IN THE SUPREME COURT OF THE STATE OF NEVADA

SCENIC NEVADA, INC.

Appellant,

Case No. 65364

v.

CITY OF RENO, a Political Subdivision of the State of Nevada,

Respondent.

_____/

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

All parent corporations and publicly-held companies owning 10% or more of the party's stock: None.

Names of all firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Mark Wray.

If litigant is using a pseudonym, the litigant's true name: None.

Dated this 22nd day of December, 2014.

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment under NRAP 3A(b)(1). Judgment was entered March 27, 2014. *JA 476.* Notice of Entry of Judgment was filed March 28, 2014. *JA 503.* Notice of Appeal was filed March 28, 2014. *JA 507.*

II

ISSUES FOR REVIEW

This appeal raises two issues:

1. Does the initiative enacted by the voters of Reno that bans construction of billboards and prohibits issuance of permits for their construction merely amount to a cap on the number of billboards?

2. If the voters enact a municipal initiative banning construction of billboards and prohibiting the issuance of permits for their construction, does it violate the Nevada Constitution for the city council to amend, annul, repeal, set aside or suspend that initiative within the first three years of its passage?

III

STATEMENT OF THE CASE

A. Nature of the Case

This is an action to invalidate the City of Reno digital billboard ordinance, which unconstitutionally violates the voters' initiative banning the construction of billboards and prohibiting the issuance of permits for their construction.

B. Course of the Proceedings

On October 24, 2012 the Reno City Council adopted Ordinance No. 6258, entitled "Digital Off-Premises Advertising Displays, including Light-Emitting Diode (LED)", authorizing the issuance of permits for construction of digital billboards in Reno (hereafter, the "digital billboard ordinance"). *JA 520.* The ordinance was to take effect January 24, 2013.

On November 16, 2012, Scenic Nevada filed a "Complaint for Judicial Review to Invalidate City of Reno Digital Billboard Ordinance." *JA 001.*

On December 12, 2012, the City adopted a moratorium on accepting applications for permits to construct digital billboards until this litigation is resolved. *JA 1412.*

On March 29, 2013, District Judge Patrick Flanagan granted the City's motion to dismiss Scenic Nevada's complaint, with leave to amend. Judge Flanagan held that Scenic Nevada's challenge to the digital billboard ordinance could not proceed by petition for judicial review and had to go by complaint for declaratory relief. *JA 028.*

On April 15, 2013, Scenic Nevada filed its "First Amended Complaint to Invalidate City of Reno Digital Billboard Ordinance." *JA 032.* On July 23, 2013, the district court denied the city's second motion to dismiss. *JA 057.*

After initially filing an answer on July 30, 2013, the City filed an amended answer to Scenic Nevada's first amended complaint on August 6, 2013. *JA 068.*

On February 18, 2014, Judge Flanagan denied the City's motion for summary judgment. *JA 142.*

On February 24, 2014, the district court held a one-day bench trial. *JA 145.*

C. Disposition Below

On March 27, 2014, the district court issued a written decision and order granting judgment in favor of the City and against Scenic Nevada. *JA 476.*

IV

STATEMENT OF FACTS

Following repeated attempts by Reno citizens to persuade the Reno Planning Commission and Reno City Council to enact stronger billboard controls, a grassroots, volunteer organization called "Citizens for a Scenic Reno" ("CFASR") formed on January 20, 2000. *JA 187-191, 1853.* CFASR changed its

name to "Citizens For A Scenic Northern Nevada" and in September 2002, adopted its current name, "Scenic Nevada". *JA 215.*

On March 29, 2000, CFASR filed with the City Clerk an Initiative Petition to qualify a measure for the ballot that would ban the construction of billboards. *JA 587.* By July 25, 2000, CFASR had collected 7,381 valid signatures, above the required minimum of 6,790 signatures, which represented 15% of the votes cast in the previous citywide election, in order to qualify its initiative for the 2000 general election ballot. *JA 1841 (Trial Exhibit 223).*

Ballot Question R-1 read:

> The construction of new off-premises advertising displays/billboards is prohibited, and the City of Reno may not issue permits for their construction.

JA 587.

On August 24, 2000, Eller Media Co. sued the City to remove the initiative from the ballot. On October 14, 2000, the Hon. Jerome Polaha, District Judge, found in favor of the City and against Eller Media. The initiative remained on the ballot. *JA 193.* Eller Media appealed. On Dec. 17, 2002, this Court affirmed, in *Eller Media Co. v. City of Reno,* 118 Nev. 767, 59 P.3d 437 (2002), holding that the billboard petition was legislative in character, a proper subject for an initiative petition, and reflected a citywide change in policy towards off-premise advertising. A petition for rehearing was denied Feb. 6, 2003. *JA 1814 (Trial Exhibit 221).*

At the polls on November 7, 2000, of the 57,782 votes cast, 32,765, or 57%, voted in favor of Ballot Question R-1. *JA 193; JA 1843 (Trial Exhibit 223).* The results were certified by the Reno City Council on November 14, 2000, and Ballot Question R-1 became Reno Municipal Code ("RMC") §18.06.920(A) (later the numbering was changed to §18.16.902(a)), entitled "Restrictions on Permanent Off-Premises Advertising Displays". *JA 193, JA 519 (Trial Exhibit 2).*

RMC §18.16.902(a) states:

> The construction of new off-premises advertising displays/billboards is prohibited, and the City of Reno may not issue permits for their construction.

JA 060, 519 (Trial Exhibit 2).

The ink was barely dry on the law before the City issued permits for construction of new billboards. *JA 194-202; JA 1800-1824 (Trial Exhibit 219).* In 1999, Outdoor Media Dimensions, a billboard company, had sued the City in federal court. *JA 196, 1802.* In the beginning of December, 2000, less than a month after the citizens of Reno enacted the initiative, the City and Outdoor Media entered into a settlement for the City to pay $50,000 and for Outdoor Media to be issued permits for the construction of 12 billboards. *JA 1810-1811.* In exchange, Outdoor Media dismissed the lawsuit on December 13, 2000. *JA 1808, 1814.*

Thereafter, the City also settled lawsuits with other billboard companies. *JA 199.*

The settlement with Clear Channel Outdoor related to a municipal project called ReTRAC. *JA 200.* ReTRAC was a trench built with municipal bond money through downtown Reno so that the freight and passenger trains would pass the downtown casinos below ground. *JA 199-200; JA 1553 (Trial Exhibit 202).* Clear Channel billboards were removed for ReTRAC, and instead of compensating Clear Channel for them, the City issued permits, or receipts, for future billboards. *JA 201.*

The settlement with YESCO in Second Judicial District Court CV02-03571 gave YESCO permits for future billboards as well. *JA 201-202.*

The City thus put itself into the position of needing to enact ordinances to allow future billboard construction, as part of settlements the City made with

billboard companies, despite the citizens' initiative banning construction and permits for new billboards.

> Q Okay. So do you have a handle, you think, on the why question, why the city did not want to literally stop the construction of new billboards?
>
> A Yes. They had a different agenda. They could not pay for all the billboards that they wanted to have come down. So they could not allow the ballot initiative to stand. They could not allow no new construction and they could not allow – they could not stop handing out permits, because they didn't want to pay for the billboards that they wanted to have come down.

JA 202:11-20.

The first of these ordinances was adopted January 22, 2002, as Ordinance No. 5295. The ordinance codified the ballot initiative as RMC §18.06.920(A), *see JA 542 (Trial Exhibit 4)*, but also added a new subsection, RMC §18.06.920(B), to carry out the agenda with the billboard companies. Subsection (B) stated, in relevant part:

> In no event shall the number of off-premises advertising displays exceed the number of existing off-premises advertising displays located within the city on November 14, 2000. This number shall include all applications for off-premises advertising displays approved in final action by the City on or before November 14, 2000, but unbuilt as well as those applications approved by a court of competent jurisdiction.

The City and the district court came to refer to subsection (B) as the "conforming ordinance", *see JA 478*, as if to signify "conforming" of the ballot initiative with the City's perceived need to appease the billboard companies. The addition of subsection (B), immediately following the subsection codifying the citizens' initiative, introduced the key concept that the City would come to rely upon later as the City's interpretation of the ballot initiative; to wit, that "no new billboards" meant a cap on the number but did not prohibit new billboards from

being constructed to replace ones that were removed. *JA 478:4-6.* As the district court said about subsection (B), "this interpreted the 'no new billboards' language in the Initiative to mean that no *additional* billboards could be built in the City of Reno, thus capping the number of billboards in the City." *Id.*

The second of the ordinances adopted in the wake of the citizens' initiative was Ordinance No. 5461, adopted June 11, 2003, which became known as the "banking and relocation ordinance." *JA 1569 (Trial Exhibit 203).* This ordinance, subsequently codified in RMC §18.16.908, formally enacted a system allowing a billboard company to remove a billboard in one location and "bank" a receipt for up to 10 years until a new permitted location could be found. *JA 1572.* Using these "banked" receipts, a billboard company could construct a new billboard, often in a new location, where no billboard stood before, by obtaining a new building permit for the new billboard. *JA 204, 1572; JA 1607 (Trial Exhibit 207).*

The City Council's adoption of the banking and relocation system effectively repealed the ballot initiative by allowing City staff to issue permits for new billboard construction when existing billboards are removed. *JA 35.* Specifically, the ordinance allowed for construction of new billboards and for permits to be issued for their construction. It provided that a billboard "may be relocated to a permitted location" as long as two permits are obtained; one to remove the old billboard and one to relocate the new billboard to a new location. *JA 1572.* The billboard permit "bank" was to provide city staff a mechanism for tracking permits of removed billboards. *Id.*

Scenic Nevada objected, but those objections fell on deaf ears. On May 8, 2003, the City Attorney's Office prepared a memo to the Mayor and City Council on "Constitutionality of Billboard Regulations and Legality of Ordinance Allowing Relocation of Billboards." *JA 1825-1830 (Trial Exhibit 220).* The memo states:

> There exists substantial debate regarding the meaning of Question R-1and whether its language can be read to allow the relocation of an existing billboard. Doug Smith, Chairman of Scenic Nevada, has adamantly insisted that relocation of existing billboards is prohibited under the initiative, and that it was never the intent of the drafters of the initiative to merely place a cap on the number of billboards. *See* letter from Doug Smith, dated January 8, 2003 (Exhibit A).

JA 1827. At trial, the judge asked Scenic Nevada director Lori Wray about the position of Scenic Nevada on the banking and relocation ordinance.

> Q The next phrase says, more increase the number of allowable signs, what did you mean by that?
>
> A Kind of the same thing, that they wanted – the City Council called it a deal. The 2002 ordinance was a deal with the industry. So that we'll cap place a cap on it and you can bank and relocate and they're going to be allowed in all of these locations, and that's the deal, which is what they all agreed to.
>
> And then in this meeting, they said to us, you know, this is the deal that everybody agreed to. And we said we didn't agree to it, but the City did and they passed the ordinance over our objections.

JA 271:24-272:11.

After undermining the ballot initiative with the conforming, banking and relocation ordinances, the City took a further step in 2008, with the introduction of the digital billboard ordinance. *JA 217-218; JA 1053 (Trial Exhibit 29).* Digital billboards are computer controlled variable message electronic signs whose informational content can be changed or altered by means of computer-driven electronic impulses (including "light emitting diodes" or "LED" light bulbs). LED bulbs turn off and on every eight seconds to display a different advertisement in a sequence of eight rotating advertisements, day and night. *JA*

220, JA 520 (Trial Exhibit 3). Digital billboard displays are by definition a new type of billboard, using new technology. *JA 223; JA 1453 (Trial Exhibit 200).* In 2

Up to that time, all billboard lighting in Reno was required to be directed toward the billboard, and not toward the street. This requirement was codified in RMC§18.16.905(l), which effectively made digital billboards illegal in Reno. In contrast to a traditional, or static, billboard where light shines onto the display, the lighting of a digital billboard shines toward the public roads. *JA 215-216, JA 542 (Trial Exhibit 4).*

On February 13, 2008, Councilman Dwight Dortch, at the behest of the billboard industry, introduced an agenda item to direct City staff to initiate a text amendment that would eliminate RMC §18.16.905(l) and allow the construction and permitting of new digital billboards. *JA 217-218; JA 1053 (Trial Exhibit 29).*

Over the next four years, Scenic Nevada fought against the proposed digital billboard ordinance by participating with city staff and representatives of the billboard industry in at least 16 workshops and hearings on the proposed ordinance. *JA 177, 185, 226, 235; JA 1062 (Trial Exhibit 31); JA 1877.* Dortch pushed the interests of the billboard industry by seeking to lessen or even eliminate new restrictions on digital billboard construction. *JA 228; JA 1596 (Trial Exhibit 206).* Scenic Nevada objected that the 2000 ballot initiative prohibited the city from allowing new billboard construction, including new construction of digital billboards. *JA 37, 62, 176, 239, 242, 243; JA 1198 (Trial Exhibit 48); JA 1207 (Trial Exhibit 50); JA 1889 (Trial Exhibit 229); JA 1964 (Trial Exhibit 235).*

Beginning with the initial draft in 2008 and at all times, the text amendment for the proposed digital billboard ordinance was based upon, and dependent upon, the City Council's adoption of the 2002 and 2003 "conforming" and banking and relocation ordinances. *JA 227; JA 283:6-8* (testimony of City planner Claudia

Hanson confirming that to build a digital billboard requires banked receipts, or, billboard removals and relocations - *JA 326:12-23*).

In November 2011, during the administrative battles, Scenic Nevada pressed the Reno Planning Commission to vote on halting proceedings toward the digital billboard ordinance due to the citizens' 2000 ballot initiative. The motion failed by a 2-3 vote. A divided Planning Commission then recommended a digital billboard ordinance to the City Council. Scenic Nevada appealed. *JA 39, 62, 240; JA 1132 (Trial Exhibit 38), JA 1146 (Trial Exhibit 39), JA 1151 (Trial Exhibit 40); JA 39, 62, 1163 (Trial Exhibit 41).*

After more workshops, members of the City Council and representatives of the billboard industry came to an understanding on how they wished to proceed and the City Council held a public hearing on the draft ordinance on July 18, 2012, where Scenic Nevada's appeal finally would be heard. Consistent with its opposition at hearings for the past four years, Scenic Nevada opposed the draft and presented arguments against its passage. The City Council approved the first reading of the draft ordinance over Scenic Nevada's objections. *JA 246; JA 1952 (Trial Exhibit 231).* More continuances followed, for more rewrites, as Scenic Nevada objected. *JA 41, 63, 251, 252; JA 1959 (Trial Exhibit 232); JA 1962 (Trial Exhibit 233).* Despite those objections, on October 24, 2012, the City Council approved the second and final reading of the digital billboard ordinance. *JA 49, 63.* Scenic Nevada filed the lawsuit November 16, 2012. *JA 1.*

V

SUMMARY OF ARGUMENT

The ballot initiative banning construction of billboards and prohibiting issuance of permits for their construction is an unambiguous expression of legislative intent by the voters of Reno, which the City of Reno will not acknowledge because the City is pursuing a different agenda with the billboard industry. The district court erred in interpreting the citizens' initiative to be

merely a "cap" which allows the City to continue issuing permits for construction of new billboards up to the "cap" amount. The City's digital billboard ordinance incorporates and is dependent upon unconstitutional "conforming" and banking and relocation ordinances adopted by the City in violation of the initiative powers of the people under Nevada Constitution Art. 19, §§ 2.3 and 4. The digital billboard ordinance violates the ballot initiative and the Nevada Constitution.

VI

ARGUMENT

A. Standard of Review

"In the absence of any factual dispute, this court reviews a district court's decision to grant or deny declaratory and injunctive relief *de novo*." *Hernandez v. Bennett-Haron,* 287 P.3d 305, 310 (Nev. 2012), citing *Nevadans for Nevada v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006). The facts of this case are undisputed.

Scenic Nevada also seeks to invalidate a municipal ordinance on grounds that it conflicts with the voter's initiative. "Courts also apply a *de novo* standard of review when interpreting municipal code provisions." *City of Reno v. Citizens for Cold Springs,* 236 P.3d 10, 16 (Nev. 2010).

Scenic Nevada contends the digital billboard ordinance violates the Nevada Constitution. This Court reviews *de novo* determinations of whether a statute is constitutional. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009).

B. The District Judge's Favorable Perception of Billboards Is Not Supported by the Record and *De Novo* Review Is Appropriate

It could be fairly concluded from his written decision that the Hon. Patrick Flanagan, District Judge, did not cast his ballot in the election of 2000 in favor of the ballot initiative to ban construction of new billboards. *JA 476-501.* An inkling of his viewpoint on the subject emerges from the opening paragraph of his

decision, in which he equates economic development with billboards, and offers the results of his independent research at www.visitrenotahoe.com: "The City of Reno drew over 4.6 million visitors in 2013, many of whom are guided to their destination by billboards on the public highways."

The website does not refer to billboards, however, so the statement that visitors use billboards to find their way to Reno is the judge's opinion rather than a finding of fact. Certainly, no evidence to support the judge's opinion was introduced at trial. The evidence was that 57% of Reno voters in 2000 favored a ban on billboard construction. To the extent the ballot box is evidence of a preference, most Reno voters -- people who actually live in Reno -- prefer that construction of billboards ceases.

Nor was there any evidence at trial that visitors, once they are *in* Reno, want to see billboards, and after all, it is billboards *in* Reno that the 2000 ballot initiative actually addresses.

While the district judge wrote that the City's digital billboard ordinance balances "the commercial needs of its business community and the scenic preservation aspirations of its citizens, enhancing both the economy and the community" (*JA 500:22-24*), there is no evidence that billboards enhance the economy of Reno or any other place. Indeed, the City's excuse for the digital ordinance was that trades would help clear the city of billboard "clutter". *JA 265:24-266:6.* Scenic Nevada's description was that "billboards are litter on a stick". *JA 128-141.* Billboards are *not* inherently beneficial, even according to the Nevada Legislature, which adopted laws declaring billboards to be *public nuisances* unless erected in certain areas and in compliance with statutory requirements. *See* NRS 405.020; NRS 410.360(1).

Pronouncements as to the alleged benefits of billboards are set forth at the beginning and end of the district court's decision. *JA 476-501.* These are opinions of the district court rather than findings from facts in evidence. It is

appropriate to apply a *de novo* standard of review to the district court's decision. *Nevadans for Nevada v. Beers*, *supra; City of Reno v. Citizens for Cold Springs, supra.*

C. The Language of the Ballot Initiative Has a Definite and Plain Meaning

The ballot initiative states:

> "The construction of new off-premises advertising displays/billboards is prohibited, and the City of Reno may not issue permits for their construction."

If language is plain and unambiguous, it must be given effect. *State v. State of Nevada Employees Ass'n, Inc.,* 102 Nev. 287, 289-290, 720 P.2d 697, 699 (1986). When a statute uses words which have a definite and plain meaning, the words will retain that meaning unless it clearly appears that such meaning was not so intended. *Balboa Ins. Co. v. Southern Distrib. Corp.,* 101 Nev. 774, 710 P.2d 725 (1985); *City of Las Vegas, v. Macchiaverna,* 99 Nev. 256, 661 P.2d 879 (1983). When examining the plain meaning of a statute, "we presume that the Legislature intended to use words in their usual and natural meaning." *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). "We interpret a clear and unambiguous statute pursuant to its plain meaning by reading it as a whole and giving effect to each word and phrase." *Davis v. Beling*, 278 P.3d 501, 508 (2012).

The first independent clause prohibits the construction of new billboards. The second independent clause prohibits the issuance of permits for their construction. Both independent clauses address prohibition of construction.

Construction has a usual and natural meaning. Construction is a noun that means "the act or process of building something." Merriam-Webster Dictionary, www.m-w.com.

The something that is prohibited from being built is a new billboard. "New" has a usual and natural meaning. "New" means "not old: recently born, built or created." Merriam-Webster Dictionary, www.m-w.com.

A billboard is defined in RMC §18.24.203.570(23) as follows:

> Off premises advertising display. Any arrangement of material, words, symbols or any other display erected, constructed, carved, painted, shaped or otherwise created for the purpose of advertising or promoting the commercial interests of any person, persons, firm, corporation or other entity, located in view of the general public which is not principally sold, available or otherwise provided on the premises on which the display is located. Any display which is composed of at least 80% of on-premises display is an on-premises sign. An off-premises advertising display includes its structure. Off-premises advertising displays are commonly called billboards. (Ord. NO. 5295, § 1, 1-22-02).

JA 536-537.

"Courts must construe ordinances in a manner that gives meaning to all of the terms and language." *Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). Using the ordinary meanings of all of the terms and language of the initiative, the first independent clause prohibits the act or process of building a recently built or created billboard, and the second independent clause prohibits the issuance of a permit for the act or process of building a recently built or created billboard.

Noting that the initiative contains two independent clauses, the district court wrote: "This implies equal attention for both ideas in each independent clause. This provides little assistance to the court." *JA 490:22-23.* On the contrary, the two independent clauses, both aimed at preventing the building of something new, should have assisted the district court. Not only is the act of construction banned; the separate act of issuing a permit for construction also is prohibited. The initiative was designed to prohibit both acts.

D. The Billboard Industry Understands the Plain Meaning of "New" Billboard

Trial Exhibit 211 consisted of copies of building permits for new billboards applied for by YESCO Outdoor Media on May 24, 2011 and Clear Channel Outdoor on July 3, 2012. *JA 1613-1622.*

In the YESCO application, the description of work states: "Erect new billboard." *JA 206-207; JA 1613.* The City planning staff notations that accompany the application state the billboard is being erected pursuant to "*New Billboard Construction* Bank Receipt Y-10". *JA 1614* (emphasis added). The trail report states: "New billboard meets all spacing requirements." *JA 1614.*

On the Clear Channel application, the description of work states: "New billboard structure to replace 2 units removed by Moana Lane widening." *JA 208; JA 1615.*

Despite the efforts of the City to muddy the issue (see below), the people who build billboards knew full well in 2011 and 2012 that they were building new billboards. To the people who build them, the construction of a new billboard is not an elusive concept. By stating what they were doing, matter-of-factly and without artifice, the billboard companies confirmed that construction of a new billboard has a plain and ordinary meaning. The City's own trail report confirmed that what was going on was "new billboard construction." *JA 1614.*

E. The City's Artifice that "New Billboard Construction" Was Not Taking Place

After Clear Channel Outdoor applied for a permit to construct a new billboard, the City staff emailed the representative of Clear Channel on July 10, 2012 stating that its permit had been reviewed and was on hold for six reasons. *JA 1619.* Reason No. 6 was as follows:

> Please revise application to remove reference of "new" billboard as no new billboards are allowed in the City.

JA 208-210; JA 1619.

The City staff's email overlooked the fact that the City itself was unable to keep up the pretense of calling a new billboard anything other than a new billboard. The City's own internal records for the YESCO application refer to "New Billboard Construction Bank Receipt Y-10". *JA 1614.*

Be that as it may, the position of the City was disingenuous to the extreme. The truth was that a new billboard was under construction on Moana Lane, and any motorist, resident or local business could see it going on. But the city could not admit the truth. During July 2012, the City was embroiled with Scenic Nevada in a battle over the new digital ordinance, and the City was highly sensitive to the "new billboard" language. Rather than following the law that bans construction of new billboards, the City's solution was to take the position that no new billboard was there, because the piece of paper on file with the planning department would omit the word "new".

Interestingly, the word "new" was not redacted; the application still contains the word "new", there is no evidence the application was ever revised, and thus, even on paper, the billboard is a new billboard. *See JA 1615.*

The district court found the City's logic persuasive, however.

> Thus, while a billboard created pursuant to the banking or removal Ordinance may appear for the first time in a different area, it isn't genuinely appearing for the first time: the location is new, but the billboard is not.

JA 494:20-22. While a metaphysical debate could be had as to whether a billboard appearing for the first time is "genuinely" appearing for the first time, it is at least true that *in reality* it is appearing for the first time. At the very least, this Court is not bound by the district court's reasoning on *de novo* review.

The absurdity of the situation[1] was highlighted at trial by two pieces of evidence.

The first was Trial Exhibit 217, a copy of documentation submitted for the construction of the new Clear Channel billboard on Moana Lane. *JA 210-211; JA 1207-1336.* The exhibit is 129 pages. It includes a geotechnical investigation, the building permit (*JA 1692*), engineering drawings, engineering calculations, construction specifications and inspection reports. If there were any doubt that new construction was taking place, Exhibit 217 would dispel it.

The second was Trial Exhibit 207, which includes a photograph of the new YESCO billboard under construction along U.S. 395 in Reno. *JA 206; JA 1608.* The photograph depicts a crane erecting a new steel monopole and signboard, obviously with all new materials and at a site where no billboard stood before. Shown this photograph, City Planner Claudia Hanson testified as follows:

> Q And the question I have for you, is this photograph in 2011, according to the testimony earlier, a photograph of a new billboard under construction?
>
> [Objections and rulings]
>
> A The way the system works, if somebody takes down a billboard elsewhere in the City, they can bank it, as we call it. So you maintain the rights or the rights to that board to relocate or reconstruct elsewhere. So this is the rights to a board that was elsewhere in the City, new materials and new construction, but for an old entitlement or to rights to an old board.

JA 277:16-278:11.

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[1] The district court was okay with removing the word "new" to avoid conflict with the ballot initiative, commenting, "the City of Reno has refused billboard applications seeking approval of 'new' billboards." *JA 493:12-13*, citing Trial Ex. 211. The City denied nothing, however; it only suggested an amendment to delete the word "new".

Q Is this picture showing a new billboard?

A It is new construction of an old board.

JA 278:19-20.

The photograph showed only one new billboard under construction. According to the testimony of a Clear Channel representative at a September 20, 2011 workshop, in the 10 years since the citizens had voted to ban the construction of new billboards, Clear Channel had removed and relocated 36 billboards, with new permits, new sites, and new structures. *JA 205; JA 1607.*

F. The Billboard Initiative Did Not Merely "Cap" the Number of Billboards at the Number in Existence on November 14, 2000

The district court employed tortured reasoning to conclude that the initiative should be interpreted as merely a "cap" on the billboards in existence at the time the initiative was enacted on November 14, 2000, thus allowing the City to approve construction of new billboards so long as the "cap" was not exceeded. *JA 491-495.*

The district court reasoned that the word "new" was ambiguous because three dictionaries defined "new" differently. *JA 491:13-19.* Each publisher had editorial license to offer a variation on the meaning of the word "new", but taking that into consideration, the definitions of "new" in the three dictionaries were essentially the same, which is not surprising, considering "new" is a household word. *Id.*

Because the definitions varied slightly, however, the Court held that it was "permitted to consider the history of the regulation in determining the intent of the legislating body." *JA 491:20-21.* The district court turned to the "pro" and "con" arguments that accompanied the initiative on the ballot in 2000, *JA 588,* holding that "[e]ven after the passage of the 2000 initiative, Scenic Nevada continued to maintain that the initiative merely placed a "cap" of 289 billboards permitted in the City of Reno and prohibited the construction of any *additional* billboards." *JA*

492:6-9 (emphasis in original). In footnote 22, the district court then purported to quote from Scenic Nevada's "pro" argument, stating:

> This Initiative Petition, supported by over 7,000 Reno citizens, would prohibit any increase in the present number of billboards, but it does place a cap on their numbers.

JA 492, fn. 22. The district court misquoted that section of the "pro" argument. The actual quotation reads as follows:

> This Initiative Petition, supported by over 7,000 Reno citizens, would prohibit any increase in the present number of billboards. *This Initiative does not ban existing billboards*, but it does place a cap on their numbers.

JA 588 (omitted section highlighted). In addition to leaving words out of Scenic Nevada's "pro" argument, the district court inserted two key words that Scenic Nevada never said. The added key words were "merely" and "additional", and by adding these words, and omitting the phrase "[t]his initiative does not ban existing billboards," the district court fundamentally altered the entire substance of the ballot initiative and Scenic Nevada's position in support of the initiative.

Even though the district court italicized the word "additional" for emphasis, the "pro" arguments did not use that word in any context, and the "pro" arguments especially did not use the word to maintain that the initiative prohibited only "additional" billboards beyond the "cap".

The phrase that the district court attributed to Scenic Nevada – "the Initiative merely placed a cap" – would dramatically affect the meaning of the initiative, meaning that the initiative was *only* a "cap", and as long as the number of billboards stayed within the "cap", the City could continue to issue permits for the construction of new billboards.

The notion that the initiative *merely* placed a "cap" did not come from Scenic Nevada. The "pro" argument pointed out that the initiative would ban

issuance of permits for construction of new billboards, the number of billboards would be capped, and the initiative would *not* ban existing billboards. *JA 588.*

The district court nevertheless took Scenic Nevada to task for allegedly changing its position, asserting that "Scenic Nevada now argues that the intent of the 2000 Initiative and Ballot Question was to eliminate billboards and that regardless where the billboard originated or how long it existed, if it is relocated to another location it is a "new" billboard whose construction is prohibited by the Initiative and the Ballot Question." *JA 492:14-18.*

Aside from the fact that there is *no evidence* that a billboard *ever* was "relocated", in the sense of a physical structure being moved to another location, Scenic Nevada has never taken the position in any forum that the intent of the initiative was, as the court states, "to eliminate billboards." *Id.* The portion of the "pro" argument that the district court omitted specifically states the initiative does *not* ban existing billboards. Over the course of time, as billboards fall into disrepair or are taken down due to loss of the lease, the number of billboards should decline until eventually there are none, but the initiative expressly concerns a prohibition on construction of new billboards, not a ban on those already existing.

The implication that Scenic Nevada somehow changed its position in any respect is baseless. The "pro" arguments in 2000 are exactly the same as Scenic Nevada's position today. The contemporaneous journals written by Scenic Nevada shortly after the 2000 election – while Scenic Nevada was still known as "Citizens For A Scenic Reno" – state the same position that Scenic Nevada takes today. *JA 1864-1865.* The City Attorney's memo of May 8, 2003 even quotes Scenic Nevada founder Doug Smith taking the same position that Scenic Nevada takes today. *JA 1827.* Scenic Nevada declared at trial that its lawsuit does not affect vested rights in any way; the only declaratory relief sought by this lawsuit is

a judgment invalidating a 2012 ordinance that would allow the construction of new digital billboards. *JA 420-421.*

G. Scenic Nevada's Interpretation of the Billboard Initiative Does Not Constitute a "Taking" in Violation of the Fifth Amendment

Most disconcerting to Scenic Nevada was the district court's statement that "Scenic Nevada's interpretation of the Initiative and Ballot Question would clearly lead to the permanent loss of a billboard to its owner." *JA 495:18-20.*

The district court's conclusion that Scenic Nevada's position amounts to a "taking" of private property in violation of the Fifth Amendment is unsupported by any tenable reading of the initiative and the record in this case. No vested rights of any billboard company would be affected by giving force and effect to the ballot initiative. Up to this time, the construction of a digital billboard in the City of Reno has been illegal, and a moratorium is in place preventing even the application for a digital billboard until this litigation ends, which makes it impossible for the invalidation of the ordinance to affect any existing rights. RMC §18.16.905(l); *JA 215-216; JA 542 (Trial Exhibit 4).*

Furthermore, although the district court does not mention it anywhere in its analysis, the billboard industry has been aware since the beginning that the initiative prohibited the construction of new billboards. In their "con" arguments in rebuttal, the industry wrote:

> The proponents of this Initiative are incorrect when they state that the Initiative will merely place a cap on the number of billboards allowed in Reno. The wording on this Initiative specifically prohibits building permits for any new billboards. This will have a significant effect on the billboard industry in Reno and will result in the loss of jobs.

JA 588.[2] Knowing that the initiative "specifically prohibits building permits for new billboards", Eller Media filed a lawsuit seeking to keep the initiative off the ballot, arguing that it was improper to address the issue by initiative petition. Judge Polaha ruled against Eller Media, as did this Court. Eller Media did not complain, however, that the initiative amounted to a "taking" under the Fifth Amendment, which Eller Media surely would have done if the initiative truly posed a takings issue.

At trial, Ryan Saunders of Saunders Outdoor, a billboard company, testified that there was no takings issue as far as he was concerned.

> Q I understand your concern about the competitive disadvantage you were talking about. I just had to ask you about that, because you do know, the city could say, Saunders cannot put up any new billboards? It could say that?
>
> A It could. In fact, cities do it all the time. They put caps on the numbers, but they have to continue to allow the existing billboards to go under grandfather status. So they can continue to operate under the current levels of business that they have and that's what the citizens initiative says.

JA 392:6-15.

It defies logic that banning construction of new billboards could be construed as a "taking". The district court's own decision acknowledges that four states have entirely banned billboards: Hawaii, Maine, Alaska and Vermont. *JA 493, fn. 24.*

Assuming *arguendo* that the initiative was ambiguous and that a resort to the "legislative history" was appropriate, the district court manifestly erred in determining that the initiative was merely a "cap" on the number of billboards.

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[2] If anyone is changing positions, it is the billboard industry, which admitted in its "con" argument that the initiative would ban issuance of new permits. The industry now assumes the contrary position.

Courts 'should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.'" *Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983); *City of Reno v. Citizens for Cold Springs,* 236 P.3d 10, 16 (Nev. 2010). The initiative not only bans construction of new billboards, it also bans the issuance of permits for their construction. If only a "cap" were intended, the initiative would have stated that permits are okay for replacement billboards up to the cap number. Instead, the initiative states explicitly that no permits can be issued, which refutes any argument that this law is merely a "cap" on billboard numbers.

"Statutes are generally construed with a view to promoting, rather than defeating, legislative policy behind them." *Dept. of Motor Vehicles v. Lovett,* 110 Nev. 473, 477, 874 P.2d 1247, 1249-1250 (1994). The policy behind this law is to ban new billboards, at least according to the author, Scenic Nevada. By issuing permits for new billboard construction, the City attempts to defeat the legislative policy behind the law.

H. The Digital Billboard Ordinance Violates Art. 19, §§ 2.3 and 4 of the Nevada Constitution

Speaking of the citizens who voted for the 2000 ballot initiative, the district court said:

> Through the exercise of the democratic process, their efforts lead to the enactment of municipal ordinances that cap and will reduce the number of billboards in the City of Reno.

JA 500:16-18. After paying respects to the democratic process, the district court held that a municipal ballot initiative can be repealed immediately by a city council. If this holding is affirmed, then the constitutional right to the initiative process at the local level, arguably at the very heart of the democratic process, is not worth the paper it is printed on.

In the instant case, the Reno citizens acted to ban the proliferation of a public nuisance, using the initiative process, because their elected representatives refused to act. Most initiatives probably arise under similar circumstances. Almost by necessity, the initiative process is the electorate's remedy of last resort. If this ultimate exercise of the right of the people to govern themselves can be nullified, by the very government that refused to act in the first place, the core of a democracy is denied to the people.

The Nevada Constitution guarantees the right of the citizens to resort to the initiative process where their elected officials have failed to act. Nevada Constitution Article 19, §2(1) states:

> Notwithstanding the provisions of Section 1 of Article 4 of this Constitution, but subject to the limitations of Section 6 of this Article, the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this Constitution, and to enact or reject them at the polls.

Once the citizens have passed a law by an initiative, the governing body of the local government is prohibited from amending, annulling or repealing that law for a period of not less than three (3) years. Nevada Constitution Article 19, §3, states, in pertinent part:

> If a majority of the voters voting on such question at such election votes approval of such statute or amendment to a statute, it shall become law and take effect upon completion of the canvass of votes by the Supreme Court. An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect. If a majority of such voters votes disapproval of such statute or amendment to a statute, no further action shall be taken on such petition.

The same initiative powers that the citizens possess with respect to statutes and constitutional provisions apply to municipal ordinances. Nevada Constitution Article 19, §4 states:

> The initiative and referendum powers provided for in this article are further reserved to the registered voters of each county and each municipality as to all local, special and municipal legislation of every kind in or for such county or municipality. In counties and municipalities initiative petitions may be instituted by a number of registered voters equal to 15 percent or more of the voters who voted at the last preceding general county or municipal election. Referendum petitions may be instituted by 10 percent or more of such voters.

The voter initiative of 2000, codified as RMC §18.16.902(a), prohibits construction of new billboards and the issuance of building permits for their construction. The district court held that the 2000 ballot initiative met the statutory and constitutional requirements for a municipal initiative. *JA 488:4-6.* Judge Polaha and this Court also held that the ballot initiative was the proper subject of an initiative petition and reflected a city-wide change in policy concerning billboards. *Eller Media Co. v. City of Reno,* 118 Nev. 767, 59 P.3d 437 (2002).

Since RMC §18.16.902(a) resulted from an initiative petition, the City Council had no authority to "amend, annul, repeal, set aside or suspend" the voter initiative for a period of three years following its enactment on November 14, 2000. By adopting the "conforming" ordinance in January, 2002, and the banking and relocation ordinance in June, 2003, the City Council permitted the construction of new billboards and the issuance of permits for their construction, thereby amending, annulling, repealing and setting aside the mandate of the voters, in violation of Art. 19, §§ 2.3 and 4 of the Nevada Constitution.

It is undisputed that the digital billboard ordinance of 2012 is dependent upon the unconstitutional underpinning of the "conforming" ordinance and the

banking and relocation ordinance. Without this unconstitutional foundation, there can be no digital billboard ordinance. The digital billboard ordinance therefore is invalid under the Nevada Constitution.

I. The District Court Erred in Holding that a City Council Can Immediately Repeal a Municipal Initiative

The district court's interpretation of Article 19 of the Nevada Constitution was that while Art. 19, § 2.3 prohibits the Legislature from amending a state initiative within three years of its enactment, there is no similar provision for municipal initiatives. *JA 488:7-9.*

The district court erred, however, in failing to consider the effect of Art. 19, § 4 of the Constitution, which states that the initiative powers provided for in Article 19, § 2 are further reserved to the registered voters of each municipality as to all local, special and municipal legislation of every kind. If this language has any meaning, it is that the powers reserved to the people that are enumerated in Section 2 likewise are reserved to the people in Section 4. This would include the power to enact an initiative that cannot be repealed for a period of at least three years.

Scenic Nevada's straightforward interpretation of Article 19, § 4 makes sense, in that it stands to reason that the right to enact law by initiative petition should not be illusory. Allowing the governing body to repeal the law immediately after its passage would be nonsensical, and Section 4 forbids it.

Scenic Nevada's position also makes sense within the structure of Article 19. Section 2 concerning statewide initiative deals with many aspects of initiative petitions that are not rehashed in Section 4 dealing with municipal initiatives. Instead, Section 4 incorporates provisions of Section 2 by stating the other provisions of Article 19 apply to municipal initiatives.

The district court quoted Section 4, *JA 487:17-20,* but never applied or even discussed the significance of Section 4 in its analysis of the constitutional

question. Indirectly, the district court reasoned that "[f]oundational differences in the structure of the Legislature and the city governments of the state caution against a liberal reading of the Nevada Constitution conflating acts by the Legislature to acts by those city governments." *JA 488:16-18.* The district court did not amplify upon the expression "foundational differences", or indeed, upon why the court considered Scenic Nevada's interpretation to be a "liberal reading" that was "conflating acts by the Legislature to acts by those city governments."

Notably, however, Section 4 plainly states that statewide initiative powers reserved to the voters under Section 2 are further reserved to the registered voters of each municipality as to all local, special and municipal legislation of every kind, and thus, it does not require a "liberal reading" to conclude that whatever "foundational differences" there may be, the Constitution nonetheless affords the same initiative powers to the voters as to both statewide and municipal measures.

The district court speculated that "the Nevada Constitution could have been amended to provide a corollary to the ban on amendments found in Article 19 § 2.3, instead the Legislature enacted Nevada Revised Statute 295.220." *JA 488:9-12.* Perhaps the language of Section 4 *could* have been differently worded, but its present language provides a "corollary" to the ban on amendments in Section 2 by expressly stating that the powers reserved in Section 2 are reserved to the voters in all local, special and municipal legislation of every kind.

The district court correctly observed that NRS 295.220 provides that a municipal initiative "shall be treated in all respects as other ordinances of the same kind adopted by the council," *JA 488:12-14,* but the district court unreasonably interpreted NRS 295.220 as permitting a city council to repeal, annul or amend a law passed by initiative, contrary to the Constitution. The district court cited no authority or reasoning for the proposition that NRS 295.220 is intended to override Section 4 of the Constitution. The statute simply ensures that the city council will give force and effect to a law enacted by initiative as it

would to any law enacted by the council. The statute does not express any intent by the Legislature to replace provisions of the Constitution pertaining to initiatives, specifically Art. 19, § 4. The district court's ruling should be reviewed *de novo* and reversed.

VII

CONCLUSION

Scenic Nevada respectfully requests that the judgment of the district court be reversed, and that this Court direct the entry of a judgment by the district court declaring that the October 24, 2012 vote of the Reno City Council adopting Ordinance No. 6258 entitled "Digital Off-Premises Advertising Displays, including Light-Emitting Diode (LED)" is unlawful, void, and of no force and effect, and that the ordinance purportedly adopted thereunder is unlawful, void, and of no force and effect.

DATED: December 22, 2014 LAW OFFICES OF MARK WRAY

By _____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 7,938 words; and

Finally, I hereby certify that I have read this *Appellant's Opening Brief* and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this *Appellant's Opening Brief* complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 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.

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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 22nd day of December, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray certifies that a true copy of the foregoing document was sealed in an envelope with first class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on December 22, 2014 addressed as follows:

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