a document is a public record, but it is entirely something else to say that a document created specifically for litigation purposes is a public record, since there is nothing to suggest that document was a public record prior to the commencement of litigation. The State's exhibit to its motion to dismiss was exactly that – a document created specifically in response to the litigation.

Having failed to take the steps required to obtain from the district court the relief they now seek from this Court, Petitioners should not be heard to complain now that the district court somehow abused its discretion or erred as a matter of law when it did not grant them such relief.

Common sense further dictates this result. When the named defendants in an action (*i.e.,* the Department of Taxation and the State Treasurer) asserted no objection to a continuance for discovery purposes, as in this case, an intervenor (*i.e.,* the Legislature) is in no position to protest that discovery would be time-consuming and costly. (Petition, at 18-19, 21). Fernley did not sue the Legislature. Instead, the Legislature voluntarily opted to intervene in this case, over Fernley's objection. (RA 4). Although intervenors are generally treated as if they had originally been parties to the suit, [*see State ex rel. Moore v. Fourth Jud. Dist. Ct.*, 77 Nev. 357, 364, 364 P.2d 1073, 1077 (1961)], the Legislature should not have interjected itself into this dispute if it did not want to endure the burdens of litigation. The district court properly recognized that discovery was crucial to the fair administration of justice and ordered accordingly.

Moreover, the only Nevada authority cited by Petitioners as support for their judicial notice theory is *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 858

P.2d 1258 (1993), which does not even address this issue.[5] Rather, *Breliant* merely recognized that a "court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted." *See Breliant*, 109 Nev. at 847, 858 P.2d at 1261. The relevant question, unanswered by *Breliant*, is the legal effect of a court having considered such documents – *i.e.,* does a motion to dismiss convert into a motion for summary judgment?

At least two of this Court's decisions indicate that a motion to dismiss supported by public records outside the pleadings converts to a motion for summary judgment. First, in *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 648, 668 P.2d 1081, 1084 (1983), the defendants attached the public court records of the plaintiff's criminal offenses and a copy of a news article to their motion to dismiss. Because the district court relied on these matters that were outside the complaint, this Court concluded that the dismissal order should be treated as a summary judgment. *See id*. at 648, 668 P.2d at 1084. Second, in *Bonnell v. Lawrence*, 128 Nev.Adv.Op. 37, at 7-8, 282 P.3d 712, 715-16 (2012), the district court relied on public records that consisted of excerpts from the record of prior litigation between the parties that had been attached to the defendants' motion to dismiss. *See id*. at 7, 282 P.3d at 715-16. The district court granted the motion and, consistent with the requirements of NRCP 12(b), this Court applied the standard of review applicable to summary judgments on appeal. *See id*. at 7-9, 282 P.3d at 715-16. *Montesano* and *Bonnell* therefore suggest, contrary to the position advanced by Petitioners here, that a district court properly treats a motion to dismiss as a motion for summary judgment when it considers public records submitted in support of the

[5] The out-of-state cases relied on by Petitioners are irrelevant because they are not informative on the requirements of Nevada law. (Petition, at 20).

motion. Whether the documents at issue could have been the subject of a request for judicial notice was never discussed in either case, and apparently was inconsequential to the Court's analysis.

In sum, Petitioners have not established any basis on which this Court should invoke its extraordinary power to issue a writ of mandamus in this case. By complying with the express mandate of NRCP 12(b), the district court could not have abused its discretion in any way when it treated Petitioners' motions to dismiss as motions for summary judgment and ordered a continuance for discovery purposes. It is a longstanding principle of Nevada law that "[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *See Round Hill*, 97 Nev. at 603-04, 637 P.2d at 536. Because Petitioners cannot show an abuse of discretion of any kind, let alone an abuse of the magnitude required to support the issuance of a writ of mandamus, their Petition is unsustainable and should be denied.

**B. Sovereign Immunity Does Not Bar Fernley's Claims.**

Petitioners argue that the State is immune from monetary damages on both the federal and state constitutional claims. (Petition, at 24-30.) Petitioners do not argue, and could not properly argue, that the State is immune from injunctive and declaratory relief on either federal or state constitutional claims. Accordingly, only the monetary remedies aspect of Fernley's claims has been challenged on a sovereign immunity theory.

Petitioners also argue that sovereign immunity bars Fernley's state constitutional claims pursuant to NRS 41.032. (*Id.*) For such immunity to apply, the government's actions must "(1) 'involve an element of individual judgment or choice,' and (2) be 'based on considerations of social, economic, or political policy.'" *Ransdell v. Clark County*, 124 Nev. 847, 855, 192 P.3d 756, 762 (2008) (citation omitted). In its Joinder, the Legislature argued, without citation to

authority, that the "administration of the C-Tax system involves an element of official discretion or judgment and is grounded in the creation or execution of social, economic or political policy." (PA 44-45). Yet, 20 pages later in its brief the Legislature switched course and stated that, "there are no grounds to support the assertion that the Department of Taxation and State Treasurer are clothed with anything other than ministerial or administrative powers in carrying out their duties under the C-Tax system. All distributions under the C-Tax system are done in accordance with specific statutory formulas." (PA 65). Although Petitioners want it both ways, the Legislature's admission undercut its own argument and demonstrates that the act of administering the C-Tax system does not involve judgment or discretion, nor does it require the exercise of social, economic or political policy. As the Legislature has admitted, the State is simply administering a mechanical formula put into place by the Legislature in 1997. As such, NRS 41.032 does not apply, and Fernley's claim for monetary damages based on state constitutional claims is not barred by sovereign immunity.

Regardless, issues of sovereign immunity under NRS 41.032 are mixed questions of law and fact. *See Ransdell*, 124 Nev. at 854, 192 P.3d at 761. Accordingly, and taking the allegations of the Complaint as true and construing inferences in Fernley's favor, dismissal at this phase of the case is inappropriate. *Id.*; *See also Rush v. Nevada Indus. Comm'n*, 94 Nev. 403, 407, 580 P.2d 952, 954 (1978) (noting that issues of sovereign immunity should not be "summarily adjudicated" at a motion to dismiss phase). The district court took note of these concerns and accordingly allowed Fernley, through discovery, an opportunity to more fully develop its claims and its responses to Petitioners' Motions to Dismiss.

Finally, with respect to both Fernley's federal and state claims in the underlying action, it must be remembered that dismissal under NRCP 12(b) is appropriate "only if it appears beyond a doubt that [Plaintiff] could prove no set of

facts, which, if true, would entitle it to relief." *Buzz Stew LLC v. City of N. Las Vegas,*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (citation omitted). Importantly, Petitioners have not argued that sovereign immunity precludes declaratory or injunctive relief on Fernley's federal or state constitutional claims. Thus, even if sovereign immunity were to ultimately bar monetary damages on federal or state constitutional claims, that does not mean that Fernley is not entitled to any relief on those claims. Because Fernley may be entitled to some type of relief on those claims, dismissal at this phase of the proceedings was inappropriate, and the district court recognized as much. *Id.* That recognition did not constitute an abuse of the district court's discretion, nor was it arbitrary or capricious, and, accordingly, the Petition should be denied.

### C. Fernley's Claims Are Not Time-Barred By Any Statute Of Limitations.

Petitioners argue that 42 U.S.C. § 1983 imposes a two year period of limitations. (Petition, at 36-44.) Petitioners also acknowledge that this Court has not identified a period of limitations for state constitutional claims. (*Id.*)

Nevada courts have utilized the "continuing violations doctrine" for purposes of determining a statute of limitations for constitutional claims. *See Chachas v. City of Ely*, 615 F.Supp.2d 1193, 1203 (D.Nev. 2009). In that case, the Court held that "a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." *Id.* The doctrine does not apply when there is "a mere continuing impact from past violations." *Id.* However, that exception does not occur in this case because there was not simply one violation in 1997 when the C-Tax system was incorporated, but there are repeated violations every time there is a collection and distribution under the C-Tax formula. *Id.*, at 1204 (applying the continuing violations doctrine to allow a challenge to utility fees that began outside the period of limitations because

the charges continued to a period of time inside the period of limitations). Accordingly, and because the system itself results in a systematic and repeated policy of constitutional violations with every dollar collected and distributed under the C-Tax formula, the inception of the C-Tax system is irrelevant for purposes of a statute of limitations analysis, and Fernley may bring its claims back to the effective date of the C-Tax system in 1997.

Assuming that the "continuing violations doctrine" does not apply and that Fernley's claims are subject to the four-year period of limitations set forth in NRS 11.220, the statute of limitations does not begin to run until a wrong occurs and a party sustains injuries for which relief might be sought. *See Petersen v. Bruen*, 106, Nev. 271, 274, 792 P.2d 18, 20 (1990). Here, and as noted above, every time a dollar is collected and distributed under the C-Tax formula, Fernley's constitutional rights are violated. Accordingly, and again assuming the inapplicability of the "continuing violations doctrine," Fernley's claims would relate back to four years before it filed its Complaint in the underlying case. *Id.*

Finally, Petitioners' position, that a local government must have challenged the C-Tax system within two to four years after its implementation in 1997, would result in an absurd result and would permanently preclude <u>any</u> local government or citizen from seeking judicial redress with respect to the C-Tax system, or indeed, to taking issue with any state law impacting their residents at all. Such a permanent bar to judicial recourse by a local government has been rejected by the Court. *We the People Nevada v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) ("[W]hen possible, the interpretation of a statute or constitutional provision will be harmonized with other statutes or provisions to avoid unreasonable or absurd results.") (citation omitted).

Because Fernley's claims were not time-barred by any applicable statute of limitations, the district court acted well within its discretion in allowing discovery to proceed. Consequently, the Petition should be denied.

**D. Laches Does Not Operate To Bar Fernley's Claims.**

While the doctrine of laches may apply to constitutional claims, especially strong circumstances must exist to sustain the defense when the statute of limitations has not run. *See Bldg. and Const. Trades Council of N. Nev. v. State ex. rel. Public Works Bd.*, 108 Nev. 605, 611, 836 P.2d 633, 637 (1992). The defense requires more than just a delay in bringing a legal challenge, but rather must be a delay that disadvantages another. *Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997).

To determine whether a claim is barred by laches, a court must consider (1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others. *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d. 1112, 1125 (2008). The applicability of laches turns on the specific facts of each case. *Price*, 113 Nev. at 412, 934 P.2d at 1043.

None of these factors exist in this case. Fernley has endeavored to find a solution to its C-Tax inequities. Fernley has sought legislative relief, and has sought adjustments from Lyon County. (PA 4 (Complaint, ¶16)). All such efforts have been unsuccessful. Fernley has not delayed its efforts to seek relief. Moreover, and as discovery is expected to show, Fernley has not acquiesced in its condition. Fernley has actively, albeit unsuccessfully, sought a C-Tax adjustment before both the executive and legislative branches of state government. Finally, it can in no way be said that any delay prejudiced other participants in the C-Tax system. Taking the allegations of the Complaint as true, Fernley has received a

disproportionately small share of C-Tax distributions. By definition, that means that other participants in the C-Tax system have received a disproportionately large share. If anything, any delay in bringing the underlying action was beneficial, not prejudicial, to other C-Tax participants, as it allowed them excess operating revenues that otherwise should not have been available.

For all of these reasons, the doctrine of laches does not bar any of Fernley's claims. As such, the district court acted within its discretion in allowing discovery to proceed. The Petition should be denied so as to leave that determination undisturbed.

### E. Fernley Has Standing To Bring 14th Amendment Claims Against The State And Has Adequately Stated A Claim For Relief.

Petitioners have accurately set forth the general rule that a municipality lacks standing to bring a 14th Amendment claim against the State. However, that general rule is not absolute, and there are limited exceptions.

In *City of New York v. New York*, 86 N.Y.2d 286, 291-92, 655 N.E.2d 649 (1995), New York's high court noted that although a municipality is a "mere political subdivision of the State, created by the State Legislature and possessing no more power save that deputed to them by that body," there are nonetheless exceptions to the general lack of standing to bring federal constitutional claims in four circumstances, including where "State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys . . ." *Id.* (citations omitted); *See also Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979) (rejecting the notion that a municipality never has standing to sue the state for violations of the federal constitution); *Fulton Found. v. Wis. Dep't of Taxation*, 108 N.W.2d 312, 317 (Wis. 1961) (holding that public officers may challenge the constitutionality of a statute if it is their official duty to do so or they will be personally affected if they fail to do so); *Sanchez v. City of Modesto*, 145

Cal.App.4th 660, 676 (Cal. Ct. App. 2006) (recognizing an exception to the rule in situations where usual standards for third-party standing are satisfied).

Other courts have identified an exception to the general rule when the issue presented is of great public concern. *See Associated Hospital Serv., Inc. v. City of Milwaukee*, 109 N.W.2d 271, 282 (Wis. 1961); *Thompson v. S.C. Comm'n on Alcohol and Drug Abuse*, 229 S.E.2d 718,719 (S.C. 1976); *Minn. State Bd. of Health v. City of Brainerd*, 241 N.W.2d 624, 628 (Minn. 1976) (quoting *Minn. ex rel. Clinton Falls Nursery Co. v. County of Steele*, 232 N.W. 737, 738 (Minn.1930).

In particular, issues related to taxation are of great public interest and municipalities have been permitted to raise 14th Amendment challenges to them. *Associated Hospital Serv.*, 109 N.W.2d at 282; *Fulton Foundation*, 109 N.W.2d at 285-86. On a motion for reconsideration, the Fulton Foundation court acknowledged that the disparate treatment of taxpayers affected more than just a few taxpayers, but affected the public at large. *Fulton Foundation*, 109 N.W.2d at 286. That court found that "extending special privileges by way of discriminating tax exemptions, which deny the equal-protection-of-the-laws requirement of the Fourteenth Amendment, have a tendency to undermine the faith of citizens in the integrity of their state government." *Id.*

Fernley brought the underlying suit on behalf of its approximately 19,000 residents. As alleged by Fernley, those residents are not receiving the benefit of a legally appropriate share of C-Tax revenues. In fact, Fernley has alleged and believes that discovery will show that its residents are paying significantly more into the C-Tax system than they are receiving from it. (PA 7 (Complaint, ¶39)). Moreover, other local governments, and the numerous residents served by such local governments, may similarly be receiving either too much or not enough in terms of C-Tax distributions, and therefore are deprived of guarantees of equal protection and due process. Such allegations justify an exception to the general rule

on municipal standing to bring 14th Amendment claims, as a matter of taxation that is of great public interest.

Petitioners base their standing argument primarily on *State ex rel. List v. Cnty. of Douglas*, 90 Nev. 272, 524 P.2d 1271 (1974). In that case, Douglas County sought to bring a 14th Amendment claim against the State with respect to the State's efforts to require Douglas County to pay a portion of the expenses of the Tahoe Regional Planning Agency. *Id.* Without much discussion, and in reliance on century-old precedent, this Court held that Douglas County lacked standing to bring a 14th Amendment challenge against the State. *Id.* at 279-280, 524 P.2d at 1275. However, the Court did not consider whether there should be limited exceptions for issues of taxation and great public interest. Moreover, *County of Douglas* did not address a 14th Amendment challenge to a tax collection and distribution scheme. Accordingly, *County of Douglas* is nothing more than the general rule, and does not mean that this Court cannot utilize or even create an exception.

Fernley has standing to allege 14th Amendment claims against the State in the underlying case, as a matter of taxation and great public interest. Accordingly, Petitioners' Motions to Dismiss, or alternatively for summary judgment, with respect to Fernley's standing to bring these claims, was appropriately – albeit only preliminarily – denied by the district court. That determination need not and should not be disturbed by a writ of mandate.

Petitioners also engage in a lengthy argument as to whether the C-Tax system satisfies the rational basis test. (Petition, at 47-56). Again, there are no facts in evidence at this point in the underlying case, as discovery has not even begun.

Petitioners have made the curious argument that because Fernley did not allege a lack of a rational basis for the C-Tax system in its Complaint, its claims fail. No citation of authority was provided for this bald assertion. Nonetheless, Fernley plainly and simply alleged a violation of the Due Process and Equal

Protection clauses of the United States Constitution, which is clearly sufficient for purposes of stating a claim. *See Langevin v. York*, 111 Nev. 1481, 907 P.2d 981 (1985) (noting that because Nevada is a notice pleading state, pleadings are construed liberally to place into issue matters which are fairly noticed to the adverse party).

Assuming for the sake of argument that the rational basis test is the correct test, such an analysis simply cannot be conducted until the facts of the case are developed. For example, in *Dane v. Jackson*, 256 U.S. 589 (1921), relied upon by Petitioners, the United States Supreme Court noted that a Fourteenth Amendment violation required a "flagrant and palpable inequality between the burden imposed and the benefit received . . ." *Dane*, at 598-599. At this point in the underlying case, facts need to be developed before the district court can make a determination of whether such inequality exists. At the very least, and taking Fernley's allegations as true, Fernley received dramatically inequitable distributions of C-Tax revenues as compared to similarly sized jurisdictions. As alleged, Fernley received $143,000 in C-Tax revenues in 2011. (PA 3 (Complaint, ¶ 9)). That same year, Fallon received $1,409,664, Boulder City received $7,935,323, Elko received $11,015,989, West Wendover received $2,275,011, Winnemucca received $3,552,393, Mesquite received $7,046,690, and Ely received $1,142,528. (PA 4 (Complaint, ¶ 12)). On its face, this is a "flagrant and palpable inequality" that rightly survived Petitioners' Motions to Dismiss, or alternatively for summary judgment, until discovery could be had.

The district court properly recognized that Fernley may have standing to pursue its constitutional claims and allowed discovery and has therefore adequately stated a claim for relief. In so doing, the district court acted within its discretion, and not arbitrarily or capriciously. The Petition should be denied so that the discovery allowed by the district court may proceed.

### F. Fernley Has Standing To Bring A Separation Of Powers Claim Against The State.

In its Joinder, the Legislature argued that Article 3, Section 1 of the Nevada Constitution "exists for the protection of state government by prohibiting one branch of state government from impinging on the functions of another branch of state government." (PA 62-63). The Legislature's argument thereafter was difficult to discern, but it seems that the Legislature argued that only a branch of state government has standing to assert a separation of powers claim.

As an initial matter, none of the cases cited by the Legislature stood for that proposition. Moreover, to the extent the case law cited by the Legislature stands for the proposition that the separation of powers clause does not apply to the powers of local government, that is irrelevant, as Fernley's separation of powers claim is grounded on the premise that the legislative branch of state government unconstitutionally delegated its authority to appropriate funds to the executive branch of state government. (PA 668-670 (Exhibit 2 to Fernley's Opposition to the Legislature's Joinder, pp. 9-11)).

Regardless, cases cited by the Legislature seem more appropriately to stand for a proposition that a local government lacks standing to challenge certain decisions in which the State itself takes or gives rights or powers to a local government. *See Cnty. of Douglas*, 90 Nev. 272, 524 P.2d 1271 (1974) (holding that a local government could not bring a state due process claim based on a taking of property by the state). However, that does not mean that a local government cannot allege that the state government is acting outside the confines of its constitutionally defined scope of authority. That is precisely why a local government can allege a constitutional violation by the State based on Article 4, Section 20 and 21 of the Nevada Constitution. *See City of Reno v. Cnty. of Washoe*, 94 Nev. 327, 580 P.2d 460 (1978). The rationale for allowing an Article 3, Section

1 challenge is the same. Fernley is not alleging that the State unconstitutionally gave or took away a power of a local government; rather, Fernley is alleging that the legislative branch of state government unconstitutionally delegated authority to appropriate funds to the executive branch. Accordingly, Fernley has standing to bring a claim based on Article 3, Section 1 of the Nevada Constitution. In so recognizing, the district court did not abuse its discretion, and the Petition should be denied in order that discovery may be had.

### G. Fernley Has Adequately Stated A Claim Based On Article 3, Section 1 Of The Nevada Constitution.

Petitioners argue that dismissal of Fernley's claims is appropriate because the C-Tax system is nothing more than a "tax law" and that the State is simply performing its duties to execute the law as required by the Nevada Constitution. (Petition, at 56-62). This is a gross oversimplification of the C-Tax System, and misunderstands Fernley's separation of powers argument.

The C-Tax system is much more than a simple tax law. It is a complex system whereby revenues are collected from a variety of sources by the Department of Taxation, and then appropriated to local governments by the State based on a complex mathematical formula. *See* PA 660 (Exhibit 2 to Fernley's Opposition to the State's Motion to Dismiss (Consolidated Tax Distribution, Department of Taxation, 1/21/11)); *see also* NRS 370.260 (cigarette tax distribution); NRS 369.173 (liquor tax distribution); NRS 482.180 & 482.181 (government services tax distribution); NRS 375.070 (real property tax distribution); NRS 377.055 (basic city-county relief tax distribution); NRS 377.057 (supplemental city-county relief tax distribution); NRS 360.680 (base allocations); NRS 360.690 (excess allocations); NRS 360.600-360.740 (formula for distribution of C-Tax revenues); NRS 354.598747 (limited adjustments to C-Tax revenues).

It is the appropriation aspect of the C-Tax system that gives rise to the fundamental separation of powers violation. It is true that the legislative branch can delegate rule and regulation making duties to other branches or administrative agencies. *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001). It cannot, on the other hand, delegate its primary functions. *See Carmel Valley Fire Protection Dist. v State*, 20 P.3d 533, 540-41 (Cal. 2001). Delegation of quasi-legislative functions is constitutional, but a delegation that calls for an administrative branch to make a fundamental policy decision is not. *Id.* (citing *Loving v. U.S.*, 517 U.S. 748 (1996)); *Plastic Pipe and Fitting Ass'n v. Cal.Bldg. Standards Comm'n*, 124 Cal.App.4th 1390, 1410 (Cal. Ct. App. 2004).

One of the primary functions of the legislative branch is the power to appropriate funds, the "power of the purse". *State of Nev. Employees Ass'n, Inc. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992) ("Further, it is well established that the power of controlling the public purse lies within legislative, not executive authority."); Nev. Const. art. 4 § 19 ("No money shall be drawn from the treasury but in consequence of appropriations made by law."); NRS 353.230 et. seq. (Appropriations made via bills passed by the Legislature); *Carmel Valley Fire Protection Dist.*, 20 P.3d at 539 (stating that the core functions of the legislative branch include passing laws, levying taxes, and making appropriations). As such, the Legislature may not constitutionally delegate the "power of the purse" to an administrative branch. *Folsom v. Wynn*, 631 So.2d 890, 894 (Ala. 1993). Appropriation determinations involve fundamental, wide policy and discretionary judgments, and cannot be delegated even with clear enough standards. *Id.* at 892-3.

The C-Tax system is set up to collect and appropriate funds without legislative participation or oversight. A review of the history of legislation passed that impacted the C-Tax system since 1997 demonstrates that with one exception, only minor legislative adjustments have been made to the C-Tax system. (PA 678

(Exhibit 3 to Fernley's Opposition to the State's Motion to Dismiss, Legislative Commission's Subcommittee to Study the Allocation of Money Distributed From the Local Government Tax Distribution Account (Assembly Bill 71, 2011 Legislature), Legislative Counsel Bureau, 109-118 (February 1, 2012)). That one exception occurred in 2002, when Assembly Bill 10 of the 17th Special Session of the Legislature resulted in a $4,000,000 adjustment to the City of Henderson's annual base allocation. (Id., at p. 115).

As alleged by Fernley and as discovery will further develop, the C-Tax system is set up to allow the executive branch to appropriate funds to local governments free of legislative oversight or intervention. When there is legislative involvement, and with only the aforementioned exception, it is only to tinker with minor adjustments to the formula. (Id., pp. 109-118). Otherwise, the revenues are collected and appropriated via a complex mathematical formula by the executive branch without Legislative participation. The C-Tax system is appropriation by auto-pilot. The Legislature has abdicated its power of the public purse with respect to the C-Tax system and accordingly, Fernley has stated a claim that Article 3, Section 1 of the Nevada Constitution has been violated.

Taking the allegations of the Complaint as true, and after discovery, Fernley can present a set of facts to the district court to demonstrate how the C-Tax system results in an abdication of legislative authority and effectively appropriates funds without legislative approval. Even under a summary judgment standard, there are questions of material fact as to how the Legislature has overseen and approved the C-Tax system since 1997. Again viewing the allegations in a light most favorable to Fernley, these questions of material fact precluded the entry of summary judgment. In denying the Petitioners' Motions to Dismiss until discovery could be completed, the district court acted within its discretion, and the Petition should be denied accordingly.

## H. Fernley Has Adequately Stated A Claim Based On Article 4, Section 20 Of The Nevada Constitution.

Article 4, Section 20 of the Nevada Constitution provides that the Legislature shall not pass local or special laws pertaining to the assessment and collection of taxes for state, county and township purposes. Petitioners have argued that Fernley fails to state a claim for relief because: (1) Fernley does not provide certain undefined services that would allow for an adjustment; (2) because Article 4, Section 20 does not apply to the distribution of tax revenues; and (3) because the C-Tax system itself is not a local or special law. These arguments are either based on facts that are not yet developed or are otherwise insufficient at this stage of the proceedings to justify dismissal.

As an initial matter, and as noted earlier in this Answering Brief, the type of services provided by Fernley as compared to other local governments is a fact-based question that must be developed during discovery. As noted earlier, there is no requirement that C-Tax revenues be used for any particular purpose and in fact, C-Tax revenues are commonly used by local governments for general operating purposes. (PA 3 (Complaint ¶8)). Trying to tie the use of C-Tax revenues to services reads requirements into the law that do not exist.

As Fernley should have a chance to develop during discovery, the C-Tax system is a mechanical formula designed to preserve the status quo since 1997 and is not tied to the provision of any services. Fernley expects discovery to show that any review by the State (or the Legislature) of how C-Tax funding levels are related to services provided by local governments is effectively non-existent. Regardless, discovery is necessary to establish whether, as Petitioners have repeatedly suggested, there is in fact some correlation between C-Tax revenues and services. Moreover, because the State's suggestion about the funding of services is a fact-

based inquiry, the issue requires a close examination of all local government budgets, which requires the parties to go through discovery.

It is also important to recognize that Article 4, Section 20 was enacted to "remedy an evil into which it was supposed the territorial legislature had fallen in the practice of passing local and special laws for the benefit of individuals instead of enacting laws of a general nature for the benefit of the public welfare." *Clean Water Coal. v. The M Resort LLC*, 127 Nev. Adv. Op. 24, at 13 (2011) (citing to *Evans v. Job*, 8 Nev. 322, 333 (1873)). This Court has noted that "[t]he problem with such lawmaking is that when 'a law affects only one small area of the state, voters in most areas will be ignorant of and indifferent to it.'" *Id.*, (citing to *Mun. City of South Bend v. Kimsey*, 781 N.E.2d 683, 686 (Ind. 2003)). The ultimate purpose of this constitutional provision is "that when a statute affects the entire state, it is more likely to have been adequately considered by all members of the Legislature, whereas a localized statute is not apt to be considered seriously by those who are not affected by it." *Id.* (citations omitted).

Fernley's situation is precisely squared with the purposes of Article 4, Section 20. Fernley is a relatively small, rural city and is the only municipality to incorporate since the implementation of the C-Tax system in 1997. Fernley's C-Tax distributions are undeniably significantly lower than comparably sized municipalities. (PA 3-4 (Complaint, ¶¶ 9-14)). And, as has been demonstrated by way of Fernley's efforts to obtain a C-Tax adjustment, there is very little concern over Fernley's situation by anyone outside of Fernley. While Fernley has attempted to seek redress in the Legislature, and submitted a bill to the Legislature in 2011, that bill did not even get a committee vote and can hardly be said to have been "considered seriously" by the Legislature as a whole. (PA 4 (Complaint, ¶16)). Further, the Legislature's intervention in and vociferous efforts to dismiss this case is certainly indicative of how that body feels about Fernley's concerns.

The State argued below that the C-Tax system is not special or local "because it is applied to Fernley in the same manner as any other city incorporated after its passage." (PA 24 (Motion to Dismiss, p. 10)). This ignores the fact that Fernley is the only municipality to incorporate since the implementation of the C-Tax system and that the root of the problem is that Fernley's base allocation is so low that there is no opportunity for a meaningful adjustment. The State's position ignores that Fernley, as a late arrival to the C-Tax system, started from a handicap that other participants did not experience. Fernley is simply not on equal footing with other participants in the C-Tax system and therefore, as applied to Fernley, the C-Tax system is a special or local law. *See Clean Water Coal.*, at 16 (holding that "the determination of whether a law is local or special is based on how it is applied, not on how it actually operates.") (citation omitted).

For example, Fernley formally asked the Department to articulate the manner in which it could seek an adjustment of its C-Tax revenues. (PA 576 (Exhibit 4 to Fernley's Opposition to the State's Motion to Dismiss)). The Department responded in writing. (PA 579 (Exhibit 5 to Fernley's Opposition to the State's Motion to Dismiss)). In summary, the Department noted that adjustments are appropriate in two circumstances. First, an adjustment is appropriate pursuant to NRS 360.740, which allows a local government created after July 1, 1998 to petition the Nevada Tax Commission for additional revenues if that local government provides certain services. NRS 360.740(1); (PA 579 (Exhibit 5 to Fernley's Opposition to the State's Motion to Dismiss)). It should be noted that this is no guarantee of an adjustment, as the request must be considered not only by the Department, but also by the Committee on Local Government Finance and the Nevada Tax Commission. NRS 360.740(1) & (4). Regardless, any requests for an adjustment made pursuant to NRS 360.740 must be made within a year of the

creation of the local government or the local government. NRS 360.740(2). Since Fernley incorporated in 2001, that option is not available.

The only other option for an adjustment is set forth in NRS 354.598747. (PA 579 (Exhibit 5 to Fernley's Opposition to the State's Motion to Dismiss)). That statute allows for an adjustment if one local government "assumes the functions" of another local government. NRS 354.596747(1). However, this section does not address the situation that Fernley is in – when a local government has a base allocation that is so low that only a significant adjustment will provide relief, it is simply unrealistic to expect another local government to give up a significant share of its revenues, even if there is an agreement to assume some services. As alleged by Fernley, and as discovery is expected to show, Lyon County has been unwilling to agree to any meaningful adjustments, and in fact has taken no action on even relatively small requests for adjustments. (PA 4 (Complaint, ¶16)); (PA 583 (Exhibit 6 to Fernley's Opposition to the State's Motion to Dismiss, Lyon County Commission Agenda, March 3, 2011 Agenda Item #22) (showing the Lyon County Commission tabling Fernley's request for additional C-Tax money to be used for road construction)). In other words, the supposed relief available to Fernley according to Petitioners is nothing more than a mirage.

Regardless, and as noted earlier, C-Tax revenues do not need to be used for the provision of any particular service and can be used for general operating purposes. (PA 3 (Complaint, ¶8)). Accordingly, NRS 354.598747, in addition to being an unrealistic option for meaningful adjustment, arbitrarily precludes a local government from seeking greater revenues when they may have needs that are unique to their situation and are not based on delineated services.

Ultimately, a system that "on its face advances statewide objectives" but burdens one particular entity is a local or special law for purposes of Article 4, Section 20. *Clean Water Coal.*, 127 Nev. Adv. Op. 24, at 18 (citations omitted).

The C-Tax system, on its face, appears to advance statewide objectives of providing collection and distribution of certain taxes to local governments. But the system heavily burdens the only municipality to incorporate since its implementation in 1997 by providing no avenues for meaningful adjustment.

Finally, with respect to Petitioners' argument that Article 4, Section 20 does not apply to the distribution of tax revenues, it should be noted at the outset that the C-Tax system is both a collection and distribution scheme. Collection and distribution are inextricably intertwined. This is not a system where taxes are collected and thereafter appropriated by the Legislature for various purposes. This is, instead, a system where taxes are collected and distributions of those same taxes are directed to specific locations without deviation or legislative participation. Moreover, Fernley has alleged that the collection of revenues from its residents vastly exceeds the amounts distributed is a violation in and of itself. (PA 7 (Complaint, ¶39)).

Treating the C-Tax system as exclusively a "distribution" system free from the constitutional limitations set forth in Article 4, Section 20 of the Nevada Constitution would effectively allow the circumvention of constitutional protections. For example, taken to a logical conclusion this would mean the Legislature could pass a law that all sales tax revenue collected throughout the state should go, by statute and without further legislative approval, to the City of Las Vegas. According to Petitioners' interpretation, this would pass constitutional muster under Article 4, Section 20, because it pertains only to the distribution of tax revenue. However, such legislation would clearly burden all local governments except the City of Las Vegas, and runs contrary to Article 4, Section 20's purpose to "remedy an evil into which it was supposed the territorial legislature had fallen in the practice of passing local and special laws for the benefit of individuals instead of enacting laws of a general nature for the benefit of the public welfare." *Clean*

*Water Coal.*, 127 Nev. Adv. Op., at 13 (citing to *Evans v. Job*, 8 Nev. 322, 333 (1873)).

For all of these reasons, and taking Fernley's allegations as true and reviewing the pleadings in a light most favorable to Fernley, Fernley has stated a claim for relief pursuant to Article 4, Section 20 of the Nevada Constitution. Accordingly, the district court acted within its discretion in denying Petitioners' Motions to Dismiss, and the Petition should be denied.

## I. Fernley Has Adequately Stated A Claim Based On Article 4, Section 21 Of The Nevada Constitution.

Article 4, Section 21 of the Nevada Constitution provides as follows: "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State."

As noted in the prior section of this Answering Brief, the C-Tax system is a local or special law. Even if it is not, it still must be analyzed for constitutional compliance with Article 4, Section 21. *See Clean Water Coal.*, 127 Nev. Adv. Op. at 25 ("Even if this court were to credit the State's argument that A.B. 6, section 18 involves only fees, not a tax, taking it outside Article 4, Section 20, the measure still fails because it violates Article 4, Section 21, which mandates general laws in all cases where they 'can be made applicable.'").

To determine whether a general law could be applicable for purposes of Article 4, Section 21, the Court must evaluate "whether the challenged law 'best subserve[s] the interests of the people of the state, or such class or portion as the particular legislation is intended to affect." *Id.*, at 26 (citing to *State v. Irwin*, 5 Nev. 111, 122 (1869)). Relevant to the inquiry is whether "the general legislation existing was insufficient to meet the peculiar needs of a particular situation." *Id.*, (quoting from *Cauble v. Beemer*, 64 Nev. 77, 96, 177 P.2d 677 (1947)). Local or

special laws are typically upheld where "an emergency situation existed within a certain county or locality and a general law could not apply to address the situation because only that county or locality was affected." *Id.* (citations omitted). Importantly, "political differences that might make it difficult to agree on a generally applicable law" are insufficient to withstand constitutional scrutiny. *Id.* at 28.

Petitioners argue that a general law cannot be made applicable because the clear purpose of the C-Tax is to distribute State revenue to government entities that provide needed services such as law enforcement and fire protection. No citation of authority or any evidence whatsoever is cited for Petitioners' claim, and it must fail on that ground alone.

Regardless, and if services are so germane to the provision of C-Tax revenues, then why are local governments not precluded from using C-Tax revenues for anything but these "needed services"? And, if funding these services is so critical, why would the Legislature set up the C-Tax system in the first place and take no active role in reviewing the budgets of local governments and appropriating funds as necessary to fund such needed services? See NRS 354.598 (providing that local government budgets are submitted to the Nevada Tax Commission, but making no requirement that such budgets be approved by the State or the Legislature).

Ultimately, a general law can easily be made applicable with respect to the collection and appropriation of the six taxes that make up the C-Tax system. Instead of an automatic appropriation based on a complex mathematical formula that preserves the status quo in place in 1997, the taxes could simply be collected, deposited into a fund segregated for local governments, and appropriated biennially by the Legislature after a careful review of local government budgets. While this might result in challenges from "political differences," that has been found by this

very Court to be an insufficient reason to satisfy constitutional requirements. *Clean Water Coal. 127 Nev. Adv. Op.* at 28.

This Honorable Court has also struck down similar legislation in *Anthony v. State*. 94 Nev. 338, 580 P.2d 939 (1978). In *Anthony*, the challenged law provided that in a county with more than 200,000 people, 68.5% of certain tax revenues "shall be apportioned to the largest city and the remainder among the other cities in proportion to their respective populations." *Id.* at 340, 580 P.2d at 940-41. In rejecting that law pursuant to Article 4, Section 20, this Court found that the "Legislature's intent, though commendable, was to protect the fiscal policy of Clark County and not the financial ability of smaller cities to provided needed services." *Id.* at 341, 580 P.2d at 941. Moreover, in finding that a general law could be made applicable to the situation, the Court stated that "[i]t is clear to us that the only purpose of the amendments is to perpetuate the existing state of affairs in Clark County." *Id.* The situation here is the same. The C-Tax system perpetuates the state of affairs in place in 1997 and serves only to protect the fiscal policy of participants in the system in 1997, to the exclusion of new local governments.

Again taking the allegations of the Complaint as true as is appropriate when reviewing a motion pursuant to Rule 12(b), after discovery, Fernley can present a set of facts to the district court to demonstrate how the C-Tax system is not of general and uniform operation, although it could be in different circumstances. Even under a summary judgment standard, there are questions of material fact as to whether the C-Tax system is not general and uniform, and whether there is a more general and uniform way to administer the C-Tax system. Again viewing the allegations in a light most favorable to Fernley, these questions of material fact precluded the entry of summary judgment. For all of these reasons, Fernley has adequately stated a claim for relief based on Article 4, Section 21 of the Nevada

Constitution, and the district court acted within its discretion in denying Petitioners' Motions to Dismiss. The Petition should be denied.

**J. Consideration of C-Tax Issues by the Legislature in 2013.**

This Court ordered Petitioners to supplement their Petition with comments on any pending legislation on the C-Tax system in 2013, and to identify any important deadlines with respect to the consideration of such legislation.

In their supplement to the Petition, the Petitioners provided the proposed 120 day calendar for the 2013 legislative session, and asked that this Court "resolve the issues in the petition as soon as is reasonably possible before these important deadlines in the legislative process." (Petitioners Supplement to Petition for Writ of Mandamus, 3). Petitioners seem to suggest that there is therefore some urgency to a final disposition of this case on the merits prior to, or at least during, the legislative session in 2013. Such is not the case.

In this Court's consideration of timing issues it may be helpful to have some further context with respect to expected legislative consideration of C-Tax legislation. In 2011, the Legislature passed Assembly Bill 71, which created an interim subcommittee of the Legislative Commission to study the C-Tax system and make recommendations for legislation in 2013.

That subcommittee has met at various times during 2012, and Fernley has participated in those proceedings. Ultimately, the subcommittee recommended Bill Draft Request ("BDR") 32-247 for consideration by the Legislature in 2013. Although Fernley advocated for a thorough evaluation of the equity in the C-Tax system, BDR 32-247 makes only minor adjustments to the existing formula, effectively leaving the status quo of the C-Tax system in place. Fernley memorialized its comments in a letter to the subcommittee chairwoman dated October 17, 2012. (RA 27)[6]

[6] The order for which mandamus is sought by Petitioners was dated October 12,

At this point, and based on the recommendations (or lack thereof) from the subcommittee, it appears that the 2013 session holds little hope of a meaningful adjustment to C-Tax distributions for Fernley. At the very least, there does not appear to be any legislative appetite to undertake a comprehensive review of C-Tax distributions and whether those distributions make sense given the needs of various local governments. This makes it all the more important that the District Court's discretionary continuance of Petitioners' motions to dismiss be upheld so that Fernley can have a chance to prove its case on the merits, as it unfortunately appears that a lawsuit is the only option left for Fernley to seek a meaningful C-Tax adjustment. In other words, to the extent this Court may have questions as to whether legislation will impact the underlying case, that does not appear likely at this point.

Accordingly, Fernley expects to participate in the legislative process in 2013, but this Court should recognize that the 2013 legislative session, and the deadlines therein, are of limited relevance to the ultimate disposition of this case. Nonetheless, it has now been five months since Fernley filed its complaint, and discovery has yet to begin. Fernley stands ready to begin an immediate prosecution of its case once the Petition is ruled upon by this Court.

Although the Petitioners would like to create a sense of urgency with this Court, that attempt is a red herring. The underlying case is a constitutional challenge to a state law. The district court appropriately granted Fernley's motion for a continuance to allow for discovery. While the Petitioners are clearly doing

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2012. This exhibit is dated October 17, 2012. Accordingly, this exhibit has not yet been submitted to the district court, although Fernley intends to rely on this exhibit once discovery commences. Moreover, this exhibit is directly relevant to rebut the Petitioners' suggestion that the issues in the underlying case may be resolved by the Legislature in 2013. Accordingly, this exhibit is properly before this Court pursuant to NRAP 30(d).

everything possible to prevent discovery, including attempting to create a sense of urgency where none exists, the reality is that the Petitioners simply would like this case to go away before the legislative session so that they will not have to deal with the possibility of meaningful reform to the C-Tax system. Fernley deserves a full and fair opportunity to present its case. If the ultimate disposition of this case results in a grant of Fernley's relief, there is certainly nothing that would prevent the Legislature from addressing that issue in a general session or otherwise in a special session.

In the November 2012 general election, the voters approved State Question #1. As a result, Article 4, Section 2A of the Nevada Constitution now provides that the Legislature has the ability to convene itself into special session. The effective date of that Section was November 27, 2012. Additionally, the Governor retains the power to call a special session of the Legislature pursuant to Article 5, Section 9 of the Nevada Constitution. While special sessions of the Legislature are rare, this Court should be aware that if Fernley ultimately obtains relief that requires a legislative reform to the C-Tax system beyond the 2013 legislative session, there are multiple avenues to enact such reform via a special session. Accordingly, the Petitioners efforts to have an expedited dismissal of this case prior to the 2013 legislative session is nothing more than an attempt to put the convenience of the Petitioners above Fernley's right to a full and fair opportunity to prove its case.

## III. CONCLUSION

Based upon the foregoing, Fernley respectfully requests that the Petition for Writ of Mandamus be denied in every respect, and that, accordingly, the district

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court's preliminary denial of Petitioners' Motions to Dismiss or for summary judgment and its grant of Fernley's Motion for a Continuance to complete discovery be left undisturbed.

DATED this 3rd day of December, 2012.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Joshua J. Hicks*

Joshua J. Hicks, Nevada Bar No. 6679
jhicks@bhfs.com
Clark V. Vellis, Nevada Bar No. 5533
cvellis@bhfs.com
Sean D. Lyttle, Nevada Bar No. 11640
slyttle@bhfs.com
50 West Liberty St., Suite 1030
Reno, Nevada 89501
Telephone: (775) 622-9450
Attorneys for Real Party in Interest,
City of Fernley

# CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief To Petition For Writ Of Mandamus complies with the formatting requirements of Rule 21(d), NRAP 32(a)(4), and NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the Answer has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point font and Times New Roman type.

2. I hereby certify that I have read the foregoing Answer, and to the best of my knowledge, information, and belief, it is not frivolous 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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.

DATED this 3rd day of December, 2012.

**BROWNSTEIN HYATT FARBER SCHRECK, LLP**

By: */s/ Joshua J. Hicks*

Joshua J. Hicks, Nevada Bar No. 6679
jhicks@bhfs.com
Clark V. Vellis, Nevada Bar No. 5533
cvellis@bhfs.com
Sean D. Lyttle, Nevada Bar No. 11640
slyttle@bhfs.com
50 West Liberty St., Suite 1030
Reno, Nevada 89501
Telephone: (775) 622-9450
Attorneys for Real Party in Intrest,
City of Fernley

## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Brownstein Hyatt Farber Schreck and that on the 3rd day of December, 2012, pursuant to NRAP 25(c) and the Order Directing Answer filed November 13, 2012, I served a true and correct copy of the foregoing Answering Brief To Petition For Writ Of Mandamus via electronic service to:

Catherine Cortez Masto
Attorney General
Andrea Nichols Senior Deputy Attorney General
anichols@ag.nv.gov
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Brenda J. Erdoes
Legislative Counsel
Kevin C. Powers
Chief Litigation Counsel
kpowers@lcb.state.nv.us
Legislative Counsel Bureau, Legal Division
401 South Carson Street
Carson City, NV 89701

And by United States Mail, postage prepaid to:

The Honorable James T. Russell
First Judicial District Court
885 East Musser Street, Room 3061
Carson City, NV 89701

*/s/ Kelly J. Chouinard*
An employee of Brownstein Hyatt Farber Schreck