

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel.
DEPARTMENT OF TAXATION;
THE HONORABLE DAN
SCHWARTZ, in his official capacity
as TREASURER OF THE STATE OF
NEVADA; and THE LEGISLATURE
OF THE STATE OF NEVADA,

Respondents.

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

JOINT APPENDIX

VOLUME 7 PART 4

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IN THE FIRST JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR CARSON CITY

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

v.

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 DOES 1-20,
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

VOLUME I

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21 **IN THE FIRST JUDICIAL DISTRICT COURT**

22 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

23 CITY OF FERNLEY, NEVADA, a
24 Nevada municipal corporation,

25 Plaintiff,

26 v.

27 STATE OF NEVADA ex rel. THE NEVADA
28 DEPARTMENT OF TAXATION; THE
HONORABLE KATE MARSHALL, in her
official capacity as TREASURER OF THE
STATE OF NEVADA; and DOES 1-20,
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff CITY OF FERNLEY, NEVADA (hereinafter "Fernley"), by and
through its attorneys of record, Brownstein Hyatt Farber Schreck, LLP, and hereby moves this

Honorable Court for an order entering summary judgment in its favor. This motion is made pursuant to Rule 56 of the Nevada Rules of Civil Procedure and is based on the following memorandum of points and authorities and the exhibits attached thereto, all other pleadings, papers, and documents on file with the Court in this action, such further documentary evidence as the Court deems appropriate, and the arguments of counsel at the hearing on this motion.

I. INTRODUCTION.

This case centers around a challenge brought under the Nevada Constitution with respect to statutory scheme to collect and distribute certain taxes to local governments, and to the City of Fernley in particular. In 1997, the Nevada Legislature passed Senate Bill 254, enacting the Consolidated Tax ("C-Tax") system whereby six different state taxes would be collected, placed in a segregated State account, and appropriated by the Department of Taxation and Nevada Treasurer to local governments via a statutory formula. Since 1997, the C-Tax system and the distributions therefrom have been largely unchanged, although the circumstances of the City of Fernley, one of the recipients of C-Tax funds, have changed dramatically.

Fernley incorporated as a municipality in 2001, and is the only local government to incorporate as a municipality in Nevada since the passage of Senate Bill 254 in 1997. Fernley's population has more than doubled since 1997 and the assessed valuation of its property has nearly doubled since 1997, and consequently the service needs for its residents have increased exponentially. *See* Exhibit 1. In 2001, Fernley received \$100,032.03 in C-Tax. *See id.* In 2013, Fernley received \$133,050.30 in C-Tax. *See id.* By comparison, comparably sized cities received millions of dollars more in that same time frame, despite growth rates significantly lower than Fernley. *See id.* The distribution to Mesquite from 2001 to 2013 increased by \$2,119,650.26. *Id.* The distribution to Boulder City from 2001 to 2013 increased by \$2,597,747.07. *See id.* The distribution to Elko from 2001 to 2013 increased by \$7,063,483.29. *See id.*

These gross inequities have left Fernley unable to provide comparable levels of services to its residents, and have forced Fernley to saddle residents and businesses with high property taxes in an effort to make up some of the difference, while comparably sized neighbors realize high levels of service and lower property taxes.

1 Even more egregious, the State of Nevada has made it impossible for a city like Fernley to
2 obtain an adjustment to its C-Tax distributions, has demonstrated a shocking level of indifference
3 to the inequitable situation, and has chosen instead to ignore the plight of politically isolated
4 communities like Fernley. As a result, Fernley had no choice but to seek relief from this Court.

5 As will be demonstrated below, the C-Tax system violates Article 3, Section 1 of the
6 Nevada Constitution (separation of powers), Article 4, Section 20 of the Nevada Constitution
7 (prohibition on special or local laws) and Article 4, Section 21 of the Nevada Constitution
8 (guarantee of general and uniform laws). Fernley requests both injunctive and monetary relief to
9 redress prior distributions and to ensure that distributions in the future meet constitutional
10 standards.

11 **II. PROCEDURAL BACKGROUND.**

12 Fernley commenced this action with the filing of its complaint on June 6, 2012, seeking
13 relief under both the United States and Nevada Constitutions. See Exhibit 2. Following this
14 Court's denial of their respective motions to dismiss, the Department and the Legislature jointly
15 petitioned the Nevada Supreme Court for a writ of mandamus compelling the dismissal of
16 Fernley's claims or the entry of summary judgment in their favor. On February 22, 2013,
17 pursuant to the Nevada Supreme Court's subsequent order, the Court dismissed Fernley's federal
18 constitutional claims, but allowed its state constitutional claims to stand. On June 6, 2014,
19 following the State's renewal of its motion to dismiss Fernley's state constitutional claims, the
20 Court ordered the conversion of the State's motion to dismiss into a motion for summary
21 judgment. Fernley now also seeks summary judgment on its remaining substantive claims – (1)
22 its second claim for relief for violation of the separation of powers clause, set forth in Article 3,
23 Section 1, of the Nevada Constitution; (2) its third claim for relief for the creation of a special law
24 in violation of Article 4, Section 20, of the Nevada Constitution; and (3) its fourth claim for relief
25 for the violation of the general and uniform clause, set forth in Article 4, Section 21, of the
26 Nevada Constitution.

27 ///

28 ///

1 **III. STATEMENT OF RELEVANT UNDISPUTED FACTS.**

2 **A. The City Of Fernley.**

3 Fernley is located in Lyon County, approximately 28 miles east of Reno, Nevada. Over
4 the past two decades, Fernley's population has more than doubled from approximately 8,000
5 people in 1997 to about 19,000 people today, and now accounts for approximately 36 percent of
6 Lyon County's population. *See* Exhibit 1. During this time, Fernley has surpassed the
7 populations of Mesquite and Boulder City and is approaching the population of Elko. *Id.*
8 Fernley incorporated as a city on July 1, 2001, when its population stood at approximately 9,500
9 people, and currently is Nevada's seventh most populous city. *See id.*; Exhibit 3, at 76:6-7.¹

10 **B. The C-Tax System.**

11 The C-Tax system is a complex mathematical formula to collect and distribute taxes to
12 local governments and special entities in Nevada. At the broadest level, revenues from six
13 different taxes are collected throughout Nevada by the Nevada Department of Taxation
14 ("Department") and deposited into a segregated State account called the Local Government
15 Distribution Account (the "C-Tax Account").² *See* NRS 360.660 et. seq.; *see also* Exhibit 6, at
16 1077.³

17 The funds in the C-Tax Account are distributed on a monthly basis by the Department and
18 the Nevada Treasurer to local governments, enterprise districts and special districts. *See* NRS
19 360.690. Local governments, enterprise districts and special districts have no restrictions on how
20 funds from the C-Tax can be used and accordingly, funds are available for general operating
21 purposes. *See* Exhibit 7, at 57:2-13, 58:8-16; Exhibit 5, at 90:7-11.⁴ Moreover, C-Tax

22 ¹ Leroy Goodman is Fernley's current mayor. *See* Exhibit 3, at 8:6-7.

23 ² The six taxes include the cigarette tax, the liquor tax, the government services tax, the real property transfer tax, the
24 basic city county relief tax ("BCCRT") and the supplemental city county relief tax ("SCCRT") (collectively the "Six
25 Taxes"). *See* NRS 369.173 (liquor tax); NRS 370.260 (cigarette tax); 375.070 (transfer tax); NRS 377.055 (basic
26 city-county relief tax); NRS 377.057 (supplemental city-county relief tax); NRS 482.180 and 482.181 (government
27 services tax); *see also* Exhibit 4, at 49:2-6; Exhibit 5, at 110:14-16. The BCCRT and SCCRT are percentages of the
28 overall rate for the sales and use tax. *See* NRS Ch. 377.

³ Marvin A. Leavitt is the former director of finance and director of intergovernmental services for the City of Las
Vegas. *See* Exhibit 4, at 12:21-13:12. Mr. Leavitt also served as a lobbyist for various cities, including the cities of
Henderson, Las Vegas, and Reno, in the Nevada Legislature and has been a member of the Committee on Local
Government Finance for 35 years. *See id.* at 15:10-22, 19:6-19.

⁴ Terry Rubald is the deputy executive director of the Department of Taxation's division of local government
services. *See* Exhibit 7, at 22:5-22. Ms. Rubald was designated as one of the Department's persons most

1 distributions are relied upon by local governments as a primary source of operating revenues. *See*
2 Exhibit 11, at 48:24-49:9; Exhibit 7, at 63:20-64:6.⁵ The C-Tax, along with the property tax, are
3 the two primary revenue sources for local governments. *See* Exhibit 7, at 63:20-64:6.

4 Distributions from the C-Tax Account are first made at the county level, commonly called
5 a Tier 1 distribution. *See* Exhibit 12, pages 9-12. Tier 1 distributions are thereafter further
6 segregated into Tier 2 distributions. *See id.* Tier 2 distributions are the actual dollar amounts
7 provided to counties, cities, towns, and other C-Tax recipients within a county. *See* Exhibit 4, at
8 70:17-71:12.

9 Tier 2 distributions are made at two levels – a base distribution and an excess distribution.
10 *See* NRS 360.680. A base distribution is of paramount importance because that amount was set
11 in 1997 and carries forward from year to year, and is adjusted for increases in the Consumer
12 Protection Index (“CPI”). *See* NRS 360.680. For example, if a city had a base distribution of
13 \$100 in 1998, they can count on a base distribution of \$100 (plus adjustments based on the CPI)
14 in 1999, 2000, and so on.⁶

15 The excess distribution is largely a function of increases to assessed valuation and
16 population within a local government, and is an addition to the base distribution. *See* NRS
17 360.690. The percentage increase for the excess distribution is determined by the Department
18 and applied as a multiplier to the base distribution. *See id.* For example, if a city had a base
19 distribution of \$100 and experienced significant growth in population and assessed valuation
20 resulting in an excess distribution multiplier of 100%, the excess distribution would be \$100 and
21

22 knowledgeable regarding topics listed in Fernley's notice of deposition of the Department's person most
23 knowledgeable. *See id.* at 10:5-8; Exhibit 8; Exhibit 9; Exhibit 10. Mary C. Walker served as a member of the
24 technical committee that assisted in the drafting of the C-Tax, is a member of the Committee on Local Government
Finance, and is a lobbyist that opposed Fernley's legislative efforts for C-Tax relief on behalf of Lyon County. *See*
Exhibit 5, at 5:10-16, 99:21-24, 103:7-17.

25 ⁵ Warner Ambrose is a budget analyst in the Department of Taxation's local government finance section. *See* Exhibit
26 11, at 22:22-23:3. Mr. Ambrose was designated as one of the Department's persons most knowledgeable regarding
topics listed in Fernley's notice of deposition of the Department's person most knowledgeable. *See id.* at 25:14-26:4;
Exhibit 8; Exhibit 9; Exhibit 10.

27 ⁶ For example, in fiscal year 2001 Fernley's base distribution was \$93,923.45. In fiscal year 2002 Fernley's base
28 distribution was \$97,116.85, and by fiscal year 2011, Fernley's base was \$120,631.97. *See* Exhibit 13. By
comparison, Boulder City had a base of \$6,113,660.93 in fiscal year 2001, and a base of \$7,836,416.68 in fiscal year
2011. *Id.*

the overall C-Tax distribution would be \$200.⁷ For purposes of comparison, if a city with a base distribution of \$10 had the same level of growth in population and assessed valuation, its excess distribution would be \$10 and the overall C-Tax distribution would be \$20.⁸ As is evident, the base distribution, which was established in 1997, is of *critical importance* because the entire future of C-Tax distributions is based on that number – whether it be adjustments based on CPI or adjustments based on increased population and assessed valuation.⁹ Moreover, as demonstrated below, the C-Tax system is set up in a way that precludes adjustments to a base distribution, which endlessly perpetuates the status quo first established in 1997.

C. The Purpose of the C-Tax System.

Four years before Fernley incorporated, the 1997 session of the Nevada Legislature passed Senate Bill 254, which established a system to collect and distribute the Six Taxes included in the C-Tax system. *See* Exhibit 4, at 49:2-6; Exhibit 5, at 110:13-16. Fernley is the only Nevada city to incorporate since the 1997 enactment of the C-Tax. *See* Exhibit 14, at 9:23-10:2.

The Legislature's primary objectives behind the C-Tax system included: (1) initially preserving the "status quo" in the distribution of C-Tax revenue; and (2) distributing future tax revenue to areas of growth. *See* Exhibit 16, at 39:13-40:14, 56:9-58:22; Exhibit 7, at 30:24-33:12; Exhibit 6, at 1077.¹⁰

As time has told, however, the C-Tax system has become an inflexible system which protects the interests of entities with larger C-Tax base distributions in 1997 to the exclusion of entities like Fernley with smaller C-Tax base distributions in 1997, even when those smaller entities experienced large increases in population and assessed valuation since that time. Simply put, the C-Tax system has frozen the status quo in place since 1997 and instead of following

⁷ If revenues are insufficient, then the C-Tax distribution would be pro-rated. *See* NRS 360.690.

⁸ For example, in fiscal year 2001 Fernley had an excess distribution of \$6,108.59 and an excess distribution in fiscal year 2011 of \$22,511.38 despite more than doubling in population and nearly doubling in assessed valuation. *See* Exhibit 13. In other words, Fernley's excess distribution increased by \$16,402.79 despite a population increase of 9,368 people, equating to \$1.75 for each new resident.

⁹ Excess revenues will be added to a recipient's base beginning in fiscal year 2015, further demonstrating the significance of a C-Tax recipient's base. *See* Exhibit 15, at 62:19-63:22.

¹⁰ Guy Hobbs was the chairperson of the technical committee that assisted the Legislature in drafting the C-Tax, was Clark County's chief financial officer, and now specializes in public finance issues at Hobbs, Ong & Associates. *See* Exhibit 16, at 13:18-14:3, 15:4-10, 27:8-29:4.

1 growth, revenue has followed the "haves" from 1997 to the exclusions of the "have-nots" like
2 Fernley.

3 1. The Preservation Of The Status Quo In The Initial
4 Distribution Of C-Tax Revenue.

5 The Legislature sought to maintain the status quo in the distribution of C-Tax revenue to
6 ensure that no entity which had been receiving revenue generated by the Six Taxes would suffer
7 financial harm because of the implementation of the new system. *See* Exhibit 7, at 30:24-33:24;
8 *see also* Exhibit 6, at 1077 ("[t]he revenue distribution would not be such a change that it would
9 create a shock for any of the local governments"); Exhibit 17, at LCB03701 (stating that one of
10 the objectives of the system is "that a new distribution system be revenue neutral, at least at the
11 beginning . . . cities that have come to rely on a certain amount of revenue . . . as a consequence
12 of the new formula should not be financially devastated because of a shift of revenue that they
13 have become accustomed to . . ."). To accomplish this goal, the Legislature determined that
14 distributions during the first fiscal year of the new system would be "revenue neutral" -- i.e.,
15 entities that had been receiving revenue produced by the Six Taxes would receive essentially the
16 same distributions in the first fiscal year of the C-Tax as they did in the immediately preceding
17 two fiscal years. *See* Exhibit 15, at 54:12-18; Exhibit 16, at 35:3-11; Exhibit 4, at 82:16-83:8;
18 Exhibit 7, at 33:10-12; *see also* Exhibit 6, at 1077; Exhibit 18 (Legislative Counsel Bureau
19 summary stating that the C-Tax "does not decrease the amount of revenue currently being
20 received by any local government")(capitalization deleted).¹¹

21 An original C-Tax recipient's population and assessed value of taxable property therefore
22 were not relevant to the determination of its initial revenue base. *See* Exhibit 15, at 143:13-
23 144:13. The Legislature likewise did not require an original C-Tax recipient to provide services
24 of any kind as a prerequisite to receiving a distribution, and its existing service obligations were
25 immaterial to the amount of its initial revenue base. *See id.* at 68:15-24. The State has
26 acknowledged this fact as well. *See* Exhibit 19, at 2:14-21; Exhibit 20, at 54:18-21, 56:22-23

27 ¹¹ Marian Henderson is a Management Analyst II at the Department of Taxation. *See* Exhibit 15, at 36:3-42:21. Ms.
28 Henderson was designated as one of the Department's persons most knowledgeable regarding topics listed in
Fernley's notice of deposition of the Department's person most knowledgeable. *See id.* at 9:7-12, 23:19-24:2; Exhibit
8; Exhibit 9; Exhibit 10.

(stating that "C-Tax revenue now is not tied to [Fernley] providing public safety" and observing that the difference in services Fernley provides compared to other cities is "not the reason for the difference in the C-Tax distributions."').¹² The Committee on Local Government Finance ("CLGF") was responsible for setting the initial revenue base for each C-Tax recipient. See Exhibit 15, at 145:4-17, 147:22-148:3.

No excess revenues were available for distribution during the first fiscal year under the C-Tax because 100 percent of all revenue from the Six Taxes was distributed in this manner. See Exhibit 16, at 44:3-8. While this approach may have advanced the Legislature's short-term interest in enabling local government entities to avoid shortfalls that could have impaired their ability to deliver services if a new distribution formula had been adopted and resulted in a significant decline in their receipt of tax dollars, it also had long-term implications because it established each recipient's initial distribution as its base for the allocation of C-Tax revenues in subsequent years. See *id.* at 35:3-36:8, 44:3-15; Exhibit 15, at 57:16-58:22. This new approach to revenue distribution therefore did not merely serve to maintain the status quo for the first fiscal year of the C-Tax, but rather also had the all-important effect of maintaining the status quo of 1997 indefinitely.¹³ See Exhibit 20, at 60:1-61:20 ("Those initial base amounts were determined on what each entity was getting, and I think, as we've discussed, the cities that we're referencing in relation to Fernley, they got more money in FY '96 and '97. Thus, they started with a higher base amount . . . that difference in the base would be maintained in the distribution."). As the chairperson of the technical committee that assisted the Legislature in creating the C-Tax has testified, the setting of an original C-Tax recipient's initial revenue base was "huge." See Exhibit 16, at 100:11-1.

¹² Russell Guindon is the principal deputy fiscal analyst in the Fiscal Analysis Division of the Legislative Counsel Bureau. See Exhibit 20, at 8:24-9:6. Mr. Guindon was designated as the person most knowledgeable at the Legislature regarding the topics listed in Fernley's notice of deposition of the Legislature's person most knowledgeable. See *id.* at 18:22-19:17; see also Exhibit 21; Exhibit 22.

¹³ In maintaining the status quo of 1997, the Legislature actually perpetuated revenue bases that had existed since about 1981. See Exhibit 16, at 40:15-41:23; Exhibit 4, at 32:24-34:6. At that time, the Legislature adopted the SCCRT, which was essentially a 1.75 percent sales tax. See *id.* The emphasis on property tax revenue had been reduced and, to offset that reduction, SCCRT revenue was distributed to local governments for general operating purposes. See *id.* The revenue bases established during the Legislature's pursuit of revenue neutrality in 1997 were a function of the revenue bases that had been established for local governments nearly 20 years earlier. See *id.*; Exhibit 5, at 71:2-73:4.

2. The Distribution Of Tax Revenues To Higher Growth Areas.

The Legislature purportedly sought to direct tax dollars to higher growth areas, which it defined as areas experiencing an increase in population and the assessed value of taxable property. *See* Exhibit 16, at 56:18-57:13; Exhibit 7 ("Over time however, and this is really the second objective, the distribution of those revenues should be allowed to go to areas that are experiencing the growth and/or needs.").

The distribution of C-Tax revenue according to established bases, however, did not advance this goal. *See* Exhibit 5, at 122:21-123:5. Since the inception of the C-Tax, the distribution of base revenue has been unrelated to the nature and cost of services rendered by recipients even though the demand for services generally increases or decreases as their populations grow or decline. *See* Exhibit 20, at 132:13-17; Exhibit 15, at 68:15-24, 138:6-21; Exhibit 7, at 31:18-21.

Not only was it unnecessary for an original C-Tax recipient to show that it required a certain amount of revenue to meet its service obligations before its initial base was set, its initial revenue base has carried forward each year after 1997 adjusted by the CPI over the five calendar years immediately preceding the year in which the allocation was made. *See* NRS 360.670(1); 360.680(2); *see also* Exhibit 15, at 58:16-59:2; Exhibit 16, at 76:23-78:7; Exhibit 4, at 82:16-25, 83:21-25.

Only excess distributions were to follow growth under the C-Tax. *See* Exhibit 5, at 74:15-24. After the first fiscal year of the C-Tax, it was possible for the total revenue generated by the Six Taxes to exceed the total combined bases of all C-Tax recipients. *See* Exhibit 16, at 44:9-15. This excess revenue is allocated to higher growth areas as determined by increases in population and assessed value of real property. *See id.* at 56:9-58:12. Excess revenue may not exist, however, in every fiscal year. *See id.* at 57:14-58:1; Exhibit 15, at 127:13-14. Also, even when a recipient has obtained a distribution of excess revenue in a particular year, the amount of the distribution has not been added to the recipient's base for the following year, except during the period from approximately 1999 to 2002. *See* Exhibit 15, at 62:19-63:14; *supra* note 9. After a statutory amendment in 2002, the recipient's base has remained unchanged except as adjusted by

1 CPI. *See id.*

2 The revenue distribution formula adopted by the Legislature consequently has ensured
3 that each recipient would generally maintain the same position relative to other recipients under
4 the C-Tax system regardless of how their individual circumstances may change over time. *See*
5 Exhibit 16, at 63:21-67:19. In other words, an entity with a low base distribution in 1997 as
6 compared to other C-Tax recipients would see that low base carried forward into the future, even
7 as members with high base distributions would see that high base carried forward. Of course, any
8 adjustments by percentage to the base would be significantly higher in terms of actual dollars for
9 entities with a high base distribution, and nominal in terms of actual dollars for entities with a low
10 base distribution. *See* Exhibit 1.

11 The Legislature has further ensured this result in at least *two* additional ways. *First*, the
12 Legislature has not mandated a reduction in the revenue base of a recipient that no longer
13 provides one or more services, such as law enforcement, regardless of the cost savings. *See, e.g.,*
14 NRS Ch. 360; *see also* Exhibit 15, at 138:6-139:11; Exhibit 4, at 82:3-15. For example, a C-Tax
15 recipient could eliminate or gut the services provided to its residents and there would be no
16 reduction in C-Tax distributions. *See id.*

17 *Second*, the Legislature has not mandated a reduction in the revenue base of a recipient
18 that has experienced both a drop in population and a decline in the assessed value of taxable
19 property. *See* NRS 360.695. Although the C-Tax does not confer discretion on the Department's
20 Executive Director, the CLGF, or the Commission to raise the revenue base of a recipient whose
21 population and assessed value of taxable property have increased, it does grant them discretion to
22 decide whether to cut the revenue base of a recipient whose population and assessed value of
23 taxable property have decreased in the immediately preceding three fiscal years. *See id.*; Exhibit
24 15, at 109:3-10, 122:22-123:2; Exhibit 16, at 91:23-94:20; Exhibit 7, at 59:24-63:15. Exercising
25 this discretion, the Department's Executive Director has decided *not* to change the C-Tax bases of
26 several local governments that have met the criteria for a reduction. *See* Exhibit 7, at 59:24-
27 60:18. Nevada cities that have qualified for a reduction in their C-Tax bases in recent years, but
28 did not receive one, have included Mesquite and Boulder City. *See* Exhibit 7, at 59:24-63:15 ;

1 *see also* Exhibit 15, at 139:12-140:20. Thus, by its terms and as applied, the C-Tax virtually
2 guarantees that the revenue distributed to each recipient would increase in perpetuity from its
3 initial revenue base established in 1997, but would not be decreased under any circumstances.
4 *See* Exhibit 15, at 58:16-59:2; Exhibit 16, at 76:23-78:7; Exhibit 4, at 83:21-25.

5 **D. Newly Created Local Government Entities, Such As Fernley, Receive**
6 **Different Treatment Under The C-Tax Than Local Government**
7 **Entities That Existed At The Time The System Was Enacted, and Do**
8 **Not Have an Opportunity for a Greater Distribution.**

9 Nevada law provides two ways in which a Local Government can obtain an adjustment to
10 its C-Tax distributions outside the mathematical distribution formula. First, a governmental
11 entity formed after 1998 has a one-year window to request an adjustment. NRS 360.740.
12 Second, two or more governmental entities can enter into an interlocal agreement to redistribute
13 revenues. NRS 354.598747. Neither option exists for Fernley and in fact, are nothing more than
14 illusory remedies.

15 **1. Adjustments Pursuant to NRS 360.740 are Not Available to**
16 **Fernley.**

17 A city that incorporates in Nevada after July 1 1998, as Fernley is the only municipality to
18 do so, is subjected to a significantly different standard to obtain C-Tax than municipalities that
19 were incorporated before that date. NRS 360.740 provides that a local government created after
20 July 1, 1998 could apply for a C-Tax adjustment if it provided police protection *and* at least one
21 other specified service, including fire protection, construction, maintenance, and repair of roads,
22 or parks and recreation, before it became eligible to receive C-Tax revenue.¹⁴ *See* NRS
23 360.740(1); *see also* Exhibit 16, at 73:17-74:15; *see also* Exhibit 23, at 13 (March 25, 2002
24 meeting minutes of the Legislative Commission's Study To Develop Enabling Legislation For
25 The Creation Of Incorporated Towns; suggesting that new government entities should have
26 access to consolidated taxes "only if they provide all four basic public services"). Local

27 ¹⁴ It is noteworthy that the chairperson of the technical committee which worked on drafting these criteria for the
28 Legislature was unaware that a new local government entity was statutorily required to provide law enforcement
before it could receive C-Tax revenue. *See* Exhibit 16, at 19:18-20:8, 27:8-35:2, ~~75:5-76:22, 86:8-90:9~~. In fact, the
technical committee recommended to the Legislature that no particular service category, including police, should be
considered mandatory. *Id.*, at 76:10-15.

1 government entities that preexisted the C-Tax, by contrast, had no obligation to provide police
2 protection or any other service as a prerequisite to their receipt of revenue under the C-Tax. *See*
3 Exhibit 15, at 104:16-105:7; Exhibit 16, at 75:1-4. In fact, those entities could actually decrease
4 or even eliminate pre-existing service levels after July 1, 1998 and suffer no decrease in their C-
5 Tax revenues. *See* Exhibit 15, at 138:6-139:11; Exhibit 4, at 82:3-15.

6 Regardless, the purported option for a new entity is only available to a local government
7 that makes the request by December 31 of the year before the first year it receives C-Tax. NRS
8 360.740(2); Exhibit 24 (“[a]t the time of its creation, Fernley had the option of taking on these
9 services and receiving an additional allocation”). Because Fernley incorporated in 2001, this
10 option is no longer available. *See id.*; Exhibit 15, at 106:3-13.

11 Despite its unavailability, the scheme set forth in NRS 360.740 bears some comment as an
12 example of an additional barricade to a C-Tax adjustment. First, the establishment of a municipal
13 police department is an expensive proposition. *See* Exhibit 25, at 32:23-34:22.¹⁵ Given the
14 Legislature’s express goal to preserve the status quo of the C-Tax system, it is no surprise that the
15 one and only mandatory service to be provided by a new local government is a police department.
16 Moreover, the statute provides that the local government must already provide a police
17 department before it can even ask for C-Tax to fund a police department. *See* NRS 360.740(1)
18 (stating that a local government “which provides police protection” is eligible for an adjustment).
19 This creates a classic catch-22 where a local government has to have a police department to ask
20 for the funds to stand up a police department, but can’t stand up a police department without the
21 funds to do so. *See* Exhibit 4, at 74:21-75:12. Further, the Nevada Attorney General has opined
22 that a County Sheriff has an obligation to provide law enforcement throughout his or her county,
23 regardless of whether other law enforcement agencies exist for municipalities inside that county.
24 *See* Exhibit 26, Attorney General Opinion No. 96-12 (May 6, 1996). Finally, if the Department
25 agrees to recommend an adjustment, the final decision is made by the CLGF and if they decide
26 against an adjustment, *no appeal is allowed*. *See* NRS 360.740(4); Exhibit 7, at 50:23-51:7 .
27 With membership of the CLGF made up of representatives of ~~other local governments, who~~

28 ¹⁵ Allen Veil is the current sheriff of Lyon County. *See* Exhibit 25, at 18:15-18.

would stand to lose revenues with a redistribution, there is no likelihood of success for a new entity in such a process. *See* Exhibit 4, at 74:15-75:4 (acknowledging that obstacles exist to obtaining adjustment in base allocation); *see also* Exhibit 20, at 116:6-24 (acknowledging that the \$4 million eventually obtained by the City of Henderson was rejected by the CLGF). In Fernley's case, for example, one CLGF member is a lobbyist paid by Lyon County to oppose its efforts to obtain a greater share of C-Tax revenues. *See* Exhibit 5, at 99:21-100:19, 103:7-17. Because the State has a finite amount of C-Tax revenue to distribute, and each local government's base is a portion of the overall C-Tax revenue allocated to the county in which it is situated, the Commission's approval of a request for C-Tax revenue necessarily makes less money available for distribution to other recipients – *i.e.*, if one entity receives more C-Tax revenue within a county, other entities within the county must receive less. *See* Exhibit 15, at 125:24-126:8; Exhibit 16, at 66:22-67:19.

With all of these insurmountable obstacles, it is no surprise that Fernley, as the only entity to incorporate since the creation of the C-Tax, did not pursue the creation of a police department in 2001. Regardless, NRS 360.740 is only available for a limited window of time which has long expired for Fernley.

Under these circumstances, a local government entity in Fernley's current position may only obtain an increase in its C-Tax revenue base by entering into a cooperative or interlocal agreement for that purpose or by lobbying the Legislature for a more favorable allocation of C-Tax revenue. *See* NRS 360.740(7); Exhibit 16, at 49:24-50:21, 66:5-67:19. Fernley has unsuccessfully tried both approaches. *See* Exhibit 3, at 59:14-25, 62:6-63:8.

As discussed below, however, this second remedy is illusory as the first.

E. Few C-Tax Recipients Enter Into Cooperative Or Interlocal Agreements For The Reallocation Of C-Tax Revenue, And Fernley Is Unable To Persuade Lyon County To Do So.

The Legislature has authorized at least *two* types of agreements between local governments that provide for the reallocation of C-Tax revenues. *See, e.g.*, NRS 360.730; NRS 360.740(7). *First*, local governments may enter into a cooperative ~~agreement that establishes an~~ alternative formula for distributing C-Tax revenue. *See* NRS 360.730. *Second*, local

1 governments may enter into an interlocal agreement that reallocates C-Tax revenue to
2 compensate one government entity for providing specified services to another government entity.
3 *See* NRS 360.740(7); NRS 354.598747(1)(b). Notably, while the Legislature has authorized such
4 agreements, there have been no meaningful cooperative or interlocal agreements for the
5 redistribution of C-Tax revenue since the system was enacted 17 years ago. *See* NRS 360.740(7);
6 Exhibit 11, at 37:21-38:11.

7 An assumption underlying the Legislature's adoption of the C-Tax was that one
8 government entity would willingly relinquish revenue to a second government entity, particularly
9 when the second entity has decided to take over services which had been provided on its behalf
10 by the first entity. *See* Exhibit 16, at 46:24-47:11. This assumption, however, has proven false.
11 There have only been *two* cooperative or interlocal agreements between C-Tax recipients for the
12 purpose of reallocating revenues during the lengthy history of the C-Tax. *See* Exhibit 11, at
13 37:21-38:11, 42:13-17; Exhibit 7, at 29:13-30:16; Exhibit 27. These agreements have included:

- 14 (1) An agreement between White Pine County and the City of Ely, which led
15 to the City of Ely receiving a greater revenue distribution than the C-Tax
16 formula otherwise provided. *See* Exhibit 11, at 38:12-40:15; Exhibit 7, at
17 29:24-30:5.
- 18 (2) An agreement between Clark County and its five incorporated cities that
19 provided a temporary solution to an allocation error, which had resulted in
20 Mesquite receiving a greater revenue distribution than it was entitled to
21 under a proper application of the C-Tax formula, until the Legislature
22 could address the issue. *See* Exhibit 11, at 40:16-42:12; Exhibit 7, at 30:6-
23 16.

24 The absence of any other cooperative or interlocal agreements, and particularly ones of any
25 significance, reveals that C-Tax recipients are generally unwilling to part with revenues that have
26 been allocated to them.

27 Fernley's inability to effectuate a cooperative or interlocal ~~agreement with Lyon County~~
28 for the redistribution of C-Tax revenue confirms this conclusion. *See* Exhibit 3, at 59:14-25.

1 Even though it comprises approximately one-third of Lyon County's population, only a fraction of
2 the Tier 1 C-Tax money returns to Fernley.¹⁶ See Exhibit 28. When a growing city like Fernley
3 finds that its tax revenues are inadequate to fund its services to the public, it may seek a
4 cooperative or interlocal agreement with the county in which it is situated for the purpose of
5 obtaining a redistribution of some of the county's C-Tax revenue. See Exhibit 16, at 66:22-67:19.

6 Several times Fernley asked Lyon County to share a portion of its C-Tax revenues, and
7 every time it was rebuffed. See Exhibit 3, at 59:14-25. One request had been for a 10 percent
8 redistribution of Lyon County's C-Tax revenue and the other had been for \$200,000. See *id.*; see
9 also Exhibit 29. Consistent with the cooperative or interlocal agreements authorized by the C-
10 Tax, Fernley intended to use these additional funds to, among other things, undertake essential
11 road repairs, upgrade its parks, and provide more police services. See Exhibit 3, at 60:4-61:25;
12 see also NRS 360.740(7). Not only does Fernley's past inability to persuade Lyon County to
13 enter into a cooperative or interlocal agreement regarding the redistribution of C-Tax revenue
14 suggest that future attempts to do so would likely meet a similar fate, the possibility of such an
15 agreement is now even more remote because Lyon County has retained a lobbyist to oppose
16 Fernley's legislative efforts to expand its C-Tax revenue base. See Exhibit 5, at 103:7-17.

17 **F. The Legislature Rarely Increases C-Tax Revenue Bases, And Rejects**
18 **Fernley's Requests For Relief.**

19 Like the lack of meaningful cooperative or interlocal agreements for the redistribution of
20 C-Tax revenues, legislative solutions to a local government entity's inadequate C-Tax revenue
21 base have been virtually nonexistent.

22 Only the City of Henderson has been able to obtain from the Legislature a substantial
23 upward adjustment in its C-Tax base, receiving an increase of \$4 million in or about 2000 when
24 the Speaker of the State Assembly was one of its elected representatives. See Exhibit 15, at
25 90:19-91:2; Exhibit 16, at 67:13-68:13, 92:20-93:16 (Hobbs. . . noting that Henderson's "chances
26 were remarkably improved" by being represented by the Speaker and that nonetheless the action

27 ¹⁶ For example, in fiscal year 2011-2012 (the most recent year information was provided for revenue collections),
28 \$4,165,732.39 was collected in Lyon County in C-Tax, yet only \$143,143.35 came back to Fernley via C-Tax
distributions. (Exhibit 28) (Exhibit 13).

caused "great controversy."); Exhibit 7, 40:23-41:4.

Other requests, such as those made by the cities of North Las Vegas and Fernley, have failed. *See* Exhibit 3, at 62:6-63:8, 75:18-23; Exhibit 15, at 91:3-20; Exhibit 16, at 68:9-69:6, 69:14-70:6. As recently as the 2011 legislative session, for instance, an Assembly Bill was introduced on Fernley's behalf that would have adjusted its C-Tax base from \$120,000 to \$5 million, but the bill never received a vote in the first committee and in fact, Fernley's legislative representative didn't even appear at the one hearing to testify in support of the bill. *See* Exhibit 3, at 62:6-21; Exhibit 30, at 1-2, 13-34. Other efforts were equally unsuccessful two years later. *See* Exhibit 3, at 62:22-63:8. Because of these failures, Fernley's current C-Tax base, which is largely the product of its initial C-Tax allocation as an unincorporated town with less than half its present population, provides grossly insufficient revenue to fund important services. *See* Exhibit 16, at 99:16-100:10.

G. Fernley's C-Tax Distributions Are Only A Fraction Of The C-Tax Revenues Received By Comparably Sized Nevada Cities.

As detailed in Exhibit 1, the C-Tax revenue currently distributed to Fernley is far below the C-Tax revenue received by the comparably sized Nevada cities of Mesquite, Boulder City, and Elko. *See* Exhibit 1. Fernley's initial revenue base upon the enactment of the C-Tax in 1997, when it was still an unincorporated town, was only approximately \$86,000. When Fernley incorporated in 2001, its population was 9,529, the total assessed value of taxable property within the city was \$233,552,164, and its C-Tax distributions totaled \$100,032.03. *See* Exhibit 1; Exhibit 3, at 76:6-7. By 2013, Fernley's population had nearly doubled to 18,897 and the total assessed value of taxable property within the city had nearly doubled to \$444,251,962, but its C-Tax distributions had only increased to \$133,050.30. *See* Exhibit 1. Stated otherwise, Fernley now receives only about \$7 in C-Tax revenue per resident despite its nearly 100 percent growth during the past 13 years. *See id.*

The nominal amount of C-Tax revenue presently distributed to Fernley stands in stark contrast to the C-Tax revenue received by Mesquite, Boulder City, and Elko, which were in existence and incorporated when the Legislature enacted the C-Tax. *See id.* All three of these

1 cities have populations and total assessed values similar to Fernley's, but received C-Tax
2 distributions in 2012 totaling \$7,336,084.71, \$8,855,664.66, and \$13,521,334.12 respectively.
3 *See id.*¹⁷. Fernley's C-Tax distributions even lag well behind the Elko Television District, which
4 has annually received C-Tax revenue of more than \$163,000 since 1997 despite having no
5 obligation to provide police or fire protection, to construct, maintain, or repair roads, or to offer
6 the public parks and recreation facilities. *See* Exhibit 13, Exhibit 16, at 99:3-100:10. Under
7 these circumstances, it is not surprising that cities like Mesquite, Boulder City, and Elko have the
8 financial wherewithal to establish sizable annual budgets for public safety, public works, culture,
9 and recreation while Fernley plainly does not.¹⁸ *See* Exhibit 1.

10 **H. Fernley Has Insufficient Funds To Provide Essential Services Because**
11 **Of Its Low C-Tax Base.**

12 A local government has responsibility to provide dozens of services to the public. *See*
13 Exhibit 5, at 90:3-6. The minimal amount of C-Tax revenue distributed to Fernley, however, has
14 significantly impaired its ability to fulfill this obligation. Fernley has a greater property tax rate
15 and imposes higher license and permit fees than those levied by Mesquite, Boulder City, and
16 Elko, but it cannot meaningfully close the gap in the revenue shortfall caused by its low C-Tax
17 base. *See* Exhibit 1. This lack of adequate revenue, for example, has caused Fernley to cut its
18 workforce by 30 percent and has left its roads and parks in a general state of disrepair. *See*
19 Exhibit 3, at 71:21-72:1; Exhibit 31.

20 Perhaps the most serious effect of Fernley's low C-Tax revenue is that the city now lacks
21 funding to provide adequate police services. *See* Exhibit 3, at 42:22-43:18, 61:14-25. When
22 Fernley incorporated in 2001, the Lyon County sheriff at the time, Sid Smith, guaranteed Fernley
23 residents that his office would continue to provide them with police services and that they would
24 experience no decline in necessary law enforcement. *See id.* at 40:21-41:7, 45:16-46:16. These

25 ¹⁷ On a per capita basis for fiscal year 2013, Mesquite receives \$419.76, Boulder City receives \$400.25, and Elko
26 receives \$645.16. Again, Fernley receives \$7 on a per capita basis. Exhibit 1.

27 ¹⁸ The Department has declined to offer any opinions regarding Fernley's receipt of C-Tax distributions that are
28 substantially less than cities of similar size, asserting that governing statutes have dictated this result. *See* Exhibit 15,
at 111:20-112:4. The Department makes no comparisons between recipients, but merely verifies that C-Tax
distributions are "mathematically and statutorily correct." *See id.* at 145:18-146:14. This approach is contrary to the
Department's rule that all taxpayers must be treated fairly. *See id.* at 115:2-116:5.

1 circumstances had dramatically changed by the March 2014 deposition of current sheriff, Allen
2 Veil, who testified that only three or four of his deputies patrol Fernley at any given time, but that
3 the national ratio is two officers per thousand population. *See* Exhibit 25, at 30:1-32:22. As a
4 result, with its current total population of approximately 19,000 people, Fernley should have a
5 minimum of 38 deputies patrolling its streets at all times. *See id.*; *see also* Exhibit 32. (stating
6 that the average United States jurisdiction with 10,000 to 24,999 residents has 1.85 law
7 enforcement officers for every 1,000 residents).

8 By contrast, and as of 2012, Boulder City had 2.02 law enforcement officers for every
9 1,000 residents, Elko had 2.60 and Mesquite had 1.79. *See* Exhibit 32, at 2. Fernley, with its
10 total of 14 law enforcement officers for a 2013 population of 18,987, has a ratio of 0.74. *See*
11 Exhibit 1; Exhibit 25, at 26:11-16.

12 With respect to public works, Fernley has been unable to maintain open space, parks and
13 playgrounds have fallen into disrepair and cemeteries are covered with blowing sand. Exhibit 31.
14 Moreover, the street system in Fernley is rapidly deteriorating. Of the 19 road projects in the
15 reconstruction project from 2007-2013, only three have been completed. *See id.* Between 2009
16 and 2013, only 900 feet (less than a quarter mile) of road has been repaired. *See id.* As a result, it
17 is common to see massive cracks in major Fernley thoroughfares as the roadways disintegrate.
18 *See id.*

19 Finally, although comparable cities like Elko, Mesquite and Boulder City receive enough
20 C-Tax to help fund police and fire protection, Fernley residents shoulder a unique burden in
21 Nevada by directly funding fire services of the North Lyon Fire Protection District through a
22 property tax charge. *See* Exhibit 33; NRS 266.043 (providing that fire protection districts are
23 prohibited in incorporated cities except for Fernley). The total amount of this unique property tax
24 burden has exceeded \$1 million in the 2012-13 and 2013-14 budget years. *See* Exhibit 33.

25 Fernley is simply unable to satisfy the demands for services that have been created by its
26 rapid growth over the past two decades, and the C-Tax system perpetuates low distributions to
27 Fernley and compounds the inability to address fundamental service needs. *See* Exhibit 1.
28

I. The Legislature Establishes No Government Oversight Of The Revenue Distributions Made Under The C-Tax System.

Because the State does not allocate C-Tax revenue for specific purposes, recipients may commingle it with revenue from other sources and use it for any purpose, including their general operations. *See* Exhibit 7, at 57:2-13, 58:8-16 ; Exhibit 5, at 90:7-11. The Legislature does not review, either on its own or through the Department, how recipients spend their C-Tax distributions. *See* Exhibit 5, at 90:7-18. While the Department reviews the budgets of local governments, it only does so to verify that they are functioning within their overall budgetary constraints. *See* Exhibit 7, at 59:8-12. The Department has acknowledged that it does not examine or assess how recipients use funds distributed to them through the C-Tax system:

- (1) It does not review the recipient's budget or otherwise examine the services provided to learn how it is spending C-Tax revenues;
- (2) It does not conduct studies to correlate the services provided with the C-Tax revenues distributed to each recipient;
- (3) It does not determine whether the C-Tax revenues allocated to each recipient are sufficient for the services which that entity must provide;
- (4) It does not consider whether the recipient has enough money to meet its service obligations; and
- (5) It does not assess whether similarly situated recipients obtain equal or close to equal allocations of C-Tax revenues.

See Exhibit 7, at 37:11-38:8, 42:7-22, 56:23-57:1, 58:8-16, 59:4-19. The Legislature has given the Department no responsibility to verify that the C-Tax system is working correctly or that it is fulfilling legislative objectives. *See id.* at 59:4-7; Exhibit 15, at 72:16-20. The Department accordingly takes no action if a recipient of C-Tax revenue provides services that are either insufficient or deficient. *See id.* at 59:20-23. In sum, the State collects and distributes C-Tax revenues pursuant to a mechanically applied formula, and without regard to how local governments use these monies, whether local governments receive an equitable share of C-Tax dollars, or whether they even have adequate funds to meet their service obligations. *See* Exhibit

20, at 138:14-23, 144:22-145:18 (noting that local government budgets get put in a "file drawer" and are only referred to "periodically"; stating that budgets are not "submitted to, like, the Legislature or compiled in a document").

IV. ARGUMENT.

A. The Entry Of Summary Judgment In Fernley's Favor Is Warranted As A Matter Of Law.

Rule 56 of the Nevada Rules of Civil Procedure authorizes the entry of summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See NRCP 56(c); *Advanced Countertop Design, Inc. v. Second Judicial Dist. Court*, 115 Nev. 268, 272, 984 P.2d 756, 759 (1999). The Nevada Supreme Court has explained this standard:

While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." The nonmoving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture."

See *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (footnotes omitted). Because this motion presents only issues of constitutional and statutory interpretation, which are entirely questions of law, no factual dispute of any kind exists that could preclude the entry of summary judgment in Fernley's favor as to its claims for: (1) the violation of the separation of powers clause, set forth in Article 3, Section 1, of the Nevada Constitution (second claim for relief); (2) the creation of a special law in violation of Article 4, Section 20, of the Nevada Constitution (third claim for relief); and (3) the violation of the general and uniform clause, set forth in Article 4, Section 21, of the Nevada Constitution (fourth claim for relief). See *Lorton v. Jones*, 130 Nev. Adv. Op. 8, slip op., at 6, 322 P.3d 1051, 1053 (2014) (constitutional interpretation); *State Farm Mut. Auto. Ins. Co. v. Cramer*, 109 Nev. 704, 707, 857 P.2d 751, 753 (1993) (statutory construction). Summary judgment in Fernley's favor is necessary and appropriate at this time because, by its plain language, the C-Tax separately and independently

violates each of these constitutional provisions as a matter of law. *See, e.g., Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev.Adv.Op. 76, 265 P.3d 688, 693-94 (2011) (affirming summary judgment based on statutory interpretation).

B. The C-Tax Violates The Separation Of Powers Clause Of The Nevada Constitution As A Matter Of Law.

The separation of powers doctrine ensures that each branch of government – the Legislative, the Executive, and the Judicial – remains independent from the others. *See Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 241-42 (1967). The principles underlying this doctrine are set forth in Article 3, Section 1, of the Nevada Constitution, which "contains an express provision prohibiting any one branch of government from impinging on the functions of another." *See Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103-04 (2009); *see also Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) ("[u]nder the separation of powers doctrine, each branch of government is considered to be co-equal, with inherent powers to administer its own affairs"). Article, 3, Section 1, provides:

The powers of the Government of the State of Nevada shall be divided into three separate departments, – the Legislative, – the Executive and the Judicial; *and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.*

See Nev. Const., art. 3, § 1 (emphasis added). This "division of powers" between the three branches "is probably the most important single principle of government declaring and guaranteeing the liberties of the people." *See Galloway*, 83 Nev. at 18, 422 P.2d at 241.

Not only does the Nevada Constitution divide our state government into three distinct branches, it delineates the powers conferred on each branch. *See N. Lake Tahoe Fire Prot. Dist. v. Washoe Cnty. Bd. of Cnty. Comm'rs*, 129 Nev.Adv.Op. 72, slip op. at 5, 310 P.3d 583, 587 (2013). The Constitution defines legislative power, for example, as "the power of law-making representative bodies to frame and enact laws, and to amend or repeal them." *See Galloway*, 83 Nev. at 20, 422 P.2d at 242; *see also Nev. Const., art. 4* (setting forth the powers of the Legislative Department). Executive power, by contrast, includes "carrying out and enforcing the

1 laws enacted by the Legislature." *See Galloway*, 83 Nev. at 20, 422 P.2d at 242; *see also* Nev.
2 Const., art. 5 (setting forth the powers of the Executive Department). The C-Tax system
3 fundamentally violates the separation of powers doctrine because it has resulted in the Legislature
4 abdicating its authority over the collection and appropriation of C-Tax revenues to the Executive
5 Branch.

6 One of the Legislature's primary functions is to appropriate funds to local governments,
7 commonly referred to as the "power of the purse." *See State of Nev. Emps. Ass'n, Inc. v. Daines*,
8 108 Nev. 15, 21, 824 P.2d 276, 279 (1992); *see also* Nev. Const., art. 4, § 19 ("[n]o money shall
9 be drawn from the treasury but in consequence of appropriations made by law"); NRS 353.230 *et*
10 *seq.* (appropriations are made through bills enacted by the Legislature). It is "well established,"
11 as the Nevada Supreme Court has pointed out, that "the power of controlling the public purse lies
12 within legislative, not executive authority." *See Daines*, 108 Nev. at 21, 824 P.2d at 279.
13 Although the Legislature may authorize other branches of government or administrative agencies
14 to adopt rules and regulations that supplement legislation "if the power given is prescribed in
15 terms sufficiently definite to serve as a guide in exercising that power," it is constitutionally
16 barred from delegating its legislative functions "to any other body or authority." *See Banegas v.*
17 *State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001). The power to make
18 appropriations is one such non-delegable legislative function. *See Folsom v. Wynn*, 631 So.2d
19 890, 894 (Ala. 1993). The C-Tax enacted by the Legislature runs afoul of this constitutional
20 limitation because it authorizes the Executive Branch, acting through the Department, to collect
21 and appropriate C-Tax revenues without any legislative participation or oversight. The
22 Legislature has acknowledged that, in the absence of a special request, it does not refer to local
23 government budgets for C-Tax purposes. *See Exhibit 20*, at 144:22-145:18 (stating that the
24 Legislature puts the budgets in "a file drawer" for future reference as needed).

25 Based on the Legislature's adoption of this "hands off" approach, the C-Tax system is
26 essentially "appropriation by auto-pilot." Not only does the Department collect and appropriate
27 C-Tax revenues based solely on the outcome of its mechanical application of a designated
28 mathematical formula without regard to whether legislative objectives are being met, it has

1 conceded that legislative considerations are irrelevant to this procedure. *See* Exhibit 15, at 72:16-
2 20; Exhibit 7, at 37:11-38:8, 42:7-22, 56:23-57:1, 58:8-16, 59:4-19. The Department has
3 acknowledged that its only concern is to ensure that the necessary mathematical calculations are
4 performed correctly, and that C-Tax revenue has been collected and appropriated accordingly.
5 *See id.*; Exhibit 15, at 71:17-22, 78:4-23, 79:14-19; Exhibit 7, at 64:22-67:2. The Legislature has
6 made a few minor adjustments to the applicable mathematical formula during the 14 years since it
7 enacted the C-tax, but has offered the Department no guidance in the collection and
8 appropriations process. Because this relinquishment of the Legislature's appropriations power to
9 the Executive Branch has resulted in a patent violation of the separation of powers clause of the
10 Nevada Constitution, the entry of summary judgment in Fernley's favor on its second claim for
11 relief is warranted as a matter of law. *See* Nev. Const., art. 3, § 1; *see also Opinion of the Justices*
12 *to the Senate*, 717 N.E.2d 655, 656 (Mass. 1999) (delegation of the power of appropriation from
13 the legislative branch to the executive branch violates separation of powers); *State ex rel.*
14 *Schwartz v. Johnson*, 907 P.2d 1001, 1002 (N.M. 1995) (legislature cannot delegate its
15 appropriations power without specific authorization by the state constitution).

16 C. **The C-Tax Is A Local Or Special Law In Violation Of The Nevada**
17 **Constitution As A Matter Of Law.**

18 Article 4, Section 20, of the Nevada Constitution expressly prohibits the Legislature from
19 passing any local or special laws for "the assessment and collection of taxes for state, county, and
20 township purposes." *See* Nev. Const., art. 4, § 20. The framers of the Nevada Constitution
21 proscribed such laws for these and other purposes to "remedy an evil into which it was supposed
22 the territorial legislature had fallen in the practice of passing local and special laws for the benefit
23 of individuals instead of enacting laws of a general nature for the benefit of the public welfare."¹⁹
24 *See Clean Water Coal. v. The M Resort, LLC*, 127 Nev.Adv.Op. 24, slip op. at 13, 255 P.3d 247,

25
26 ¹⁹ *See also Evans v. Job*, 8 Nev. 322, 333 (1873) (explaining that "[t]hese actions were
27 intended to prohibit the legislature from passing any local or special law in any one of the cases
28 enumerated in section 20, and to limit the passing of other local or special laws in all other cases
where a general law would be applicable, that is to say, where a general law would be adapted to
the wants of the people, suitable to the just purposes of legislation, or effect the object sought to
be accomplished").

254 (2011). The Nevada Supreme Court explained the rationale underlying this prohibition:

As previously announced by this court, the reasoning behind requiring that a statute be general in nature is that when a statute affects the entire state, then it is more likely to receive adequate and thorough consideration from all members of the legislature; whereas, if the bill is localized, it is apt not to be considered seriously by those who are not affected by it.

See Town of Pahrump v. County of Nye, 105 Nev. 227, 229, 773 P.2d 1224, 1225 (1989). Simply stated, a law is unconstitutional where, as here, it is a local or special law and comes within any of the cases enumerated in Article 4, Section 20. *See Attorney General v. Gypsum Res., LLC*, 129 Nev. Adv. Op. 4, slip op. at 9-10, 294 P.3d 404, 409 (2013) (holding that a Senate bill was unconstitutional because it was a local law and fell within one of the cases enumerated in Article 4, Section 20).

The quandary that Fernley now finds itself in is a classic example of a city burdened by a local or special tax law which the framers of the Nevada Constitution sought to remedy through the adoption of Article 4, Section 20. Fernley is located in a small rural county, and is the only city to have incorporated since the enactment of the C-Tax in 1997. The consequence is that Fernley receives substantially less C-Tax revenue than comparably sized Nevada cities, including Boulder City, Elko, and Mesquite. *See Exhibit 1*. Not only is the Legislature's design of the C-Tax system responsible for this discrepancy, it offers Fernley no meaningful statutory solution. *See supra* Sections II(D) and (E). The low C-Tax revenue base originally allocated to Fernley nearly twenty years ago, when it was a small unincorporated town, dictates the amount of C-Tax revenue Fernley receives today even though it has rapidly grown into Nevada's seventh largest city. Comparably sized cities like Boulder City, Elko, and Mesquite do not suffer from this same handicap because, having existed at the time the Legislature enacted the C-Tax, they started with significantly higher C-Tax bases. A law may have statewide effect, as the C-Tax does in this case, but it still lacks constitutionality under Article 4, Section 20, when it has the effect of burdening a particular locality, such as Fernley. *See Gypsum Res.*, 129 Nev. Adv. Op. 4, at 6-7, 294 P.3d at 407-08.

The hallmark of an unconstitutional local or special law, like the C-Tax, is that it raises little or no concern beyond the borders of the affected locality. *See Clean Water Coal.*, 127

1 Nev.Adv.Op. 24, at 13, 255 P.3d at 254 (when "a law affects only one small area of the state,
2 voters in most areas will be ignorant of and indifferent to it"). Fernley's circumstances exemplify
3 this problem in that its predicament has failed to garner any sympathy statewide. Because no
4 provision of the C-Tax offers it relief, Fernley has been compelled to seek assistance from the
5 Legislature and Lyon County. Not only have both the Legislature and Lyon County shown that
6 they are not receptive to Fernley's needs, they have vigorously opposed Fernley's efforts to obtain
7 an upward adjustment of its C-Tax base:

8 -- Fernley has been unable to convince the Legislature to consider its pleas
9 for an adjustment of its C-Tax base. The closest that Fernley came to a favorable
10 legislative outcome was a bill submitted on its behalf during the Legislature's
11 2011 session (Assembly Bill 47), which had only one hearing and never even
12 received a committee vote.²⁰ The Legislature has since intervened in this action
13 to oppose directly Fernley's efforts to obtain a judicial resolution of its C-Tax
14 dilemma.²¹

15 -- Lyon County has repeatedly rejected Fernley's requests to share a
16 relatively small portion of its allocation of C-Tax revenue, has opposed Assembly
17 Bill 47, and has even retained a lobbyist to oppose Fernley's efforts to obtain C-
18 Tax relief in the Legislature. *See* Exhibit 3, at 62:6-63:8; Exhibit 5, at 103:7-17;
19 Exhibit 30, at 26.

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21 ²⁰ Fernley's own assemblyman during the 2011 legislative session, Tom Grady, did not
22 even attend the sole meeting of the Assembly Committee on Taxation at which Fernley made its
23 presentation in support of Assembly Bill 47. *See* Exhibit 30. The lack of an appearance by
24 Fernley's own legislator undoubtedly contributed to its inability to obtain legislative relief.

25 ²¹ The Legislature has mistakenly maintained that Article 4, Section, 20, applies to tax
26 collection, but not to the distribution of tax revenues. The collection and distribution of C-Tax
27 revenue are inextricably intertwined. By statutory mandate, C-Tax revenue is collected and then
28 deposited into the Local Government Tax Distribution Account ("Account"), rather than into the
state general fund appropriated by the Legislature every biennium. *See* NRS 360.605 and
360.660; *see also* NRS 369.173 (deposit of liquor tax); NRS 370.260 (deposit of cigarette tax);
NRS 375.070 (deposit of real property transfer tax); NRS 377.055 (deposit of basic city-county
relief tax); NRS 377.057 (deposit of supplemental city-county relief tax); NRS. 482.180 and
482.181 (deposit of government services taxes). The Department's Executive Director
administers the Account, and annually allocates a portion of its funds to each eligible C-Tax
recipient. *See* NRS. 360.680 *et seq.*

Fernley therefore is essentially at the mercy of others, and it is indisputable that no support has been forthcoming or is likely to come. Because the C-Tax as applied does not place Fernley on an equal basis with other participants in the system, but rather imposes on Fernley a far lesser status, the C-Tax plainly constitutes a local or special law in contravention of Article 4, Section 20. *See Clean Water Coal.*, 127 Nev.Adv.Op. 24, at 16, 255 P.3d at 255 ("the determination on whether a law is local or special is based on how it is applied, not on how it actually operates").

C. The C-Tax Violates The General And Uniform Clause Of The Nevada Constitution As A Matter Of Law.

Not only is the C-Tax an unconstitutional local or special law, it also cannot pass muster under Article 4, Section 21, of the Nevada Constitution, which mandates that in "all" cases "where a general law can be made applicable, all laws *shall* be general and of uniform operation throughout the State." *See Nev. Const.*, art 4, § 21 (emphasis added); *see also Clean Water Coal.*, 127 Nev.Adv.Op. 24, at 25, 255 P.3d at 259 ("[e]ven 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"). The Court should begin and then immediately end its inquiry under Article 4, Section 21, because the C-Tax is a local or special law *and* falls within one of the cases enumerated in Article 4, Section 20, in that it involves the assessment and collection of taxes for state, county, and township purposes. *See supra* Section II. On this basis alone, the C-Tax cannot survive scrutiny under Article 4, Section 21, regardless of whether a general law could have been made applicable. *See Gypsum Res.*, 129 Nev.Adv.Op. 4, at 9-10, 294 P.3d at 409 (concluding that a violation of Article 4, Section 21, had occurred, irrespective of whether a general law could have been made applicable, because the subject bill was a local law and fell within one of the cases enumerated in Article 4, Section 20); *see also Goodwin v. City of Sparks*, 93 Nev. 400, 402, 566 P.2d 415, 416 (1977) (the constitutionality of a local or special law depends on whether a general law can be made applicable only when the law does not come within one of the cases enumerated in Article 4, Section 20).

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1 Even if the Court nevertheless were to consider whether a general law could have been
2 made applicable here, which it should not according to the teachings of *Gypsum Resources*
3 because the C-Tax is one of the cases enumerated in Article 4, Section 20, it should still find that
4 the C-Tax is unconstitutional under Article 4, Section 21. *See Cauble v. Beemer*, 64 Nev. 77, 87,
5 177 P.2d 677, 682 (1947) ("[i]t is a general rule, under such provisions as those of sections 20
6 and 21 of article 4 of the State constitution, that if a statute be either a special or local law, or
7 both, and comes within any one or more of the cases enumerated in section 20, such statute is
8 unconstitutional; if the statute be special or local, or both, but does not come within any of the
9 cases enumerated in section 20, then its constitutionality depends upon whether a general law can
10 be made applicable"). When it has upheld local or special legislation, the Nevada Supreme Court
11 has focused on whether "the general legislation existing was insufficient to meet the peculiar
12 needs of a particular situation," and "a general law could not be made applicable," or whether "a
13 particular emergency situation existed, requiring more speedy action and relief than could be had
14 by proceeding under the existing general law." *See Clean Water Coal.*, 127 Nev. Adv. Op. 24, at
15 26, 255 P.3d at 259. In this case, however, no emergency situation prompted the Legislature's
16 enactment of the C-Tax, and any notion that the C-Tax could not have been made generally
17 applicable is untenable.

18 The Legislature readily could have enacted a general law relating to the collection and
19 appropriation of the Six Taxes that comprise the C-Tax. Rather than the C-Tax's automatic
20 appropriation based on a mathematical formula that maintains the status quo that existed in 1997,
21 the taxes could have been collected, deposited into a fund segregated for local governments, and
22 appropriated biennially by the Legislature after a careful review of local government budgets.
23 Although this process may have prompted challenges based on "political differences," such
24 considerations do not establish the "special circumstances" necessary for dispensing with
25 constitutional requirements. *See Clean Water Coal.*, 127 Nev. Adv. Op. 24, at 28, 255 P.3d at 260;
26 *see also Town of Pahrump*, 105 Nev. at 229-30, 773 P.2d at 1225 (statute originally presented as
27 a general law, but then limited to a single town and county based on oppositions lodged by
28 various counties, was an unconstitutional local or special law). Because the C-Tax is a local or

1 special law that could have been made generally applicable, it is "not permissible under Article 4,
2 Section 21" and should be declared unconstitutional as a matter of law. *See Clean Water Coal*,
3 127 Nev.Adv.Op. 24, at 31, 255 P.3d at 261-62; *see also Anthony v. State*, 94 Nev. 338, 342, 580
4 P.2d 939, 942 (1978) (holding that statutory amendments "directed at solving a problem special to
5 Las Vegas which could as easily be[en] resolved by a general law" violated Article 4, Section 21).

6 Finally, the C-Tax is unsustainable under the Nevada Supreme Court's analysis in
7 *Anthony*, 94 Nev. at 338, 580 P.2d at 939. In that case, the Court considered the constitutionality
8 of statutory amendments, which provided for the distribution of certain tax revenues, under
9 Article 4, Section 21. *See id.* at 339, 580 P.2d at 940. The challenged law provided that, in a
10 county with a population greater than 200,000, 68.5% of certain tax revenues "shall be
11 apportioned to the largest city and the remainder among the other cities in proportion to their
12 respective populations." *See id.* at 340, 580 P.2d at 940-41. In holding that the law violated
13 Article 4, Section 21, the Court found that the "Legislature's intent, though commendable, was to
14 protect the fiscal policy of Clark County and not the financial ability of smaller cities to provide
15 needed services." *See id.* at 341, 580 P.2d at 941. The Court determined that the "only purpose"
16 of the statutory amendments at issue was "to perpetuate the existing state of affairs in Clark
17 County," and observed that "[i]f the revenue allocation amendments had a reasonable relation to
18 the needs of the other counties, rather than imposing Clark County's fiscal policies on them, the
19 amendments would have had general application." *See id.* at 342, 580 P.2d at 941-42. The
20 situation here is identical – the C-Tax has perpetuated the status quo of 1997, to protect the fiscal
21 policy of participants in the system at that time, all to the detriment and exclusion of local
22 governments, like Fernley, that were subsequently established. The C-Tax therefore should be
23 declared unconstitutional under Article 4, Section 21, as a matter of law.

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1 **V. CONCLUSION.**

2 For the foregoing reasons, Fernley respectfully requests that the Court grant this motion in
3 its entirety and enter summary judgment in its favor, granting both injunctive and monetary relief
4 to Fernley so that past and future C-Tax distributions meet constitutional standards.

5 DATED this 12th day of June, 2014.

6 BROWNSTEIN HYATT FARBER SCHRECK, LLP

7
8 By: 

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11 Reno, Nevada 89501
12 Telephone: 775-622-9450


13 *Attorneys for the City of Fernley, Nevada*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on this 13th day of June, 2014, I caused to be served via hand delivery, a true and correct copy of the above foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** properly addressed to the following:

Andrea Nichols, Esq.
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5420 Kietzke Lane, Suite 202
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Employee of Brownstein Hyatt Farber Schreck, LLP

DECLARATION OF JOSHUA J. HICKS, ESQ.

I, Joshua J. Hicks, Esq., hereby declare as follows:

1. I am an attorney at the law firm of Brownstein Hyatt Farber Schreck, LLP, counsel for Plaintiff City of Fernley, Nevada in Case No. 12 OC 00168 1B, currently pending before the First Judicial District Court, Carson City, Nevada. I submit this declaration in support of the Plaintiff's Motion for Summary Judgment. I have personal knowledge of the facts set forth herein, and if called upon to do so, am competent to testify thereto.

2. A true and correct copy of the compilation "FY 2013-2014 Budget Totals for Select Cities and Lyon County as Reported to the Nevada Department of Taxation," is attached hereto as Exhibit "1."

3. A true and correct copy of the Complaint dated June 6, 2012, is attached hereto as Exhibit "2."

4. A true and correct copy of excerpts of the deposition transcript of Leroy Goodman taken February 3, 2014, is attached hereto as Exhibit "3."

5. A true and correct copy of excerpts of the deposition transcript of Marvin Leavitt taken November 22, 2013, is attached hereto as Exhibit "4."

6. A true and correct copy of excerpts of the deposition transcript of Mary Walker taken December 3, 2013, is attached hereto as Exhibit "5."

7. A true and correct copy of the excerpts of Journal of the Nevada Senate dated May 22, 1997, is attached hereto as Exhibit "6."

8. A true and correct copy of excerpts of the deposition transcript of Terry Rubald taken December 12, 2013, is attached hereto as Exhibit "7."

9. A true and correct copy of the Notice of Deposition for the Person Most Knowledgeable, Nevada Department of Taxation, is attached hereto as Exhibit "8."

10. A true and correct copy of the Amended Notice of Deposition for the Person Most Knowledgeable, Nevada Department of Taxation, is attached hereto as Exhibit "9."

11. A true and correct copy of the correspondence ~~from Andrea Nichols~~ dated November 14, 2013, is attached hereto as Exhibit "10."

12. A true and correct copy of excerpts of the deposition transcript of Warner Ambrose taken December 12, 2013, is attached hereto as Exhibit "11."

13. A true and correct copy of the Nevada Department of Taxation's PowerPoint Presentation "Can Anyone Explain the CTX," is attached hereto as Exhibit "12."

14. A true and correct copy of the Nevada Department of Taxation, Base vs. Excess Charts, FY 1999-2011, is attached hereto as Exhibit "13."

15. A true and correct copy of excerpts of the Nevada Legislature's Response to Fernley's First Request for Admissions, is attached hereto as Exhibit "14."

16. A true and correct copy of excerpts of the deposition transcript of Marian Henderson taken November 13, 2013, is attached hereto as Exhibit "15."

17. A true and correct copy of excerpts of the deposition transcript of Guy Hobbs taken January 13, 2014, is attached hereto as Exhibit "16."

18. A true and correct copy of excerpts of the Minutes of the SCR 40 Legislative Commission's Subcommittee dated October 5, 1995, is attached hereto as Exhibit "17."

19. A true and correct copy of excerpts of The 1997 Nevada Legislature: A Review of Legislative Actions on State Issues, is attached hereto as Exhibit "18."

20. A true and correct copy of Nevada Department of Taxation's Supplemental Response to Fernley's Interrogatory No. 19, is attached hereto as Exhibit "19."

21. A true and correct copy of excerpts of the deposition transcript of Russell Guindon taken November 20, 2013, is attached hereto as Exhibit "20."

22. A true and correct copy of the Notice of Deposition for the Person Most Knowledgeable, Nevada Legislature, is attached hereto as Exhibit "21."

23. A true and correct copy of the Amended Notice of Deposition for the Person Most Knowledgeable, Nevada Legislature, is attached hereto as Exhibit "22."

24. A true and correct copy of excerpts of Minutes of the Meeting of the Legislative Commission's Study to Develop Enabling Legislation for the Creation of Incorporated Towns dated March 25, 2002, is attached hereto as Exhibit "23."

25. A true and correct copy of the Letter from Director Chisel, Nevada Department of Taxation, dated December 20, 2011, is attached hereto as Exhibit "24."

3 26. A true and correct copy of excerpts of the deposition Transcript of Allen Veil
4 taken March 13, 2014, is attached hereto as Exhibit "25."

27. A true and correct copy of Attorney General Opinion 96-12, is attached hereto as Exhibit "26."

28. A true and correct copy of Table 1-Second Tier Distribution of Revenue from the Local Government Tax Distribution Account, is attached hereto as Exhibit "27."

29. A true and correct copy of the Nevada Department of Taxation, Consolidated Tax Collections, FY 1999-2012, is attached hereto as Exhibit "28."

11 30. A true and correct copy of correspondence from Leroy Goodman to Jeff Page, is
12 attached hereto as Exhibit "29."

31. A true and correct copy of the Minutes of the Nevada Assembly Committee on Taxation, dated February 22, 2011, is attached hereto as Exhibit "30."

15 32. A true and correct copy of the Report of Sheri Whalen dated February 1, 2014, is
16 attached hereto as Exhibit "31."

17 33. A true and correct copy of the Report of William Sousa dated February 8, 2014, is
18 attached hereto as Exhibit "32."

19 34. A true and correct copy of the North Lyon Fire Protection District, FY ending June
20 30, 2013, is attached hereto as Exhibit "33."

21 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
22 is true and correct.

23 Executed this 12th day of June, 2014, in Reno, Nevada.

~~JOSHUA J. HICKS, ESQ.~~

CITY OF LAS VEGAS, NEVADA, a Nevada municipal corporation,
Plaintiff,

v.

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 DOES 1-20, inclusive,
Defendants,

NEVADA LEGISLATURE,
Intervenor

Case No.: 12 OC 00168 1B

Dept. No.: I

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EXHIBIT 1

EXHIBIT 1

FY 2013-2014 Budget Totals for Select Cities and Lyon County as Reported to the Nevada Department of Taxation

	2001 Population ¹	2013 Population ²	Percent Change	2001 Assessed Valuation ³	2013 Assessed Valuation ⁴	Percent Change	2001 CTX ⁵	2013 CTX ⁶	Percent Change	2001 Property Tax Rate ⁷	2013 Property Tax Rate ⁸	2013-2014 Municipal/ County Budget ⁹
Fernley	9,529	18,987	99.25%	\$ 233,552,164	\$ 444,251,962	90.22%	\$ 100,032.03	\$ 133,050.30	33.01%	2.7403%	3.5497%	\$ 8,636,493
Mesquite	11,940	17,477	46.37%	255,555,696	538,961,318	110.90%	5,216,434.45	7,336,084.71	40.63%	2.4877%	2.7737%	42,066,527
Boulder City	14,760	15,635	5.93%	370,567,281	528,726,970	42.68%	6,257,917.59	8,855,664.66	41.51%	2.4744%	2.7264%	28,834,365
Elko	17,093	20,958	22.61%	295,123,546	427,764,045	44.94%	6,457,850.83	13,521,334.12	109.38%	3.0726%	3.4823%	23,941,346
Lyon County	37,329	52,960	41.87%	\$ 722,002,643	\$ 1,192,776,765	65.20%	\$ 10,712,760.86	\$ 14,368,990.95	34.13%	2.6675%	2.9969%	\$37,337,010
1 "2001 Population" figures derived from the following pursuant to NRS 360.285: Nevada Dept. of Taxation's "Population of Nevada's Counties and Incorp Cities 2013 Governor's Certified Series." Figures as of July 1, 2001												
2 "2013 Population" figures derived from the following pursuant to NRS 360.285: Nevada Dept. of Taxation's "Population of Nevada's Counties and Incorp Cities 2013 Governor's Certified Series." Figures as of July 1, 2013												
3 "2001 Assessed Valuation" figures derived from the following: Nevada Dept. of Taxation's "Property Tax Rates for Nevada Local Governments." Figures as of July 16, 2001 (FY 2001-2002)												
4 "2013 Assessed Valuation" figures derived from the following: Nevada Dept. of Taxation's "Property Tax Rates for Nevada Local Governments." Figures as of July 15, 2013 (FY 2013-2014)												
5 "2001 CTX" figures derived from the following: Nevada Dept. of Taxation's "Consolidated Tax Distribution" report. (FY 2000-2001)												
6 "2013 CTX" figures derived from the following: Nevada Dept. of Taxation's "Consolidated Tax Distribution" report. (FY 2012-2013)												
7 "2001 Property Tax Rate" figures derived from the following: Nevada Dept. of Taxation's "Property Tax Rates for Nevada Local Governments." Figures as of July 16, 2001 (FY 2001-2002)												
8 "2013 Property Tax Rate" figures derived from the following: Nevada Dept. of Taxation's "Property Tax Rates for Nevada Local Governments." Figures as of July 15, 2013 (FY 2013-2014)												
9 "2013-2014 Municipal/County Budget" figures are the "Total Revenues" from "Budget Summary, Schedule S-1 - Form 2" and are derived from the following: Municipality/County's "Final Budget for FY End June 30, 2014," submitted to Nevada Dept. of Taxation (FY 2013-2014)												

EXHIBIT 2

EXHIBIT 2

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17 *Attorneys for the City of Fernley, Nevada*

18
19 **IN THE FIRST JUDICIAL DISTRICT COURT**
20 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

21 CITY OF FERNLEY, NEVADA, a
22 Nevada municipal corporation,

23 Plaintiff,

24 v.

25 STATE OF NEVADA ex rel. THE NEVADA
26 DEPARTMENT OF TAXATION; THE
27 HONORABLE KATE MARSHALL, in her
28 official capacity as TREASURER OF THE
STATE OF NEVADA; and DOES 1-20,
inclusive,

Defendants.

Case No.: 120C 00168 1B
Dept. No.: I

COMPLAINT

For its Complaint against Defendants the State of Nevada ex rel. the Nevada Department of Taxation (the "Department") and the Honorable Kate Marshall, in her official capacity as Treasurer of the State of Nevada ("Treasurer") (collectively "Defendants"), Plaintiff the City of Fernley, Nevada ("Fernley") alleges as follows:

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ALAN GLOVER
BY C. Cooper CLERK

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PARTIES

1
2 1. Fernley is a Nevada municipal corporation, located in Lyon County, Nevada.
3 Fernley is not a debtor in bankruptcy.

4 2. The Department is an executive branch agency of the State of Nevada. The
5 Department's responsibilities include general supervision and control over the entire revenue
6 system of the State of Nevada.

7 3. The Treasurer is a constitutional officer in the executive branch of the State of
8 Nevada. The Treasurer's responsibilities include, *inter alia*, the disbursement of public monies.

BACKGROUND

9
10 4. In 1997, the State of Nevada, through its Legislature, established a system, unique
11 to Nevada, known as the Consolidated Tax (the "C-Tax") system. At the time the C-Tax system
12 was established fifteen years ago, Fernley was an unincorporated town, with a population of
13 approximately 8,000 people.

14 5. The C-Tax system was intended to provide revenue stability and an equitable
15 distribution of certain tax revenues among Nevada's counties and local governments, and the
16 Defendants are responsible for administering the C-Tax system to achieve those ends.

17 6. C-Tax revenues are comprised of the following six (6) taxes collected in Nevada: (i)
18 the Cigarette Tax; (ii) the Liquor Tax; (iii) the Government Services Tax (the "GST"); (iv) the
19 Real Property Transfer Tax (the "RPTT"); (v) the Basic City County Relief Tax (the "BCCRT");
20 and (vi) the Supplemental City County Relief Tax (the "SCCRT"). The BCCRT and SCCRT are
21 percentages of the overall Sales and Use Tax rate, 0.50% and 1.75%, respectively, of the 6.85%
22 statewide Sales and Use Tax.

23 7. The revenues collected from the six (6) taxes described in Paragraph 7 above are
24 consolidated by the Department and then distributed by the Treasurer, at the direction of the
25 Department, on a monthly basis as follows: (i) the Cigarette Tax is distributed to Nevada's
26 counties based on population; (ii) the Liquor Tax is distributed to Nevada's counties based on
27 population; (iii) the GST is distributed to the county in which it was collected; (iv) the RPTT is
28 distributed to the county in which it was collected; (v) the BCCRT is distributed, when collected

1 from in-state companies, to the county in which the in-state company is located and, when
2 collected from out-of-state companies, to Nevada's counties based on population; and (vi) the
3 SCCRT is distributed to Nevada's counties based on a statutory formula found at Nevada Revised
4 Statutes ("NRS") 377.057. Pursuant to NRS 377.057, nine (9) of Nevada's seventeen (17)
5 counties, including Lyon County, receive a guaranteed monthly allocation of SCCRT revenues,
6 regardless of their SCCRT receipts.

7 8. C-Tax revenues are distributed monthly in tiers. Tier 1 Distributions go to
8 Nevada's seventeen (17) counties, in varying amounts based on the factors described in Paragraph
9 8 above. Tier 2 Distributions are distributions of the Tier 1 amounts and are made to the various
10 local governments and special districts within that county. Tier 2 Distributions are made according
11 to statutory "Base" and "Excess" allocation formulas, found at NRS 360.680 and 360.690,
12 respectively. There are no restrictions on what C-Tax revenues can be used for by a county or
13 local government, and in fact C-Taxes are commonly used for general operating expenses.

14 9. Fernley incorporated in 2001. Fernley is the only municipality to incorporate in
15 Nevada since the C-Tax system was implemented in 1997. No meaningful adjustments were made
16 to Fernley's C-Tax distribution after its incorporation in 2001 and, even today, despite significant
17 growth in population and assessed property valuation, Fernley receives a C-Tax distribution
18 similar to its distributions as an unincorporated town in 1997. For example, in 1997, Fernley, then
19 an unincorporated town, received approximately \$86,000 in C-Tax distributions. In 2001, the year
20 Fernley incorporated, it received \$110,685 in C-Tax distributions. In 2011, Fernley received
21 \$143,143 in C-Tax distributions.

22 10. Today, Fernley, home to a major Amazon.com distribution center since 1999, is the
23 seventh most populous city in Nevada, with a population of approximately 19,000 people. Lyon
24 County, within which Fernley is located, is Nevada's fourth most populous county, with a
25 population of approximately 52,000 people, some 36% of whom live in Fernley.

26 11. Despite experiencing population growth of approximately 250% since the C-Tax
27 system was established, Fernley's current C-Tax distributions are not significantly different from
28 what it received as an unincorporated town in the late 1990s.

12. Comparisons of C-Tax distributions to comparably sized jurisdictions in Nevada are striking. C-Tax distributions for 2010-2011 to comparably sized Nevada towns or cities include: Fallon (\$1,409,664); Boulder City (\$7,935,323); Elko (\$11,015,989); West Wendover (\$2,275,011); Winnemucca (\$3,552,393); Mesquite (\$7,046,690); and Ely (\$1,142,528). The average C-Tax distribution to these jurisdictions in 2010-2011 was \$4,910,571. Again, Fernley's C-Tax distribution for the same year was just \$143,143.

13. Of the \$14.836 million Lyon County received in Tier 1 C-Tax Distributions in 2011, Fernley received a total of only \$143,000 in Tier 2 Distributions, which is less than 1% of Lyon County's 2011 Tier 1 C-Tax Distributions. Put another way, in 2011, Fernley received approximately \$7 in C-Tax revenue per resident. By comparison, in Clark County, Boulder City and Mesquite, both of which are less populous than Fernley, received 2011 Tier 2 C-Tax Distributions totaling \$7.935 million and \$7.047 million, respectively (between \$450 and \$550 per resident). In Elko County, the City of Elko, the population of which is comparable to Fernley's, received \$11.016 million in 2011 Tier 2 C-Tax Distributions, roughly one hundred times more than Fernley.

14. The C-Tax system is not designed to allow for any meaningful adjustment to distributions. The Department has no ability to adjust Tier 1 Distributions, and can only make minor adjustments to Tier 2 Distributions if local governments agree to a transfer of services. Other adjustments are permanently barred to a municipality if they are not requested within 12 months of incorporation. What this means is that a jurisdiction like Fernley, that begins with a low base allocation, has no hope of ever obtaining a meaningful adjustment.

15. Fernley has been rebuffed in its efforts to obtain a larger share of the distribution to Lyon County.

16. Fernley has been rebuffed in its efforts to obtain relief from the Nevada Legislature. In 2011, Fernley promoted a bill to increase its base C-Tax allocation. That bill received one committee hearing and died, never receiving even so much as a committee vote.

17. Fernley has exhausted all of its options to obtain an adjustment to its C-Tax distribution, leaving Fernley in the position of having no choice but to seek relief from this Court.

1 18. Fernley's inability to obtain any adjustment to its C-Tax distribution severely limits
2 Fernley's ability to operate and plan for its future.

3 19. As administered by the Defendants, Nevada's C-Tax system denies Fernley equal
4 protection, in violation of Section 1 of Amendment XIV of the United States Constitution.
5 Nevada's C-Tax system further violates the separation of powers, creates a special law, operates in
6 a non-uniform and non-general fashion, and imposes non-uniform and unequal taxation within the
7 State of Nevada, all in violation of the Nevada Constitution and to Fernley's harm.

8 **FIRST CLAIM FOR RELIEF**

9 **(Denial of Equal Protection in Violation of Section 1 of the
10 Fourteenth Amendment to the United States Constitution)**

11 20. Fernley repeats and realleges the allegations set forth in Paragraphs 1 through 19 as
12 though fully set forth herein.

13 21. The Fourteenth Amendment to the United States Constitution prohibits a State from
14 denying equal protection of its laws to any person within its jurisdiction.

15 22. As administered by the Defendants, Nevada's C-Tax system results in Fernley
16 receiving distributions that are substantially less than what is received by other, comparably
17 populated and similarly situated Nevada towns and cities.

18 23. As administered by the Defendants, Nevada's C-Tax system is non-uniform and
19 unequal in its effect upon Fernley as compared to other similarly situated Nevada towns and cities.

20 24. As administered by the Defendants, Nevada's C-Tax system denies Fernley and its
21 citizens the equal protection of Nevada's laws.

22 25. The denial of Fernley's equal protection of the law by the Defendants has
23 proximately caused damages to Fernley, in an amount to be determined at trial.

24 26. The C-Tax system is unconstitutional, both on its face and as applied to Fernley.

25 27. Fernley has been required to retain the services of Brownstein Hyatt Farber
26 Schreck, LLP to prosecute its Constitutional claims and is therefore entitled to recover an award of
27 reasonable attorneys' fees and costs of suit.

28 ///

SECOND CLAIM FOR RELIEF

(Violation of the Separation of Powers Clause of the Nevada Constitution)

28. Fernley repeats and realleges the allegations set forth in Paragraphs 1 through 27 as though fully set forth herein.

29. Article 3, Section 1 of the Nevada Constitution provides that the powers of the State government are divided into three branches and that no person charged with the exercise of powers properly belonging to one of those branches may be exercised by either of the other branches.

30. Legislative authority in Nevada is vested in the Nevada Legislature, including the power to control the raising and distribution of revenues.

31. The Nevada Legislature is empowered to direct the distribution of C-Tax revenues to counties and local governments.

32. The C-Tax system, which is administered by the executive branch of the state government, is set up so that the legislative authority over the C-Tax system is abdicated to and exercised by the executive branch of state government.

33. As administered by Defendants, the C-Tax system violates the Separation of Powers Clause of the Nevada Constitution.

34. The violation of the separation of powers clause has proximately caused damages to Fernley, in an amount to be determined at trial.

35. The C-Tax system is unconstitutional, both on its face and as applied to Fernley.

36. Fernley has been required to retain the services of Brownstein Hyatt Farber Schreck, LLP to prosecute its Constitutional claims and is therefore entitled to recover an award of reasonable attorneys' fees and costs of suit.

THIRD CLAIM FOR RELIEF

(Creation of a Special Law in Violation of Article 4, Section 20 of the Nevada Constitution)

37. Fernley repeats and realleges the allegations set forth in Paragraphs 1 through 36 as though fully set forth herein.

1 38. Article 4, Section 20 of the Nevada Constitution provides that the Nevada
2 Legislature shall not pass local or special laws pertaining to the assessment and collection of taxes
3 for state, county and township purposes.

4 39. Fernley and its residents are net exporters of tax revenues into the C-Tax system
5 and receive substantially less in C-Tax distributions than are submitted in C-Tax collections.

6 40. As administered by Defendants, the C-Tax system operates as a local or special law
7 with respect to Fernley, by treating Fernley significantly differently for tax collection and
8 distribution purposes than other local governments.

9 41. The violation of Article 4, Section 20 of the Nevada Constitution has proximately
10 caused damages to Fernley, in an amount to be determined at trial.

11 42. The C-Tax system is unconstitutional, both on its face and as applied to Fernley.

12 43. Fernley has been required to retain the services of Brownstein Hyatt Farber
13 Schreck, LLP to prosecute its Constitutional claims and is therefore entitled to recover an award of
14 reasonable attorneys' fees and costs of suit.

15 **FOURTH CLAIM FOR RELIEF**

16 **(Violation of Article 4, Section 21 of the Nevada Constitution)**

17 44. Fernley repeats and realleges the allegations set forth in Paragraphs 1 through 43 as
18 though fully set forth herein.

19 45. Article 4, Section 21 of the Nevada Constitution provides that in all cases where a
20 general law can be made applicable, that all laws shall be general and of uniform operation
21 throughout the State.

22 46. As administered by Defendants, the C-Tax system operates in a non-general and
23 non-uniform fashion by treating Fernley significantly differently from other local governments.

24 47. The violation of Article 4, Section 21 of the Nevada Constitution has proximately
25 caused damages to Fernley, in an amount to be proven at trial.

26 48. The C-Tax system is unconstitutional, both on its face and as applied to Fernley.

1 49. Fernley has been required to retain the services of Brownstein Hyatt Farber
2 Schreck, LLP to prosecute its Constitutional claims and is therefore entitled to recover an award of
3 reasonable attorneys' fees and costs of suit.

4 **FIFTH CLAIM FOR RELIEF**

5 **(Denial of Due Process in Violation of Section 1 of**
6 **the 14th Amendment to the United States Constitution)**

7 50. Fernley repeats and realleges the allegations set forth in Paragraphs 1 through 49 as
8 though fully set forth herein.

9 51. The Fourteenth Amendment to the United States Constitution prohibits a State from
10 denying due process of law to any person within its jurisdiction.

11 52. As administered by the Defendants, Nevada's C-Tax system results in Fernley
12 receiving tax revenue distributions that are substantially less than what is received by other local
13 governments and provides no process by which Fernley can obtain a meaningful and effective
14 adjustment of such tax distributions .

15 53. As administered by the Defendants, Nevada's C-Tax system prevents Fernley and
16 its citizens from any meaningful adjustment to C-Tax distributions.

17 54. As administered by the Defendants, Nevada's C-Tax system denies Fernley and its
18 residents of due process of law.

19 55. The denial of due process by the Defendants has proximately caused damages to
20 Fernley, in an amount to be determined at trial.

21 56. The C-Tax system is unconstitutional, both on its face and as applied to Fernley.

22 57. Fernley has been required to retain the services of Brownstein Hyatt Farber
23 Schreck, LLP to prosecute its Constitutional claims and is therefore entitled to recover an award of
24 reasonable attorneys' fees and costs of suit.

25 **SIXTH CLAIM FOR RELIEF**

26 **(Declaratory Relief)**

27 58. Fernley repeats and realleges the allegations set forth in Paragraphs 1 through 57 as
28 though fully set forth herein.

1 59. As set forth above, through the operation of Nevada's C-Tax system, as
2 administered by the Defendants, Fernley has been deprived of its rights under the United States
3 and Nevada Constitutions.

4 60. Fernley has inquired of Defendants in writing regarding what remedies Defendants
5 would be able to afford Fernley.

6 61. Defendants have indicated that they will not and cannot provide adequate remedies
7 to Fernley.

8 62. As such, an actual justiciable controversy has arisen with respect to the following
9 issues:

10 a) Whether Nevada's C-Tax system, as administered by the Defendants, gives
11 Fernley the equal protection of Nevada's laws;

12 b) Whether Nevada's C-Tax system, as administered by the Defendants,
13 violates the Separation of Powers Clause of the Nevada Constitution;

14 c) Whether Nevada's C-Tax system, as administered by the Defendants,
15 operates as a local or special law for the assessment and collection of taxes for state, county and
16 township purposes;

17 d) Whether Nevada's C-Tax system, as administered by the Defendants,
18 violates the mandate of the Nevada Constitution that all laws be of general and uniform operation
19 throughout the State; and

20 g) Whether Nevada's C-Tax system, as administered by the Defendants, gives
21 Fernley due process.

22 63. Fernley contends that the answer to all of the above questions results in a
23 determination that the C-Tax system is unlawful on its face and on an as-applied basis to Fernley.
24 Thus, there presently exists a ripe case and controversy for which the parties are in need of
25 declarations from the Court to resolve their respective rights under the United States and Nevada
26 Constitutions.

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1 64. Fernley has been required to retain the services of Brownstein Hyatt Farber
2 Schreck, LLP to prosecute its Constitutional claims and is therefore entitled to recover an award of
3 reasonable attorneys' fees and costs of suit.

4 **SEVENTH CLAIM FOR RELIEF**

5 **(Injunctive Relief)**

6 65. Fernley repeats and realleges the allegations set forth in Paragraphs 1 through 64 as
7 though fully set forth herein.

8 66. Fernley has suffered and will continue to suffer immediate, great and irreparable
9 injury, loss or damage if the Defendants are allowed to continue to administer Nevada's C-Tax as
10 they have been, with the resultant deprivation of Fernley's rights under the United States and
11 Nevada Constitutions.

12 67. Fernley is entitled to restrain the Defendants from administering Nevada's C-Tax
13 system in a way which infringes upon Fernley's Constitutional rights and works to Fernley's
14 prejudice.

15 68. Defendants' administration of Nevada's unconstitutional C-Tax system to Fernley's
16 prejudice is both ongoing and imminent.

17 69. Fernley seeks an order from this Court enjoining the Defendants, as well as those
18 persons acting on their behalf or in concert with them, from making or causing to be made any
19 distributions under Nevada's C-Tax system, until such time as this Court rules upon the
20 declaratory relief requested herein and thereafter to the extent the Court deems appropriate.

21 70. Fernley has been required to retain the services of Brownstein Hyatt Farber
22 Schreck, LLP to prosecute its Constitutional claims and is therefore entitled to recover an award of
23 reasonable attorneys' fees and costs of suit.

24 WHEREFORE, Fernley prays for judgment as follows:

- 25 1. On its First Claim for Relief, for damages in an amount to be proven at trial;
26 2. On its Second Claim for Relief, for damages in an amount to be proven at trial;
27 3. On its Third Claim for Relief, for damages in an amount to be proven at trial;
28 4. On its Fourth Claim for Relief, for damages in an amount to be proven at trial;

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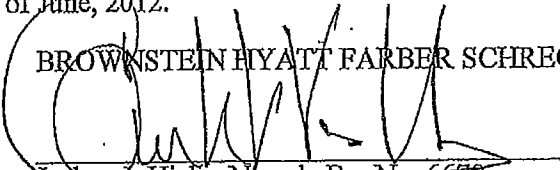
- 1 5. On its Fifth Claim for Relief, for damages in an amount to be proven at trial;
- 2 6. On its Sixth Claim for Relief, for declarations as follows:
- 3 a) That Nevada's C-Tax system, as administered by the Defendants, denies
- 4 Fernley and its residents the equal protection of Nevada's laws, in violation of Section 1 of the
- 5 Fourteenth Amendment to the United States Constitution;
- 6 b) That Nevada's C-Tax system, as administered by the Defendants, violates
- 7 the Separation of Powers Clause of the Nevada Constitution;
- 8 c) That Nevada's C-Tax system, as administered by the Defendants, operates as
- 9 a local or special law for the assessment and collection of taxes for state, county and township
- 10 purposes and therefore violates Article 4, Section 20 of the Nevada Constitution;
- 11 d) That Nevada's C-Tax system, as administered by the Defendants, violates
- 12 the mandate of Article 4, Section 21 of the Nevada Constitution that all laws be of general and
- 13 uniform operation throughout the State; and
- 14 e) That Nevada's C-Tax system, as administered by the Defendants, denies
- 15 Fernley and its residents guarantees of due process, in violation of Section 1 of the Fourteenth
- 16 Amendment to the United States Constitution.
- 17 7. On its Seventh Claim for Relief, for the issuance of an injunction enjoining the
- 18 Defendants, as well as those persons acting on their behalf or in concert with them, from making
- 19 or causing to be made any distributions under Nevada's C-Tax system, until such time as this
- 20 Court rules upon the declaratory relief requested herein and thereafter to the extent the Court
- 21 deems appropriate;
- 22 ///
- 23 ///
- 24 ///
- 25 ///
- 26 ///
- 27 ///
- 28 ///

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- 1 8. Attorneys' fees and costs of suit; and
2 9. Any further relief this Court deems proper.

3 DATED this 6th day of June, 2012.

4 BROWNSTEIN HYATT FARBER SCHRECK, LLP

5 
6 Joshua J. Hicks, Nevada Bar No. 6679

7 Clark V. Vellis, Nevada Bar No. 5533

8 Sean D. Lyttle, Nevada Bar No. 11640

9 9210 Prototype Drive, Suite 250

10 Reno, Nevada 89521

11 *Attorneys for Plaintiff the City of Fernley, Nevada*

EXHIBIT 3

EXHIBIT 3



ORIGINAL

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

-o0o-

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Case No. 12 OC 00168 1B

Department No. I

Plaintiff,

vs.

STATE OF NEVADA, ex rel. THE
NEVADA DEPARTMENT OF TAXATION;
et al.,

Defendants,

NEVADA LEGISLATURE,

Intervener.

DEPOSITION OF

LEROY GOODMAN

January 10, 2014

Reno, Nevada

REPORTED BY: CONSTANCE S. EISENBERG, CCR #142, RMR, CRR

Job No. 197783

1 Q And then at some point, you were a manager?

2 A Sales manager, right, just more of a title than
3 anything, because we had a small sales force. That's all.

4 When you get someplace for so long, it kind of evolves.
5 That's all.

6 Q I know you are the current mayor of Fernley --

7 A Uh-huh.

8 Q -- and a former Lyon County commissioner. Have you held
9 any other political offices?

10 A I was an elected member of the Fernley town board.

11 Q When was that?

12 A That would have been 1984 through 1988.

13 Q And then when were you a Lyon County commissioner?

14 A 1997 through 2008.

15 Q And then when were you elected mayor of Fernley?

16 A I was first appointed mayor of Fernley because the
17 incumbent moved out of town. That was in August of 2009. And I
18 was elected to the position in, actually, June of 2010.

19 Q So were you a Lyon County commissioner when the town of
20 Fernley was considering incorporation?

21 A Yes, I was.

22 Q And actually, were you on -- in -- was the City of
23 Fernley considering incorporation at all when you were on the
24 Fernley town board?

25 A Back in '88?

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel.
DEPARTMENT OF TAXATION;
THE HONORABLE DAN
SCHWARTZ, in his official capacity
as TREASURER OF THE STATE OF
NEVADA; and THE LEGISLATURE
OF THE STATE OF NEVADA,

Respondents.

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

JOINT APPENDIX

VOLUME 7 PART 3

Filed By:

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Nevada*

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City of Fernley v. State of Nevada et al., Case No. 66851

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**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a Nevada
municipal corporation,

Plaintiff,

v.

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; THE LEGISLATURE
OF THE STATE OF NEVADA and DOES 1-
20, Inclusive,

Defendants.

Case No.: 12 OC 00168 1B

Dept. No.: I

**NEVADA DEPARTMENT OF TAXATION
AND NEVADA TREASURER'S REPLY TO
CITY OF FERNLEY'S RESPONSE TO
RENEWAL OF MOTION TO DISMISS**

Defendants, State of Nevada, ex rel. its Department of Taxation and Kate Marshall, in
her official capacity as Treasurer of the State of Nevada, by and through counsel, Catherine
Cortez Masto, Attorney General of the State of Nevada, Gina Session, Chief Deputy
Attorney General, and Andrea Nichols, Senior Deputy Attorney General, Reply to Plaintiff's
Response to their Renewal of Motion to Dismiss.

This Reply is made pursuant to Rules 1 and 12(b)(5) of the Nevada Rules of Civil
Procedure (NRCP) and is based upon the following Memorandum of Points and Authorities,
together with all other papers, pleadings and documents on file herein.

///

MEMORANDUM OF POINTS AND AUTHORITIES

I. NATURE OF THE REPLY

Defendants, State of Nevada, ex rel. its Department of Taxation ("Department") and Kate Marshall, in her official capacity as Treasurer of the State of Nevada ("Treasurer") reply to City of Fernley's Response to their Renewal of Motion to Dismiss. Plaintiff, the City of Fernley ("Fernley") can prove no set of facts, which, if true, would entitle it to relief. Dismissal of Fernley's lawsuit is therefore warranted.

The Department and Treasurer do not object to Fernley's request for a status conference to clarify all issues related to this renewal so long as Fernley identifies some factual issue that is of consequence to a determination of this action.

II. PROCEDURAL POSTURE

Defendants, Department and Treasurer filed their Motion to Dismiss on August 3, 2012; the Nevada Legislature ("Legislature") filed a Joinder in Motion to Dismiss on August 16, 2012; the Department and Treasurer filed their Reply to Opposition to Motion to Dismiss on August 27, 2012; and, the Nevada Legislature filed its Reply in Support of Joinder in Motion to Dismiss on October 8, 2012 (collectively "Motions to Dismiss").

Plaintiff, Fernley, filed its Opposition to Motion to Dismiss and Motion for Continuance Pursuant to NRCP 56(f) on August 20, 2012, and its Opposition to Nevada Legislature's Joinder in Motion to Dismiss on or about September 28, 2012.

On October 15, 2012, this Court entered an order which provided, among other things, "that the Defendants, upon completion of a reasonable discovery period, may renew their Motions to Dismiss which will then be duly considered by this Court."¹

On May 5, 2014, the Department and Treasurer filed their Renewal of Motion to Dismiss and requested, in the interests of judicial economy, that this Court review Fernley's remaining claims under the NRCP 12(b)(5) standard of review before the parties file Motions

¹ A copy of that Order is attached as Exhibit 1 to the City of Fernley's Response to the Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss and to the Nevada Legislature's Joinder Thereto and Request for Status Conference, dated May 15, 2014.

1 for Summary Judgment pursuant to NRCP 56. On May 6, 2014, the Legislature filed its
2 Joinder in the Department and Treasurer's Renewal of Motion to Dismiss. On or about May
3 15, 2014, the City of Fernley ("Fernley") filed its Response to the Nevada Department of
4 Taxation and Nevada Treasurer's Renewal of Motion to Dismiss and to the Nevada
5 Legislature's Joinder Thereto and Request for Status Conference. Herein, the Department
6 and Treasurer submit their Reply.

7 **III. ARGUMENT**

8 Dismissal of this lawsuit is warranted pursuant to Rule 12(b)(5) as it is beyond doubt
9 that Fernley can prove no set of facts which would entitle it to relief. To survive a motion to
10 dismiss, Plaintiff must allege sufficient factual matter to raise a claim from speculative to
11 plausible. *Bell Atlantic Corporation et al., v. Twombly*, 550 U.S. 544, 555-56 (2007) and
12 *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Although this matter has been proceeding
13 for two years, and Fernley has had ample opportunity to conduct discovery, Fernley has
14 failed to identify any fact on which it could base a claim for relief.

15 Fernley's Complaint filed June 6, 2012, does not identify factual issues but rather
16 alleges legal conclusions. In its Opposition to Motion to Dismiss and Motion for Continuance
17 Pursuant to NRCP 56(f) filed August 20, 2012, Fernley does not identify any material facts
18 tending to show that Nevada's C-Tax statutes are unconstitutional, but rather seeks to have
19 the matter continued to allow for discovery. In its Opposition to Nevada Legislature's Joinder
20 in Motion to Dismiss, filed on or about September 28, 2012, again Fernley does not identify
21 any fact that would entitle it to relief but states in its conclusion, "[A]s discovery has not
22 commenced, the motion is premature as the facts of the case have yet to be developed."

23 Fernley has now had over a year to conduct discovery. The parties have produced
24 over twenty-thousand pages of documents. The Department and Treasurer respectfully
25 submit that during discovery, Fernley has not identified any facts tending to show that
26 Nevada's C-Tax system violates the Nevada Constitution either on its face or as applied. In
27 its Response to the Department and Treasurer's Renewal of Motion to Dismiss, filed on or

28 ///

1 about May 15, 2014, Fernley once again failed to identify any factual issue that is of
2 consequence to a determination of this action.

3 In the pleadings, papers and documents filed herein, Fernley asserts legal
4 conclusions but no facts tending to show that Nevada's C-Tax system violates the Nevada
5 Constitution either on its face or as applied. Under these circumstances, the filing of motions
6 for summary judgment would violate NRCP 1 as it would needlessly add to the time and
7 expense of litigating this action. Rather, the matter should be dismissed pursuant to NRCP
8 12(b)(5) as it appears beyond doubt that Fernley could prove no set of facts which, if true,
9 would entitle it to relief.


10 **IV. CONCLUSION**

11 In light of the foregoing, Defendants, State of Nevada, ex rel. its Department of
12 Taxation and Kate Marshall, in her official capacity as Treasurer of the State of Nevada,
13 respectfully request that this Court enter its order dismissing Plaintiff's claims against them.

14 DATED this 23rd day of May, 2014.

15 CATHERINE CORTEZ MASTO
16 Attorney General

17 By:


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25 *Taxation and Kate Marshall, State Treasurer*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 23rd day of May, 2014, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true copy of the foregoing **NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER'S REPLY TO CITY OF FERNLEY'S RESPONSE TO RENEWAL OF MOTION TO DISMISS**, by electronic mail, directed to the following:

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**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

vs.

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; THE LEGISLATURE OF
THE STATE OF NEVADA; and DOES 1-20,
inclusive,

Defendants.

Case No. 12 OC 00168 1B
Dept. No. 1

**DEFENDANT NEVADA LEGISLATURE'S REPLY CONCERNING JOINDER IN
NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER'S
RENEWAL OF MOTION TO DISMISS**

Defendant, the Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau under NRS 218F.720, hereby submits the following Reply concerning its Joinder in the Renewal of Motion to Dismiss filed on May 5, 2014, by Defendants Nevada Department of Taxation and Nevada Treasurer (collectively the Department). The Legislature is submitting this Reply to address the issues raised by Plaintiff City of Fernley (Fernley) in its combined Response to the Department's Renewal of Motion to Dismiss and the Legislature's Joinder and its

1 Request for Status Conference, which was filed on May 15, 2014.

2 **I. Summary of the Argument.**

3 Fernley improperly classifies the Department's Renewal of Motion to Dismiss as a "Motion for
4 Summary Judgment." (Fernley's Resp. at 2.) Because the Department's Renewal of Motion to Dismiss
5 was filed after the close of the pleadings and asks for the resolution of claims and defenses where only
6 questions of law remain, the Department's Renewal of Motion to Dismiss is not a motion for summary
7 judgment but is properly classified as a motion for judgment on the pleadings pursuant to NRCP 12(c)
8 and NRCP 12(h)(2).

9 To ensure that the Legislature's interests are adequately represented and protected if the Court
10 considers the merits of the Department's motion, it was necessary for the Legislature to file a Joinder in
11 the motion. With all parties properly represented, the Court can enter a final judgment that adjudicates
12 all the rights and liabilities of all the parties and terminates the action pursuant to NRCP 54(b) if the
13 Court rules on the merits of the Department's motion. Additionally, to guarantee that the Legislature's
14 interests are adequately represented and protected if the Court grants the Department's motion, it was
15 necessary for the Legislature to file a Joinder in the motion to ensure that any final judgment disposing
16 of Fernley's action is entered in favor of all the Defendants, not just in favor of the Department.

17 When ruling on the Department's motion, the Court may take judicial notice of the official
18 legislative histories of the C-Tax statutes that are already included in the record of this case without
19 converting the Department's motion for judgment on the pleadings into a motion for summary
20 judgment. Furthermore, because only questions of law remain in order for the Court to decide the merits
21 of Fernley's state constitutional claims and the legal defenses raised by the Defendants, the Court may
22 resolve all outstanding claims and defenses through the Department's motion for judgment on the
23 pleadings. However, if the Court finds it necessary to consider matters outside the pleadings—except
24 for the official legislative histories and any additional matters of which the Court may take judicial

1 notice—in order for the Court to decide the merits of Fernley's state constitutional claims and the legal
2 defenses raised by the Defendants, the Legislature respectfully requests the Court to: (1) inform the
3 parties that it is converting the motion for judgment on the pleadings into a motion for summary
4 judgment; and (2) provide the parties with a reasonable opportunity to present additional material in
5 support of the converted motion.

6 Finally, the Legislature does not object to Fernley's request for a status conference concerning the
7 Department's motion if the Court believes that such a status conference would be helpful in resolving
8 the claims and defenses raised in this case.

9 II. Argument.

10 A. The Legislature filed a Joinder to ensure that if the Court considers the merits of the
11 Department's Renewal of Motion to Dismiss, the Court would be able to enter a final judgment
12 that adjudicates all the rights and liabilities of all the parties and terminates the action
pursuant to NRCP 54(b).

13 In its Response, Fernley contends that the Legislature's Joinder has added to the "procedural
14 confusion created by the [Department's] renewal of its Motion to Dismiss." (Fernley's Resp. at 2.)
15 However, to ensure that the Legislature's interests are adequately represented and protected if the Court
16 considers the merits of the Department's Renewal of Motion to Dismiss, it was necessary for the
17 Legislature to file a Joinder in the motion.

18 In this case, there are multiple defendants represented by different counsel. Under such
19 circumstances, NRCP 54(b) sets forth specific procedures which the Court must follow before it may
20 enter a final judgment that adjudicates all the rights and liabilities of all the parties and terminates the
21 action. In particular, NRCP 54(b) provides that:

22 When multiple parties are involved, the court may direct the entry of a final judgment as to
23 one or more but fewer than all of the parties only upon an express determination that there is
24 no just reason for delay and upon an express direction for the entry of judgment. *In the
absence of such determination and direction, any order or other form of decision, however
designated, which adjudicates the rights and liabilities of fewer than all the parties shall not
terminate the action as to any of the parties, and the order or other form of decision is*

1 subject to revision at any time before the entry of judgment adjudicating all the rights and
2 liabilities of all the parties.

3 NRCP 54(b) (emphasis added).

4 Under NRCP 54(b), if one defendant files a motion to dismiss and another defendant does not join
5 in or file its own motion to dismiss, the Court may not enter a final judgment against any of the
6 defendants unless the Court makes an express determination of finality pursuant to NRCP 54(b) after
7 notice and an opportunity to be heard. See Wilmurth v. State, 79 Nev. 490, 491-92 (1963) (holding that
8 an order dismissing the State of Nevada as a party defendant in a civil action was not a final judgment
9 pursuant to NRCP 54(b) where the order did not adjudicate the rights and liabilities of all the defendants
10 in the action); Knox v. Dick, 99 Nev. 514, 515-16 & n.2 (1983) (stating that "[t]he determinations made
11 pursuant to NRCP 54(b) are matters to be considered carefully and should not be entered routinely or as
12 an accommodation to counsel. Such orders should only result after notice and an opportunity to be
13 heard.") (citations omitted).

14 In response to the Department's Renewal of Motion to Dismiss, the Legislature filed a Joinder in
15 the motion to ensure that if the Court considers the merits of the Department's Renewal of Motion to
16 Dismiss, all parties are properly represented and the Legislature's interests are adequately protected.
17 With all parties properly represented, the Court can enter a final judgment that adjudicates all the rights
18 and liabilities of all the parties and terminates the action pursuant to NRCP 54(b) if the Court rules on
19 the merits of the Department's motion.

20 **B. The Legislature also filed a Joinder to ensure that if the Court grants the Department's**
21 **Renewal of Motion to Dismiss, any order disposing of Fernley's action would inure to the**
benefit of the Legislature in addition to the Department.

22 As a general rule, "where several persons are joined as defendants . . . and the others defend
23 successfully upon a ground not personal to themselves, but which goes to destroy the very basis of the
24 action, their success in maintaining such defense inures to the benefit of all." In re Forsyth's Estate, 45

1 Nev. 385, 392-94 (1922); Uitley v. Airoso, 86 Nev. 116, 122 (1970). However, it is necessary for a
2 defendant seeking the benefit of the general rule to ensure that a final judgment is entered in favor of all
3 the defendants, not just in favor of the defendants who filed the motion and succeeded on the defense.
4 See Bullion Mining Co. v. Croesus Gold & Silver Mining Co., 3 Nev. 336, 338-41 (1867). Otherwise,
5 “[a]n erroneous judgment may become final and effective against a party by his negligence in failing to
6 take [action].” Id. at 341.

7 In this case, the Department’s Renewal of Motion to Dismiss raises several legal defenses which
8 would destroy the very basis of Fernley’s action as a matter of law. Under the general rule, any order
9 disposing of Fernley’s action based on those legal defenses would inure to the benefit of the Legislature.
10 However, to guarantee that the Legislature’s interests are adequately represented and protected if the
11 Court grants the Department’s motion, it was necessary for the Legislature to file a Joinder in the motion
12 to ensure that any final judgment disposing of Fernley’s action is entered in favor of all the Defendants,
13 not just in favor of the Department.

14 **C. The Department’s Renewal of Motion to Dismiss is not a motion for summary judgment**
15 **but is properly classified as a motion for judgment on the pleadings pursuant to NRCP 12(c)**
and NRCP 12(h)(2).

16 In its response, Fernley improperly classifies the Department’s Renewal of Motion to Dismiss as a
17 “Motion for Summary Judgment.” (Fernley’s Resp. at 2.) Because the Legislature filed a Joinder in the
18 Department’s Renewal of Motion to Dismiss, Fernley has, by implication, also improperly classified the
19 Legislature’s Joinder as a motion for summary judgment. However, under Nevada’s civil rules, the
20 Department’s Renewal of Motion to Dismiss is actually a motion for judgment on the pleadings
21 pursuant to NRCP 12(c) and NRCP 12(h)(2). When the Department’s motion is properly classified as a
22 motion for judgment on the pleadings, it is clear that the Department is asking the Court to enter a
23 judgment in the Department’s favor as a matter of law because there are no allegations in Fernley’s
24 pleadings that, if proved, would permit recovery under Fernley’s claims.

1 Pursuant to NRCP 12(c), “[a]fter the pleadings are closed but within such time as not to delay the
2 trial, any party may move for judgment on the pleadings.” In addition, pursuant to NRCP 12(h)(2), “[a]
3 defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading
4 permitted or ordered under Rule 7(a), *or by motion for judgment on the pleadings*, or at the trial on the
5 merits.” (Emphasis added.)

6 A party moving for judgment on the pleadings under NRCP 12(c) and NRCP 12(h)(2) is asserting
7 that the material facts in the pleadings are not in dispute and that the moving party is entitled to
8 judgment as a matter of law because there are no allegations in the plaintiff’s pleadings that, if proved,
9 would permit recovery under the plaintiff’s claims. Duff v. Lewis, 114 Nev. 564, 568 (1998); Bonicamp
10 v. Vazquez, 120 Nev. 377, 379 (2004). A motion for judgment on the pleadings may be used to resolve
11 claims or defenses in the pleadings where “only questions of law remain.” Duff, 114 Nev. at 568
12 (quoting Bernard v. Rockhill Dev. Co., 103 Nev. 132, 136 (1987)). For example, a defendant is entitled
13 to judgment on the pleadings when the plaintiff’s claims are barred by the legal defense of immunity
14 because the issue of whether such immunity exists “is a question of law.” Duff, 114 Nev. at 568-71.

15 In this case, before the pleadings were closed, the Department and the Legislature each filed a
16 motion to dismiss pursuant to NRCP 12(b)(5). On October 15, 2012, the Court entered an order denying
17 the motions to dismiss to allow Fernley a period of time to complete discovery. In its order, the Court
18 stated that “the Defendants, upon completion of a reasonable discovery period, may renew their *Motions*
19 *to Dismiss* which will then be duly considered by the Court.” (Emphasis added.) Given that the
20 pleadings in this case were not closed when the Court entered its order, the Court’s reference to renewed
21 “Motions to Dismiss” was procedurally accurate because, until the Defendants filed their answers, a
22 motion to dismiss would have been a procedurally appropriate means under NRCP 12(b)(5) to argue that
23 Fernley’s complaint fails to state a claim upon which relief can be granted and that the Defendants are
24 entitled to judgment as a matter of law.

1 After the Court entered its order denying the motions to dismiss, the Defendants filed a petition for
2 writ of mandamus with the Nevada Supreme Court on November 5, 2012, which asked the Supreme
3 Court to review this Court's order. On January 25, 2013, the Nevada Supreme Court entered an order
4 granting in part and denying in part the Defendants' writ petition. State Dep't of Taxation v. District
5 Court, No. 62050 (Nev. Jan. 25, 2013). The Supreme Court found that Fernley's federal constitutional
6 claims were barred by the statute of limitations and therefore directed the dismissal of those claims. Id.
7 at 2-4. However, with regard to the Defendants' arguments that Fernley's state constitutional claims
8 should be dismissed, the Supreme Court stated that "although we make no comment on the merits of
9 these arguments, we nonetheless decline to exercise our discretion to entertain this writ petition with
10 regard to these issues." Id. at 3-4.

11 On February 22, 2013, this Court entered an order in accordance with the writ of mandamus which
12 vacated the October 15, 2012, order to the extent that it denied the Defendants' motions to dismiss
13 Fernley's federal constitutional claims, and this Court granted the Defendants' motions to dismiss with
14 regard to Fernley's federal constitutional claims. However, this Court denied the Defendants' motions
15 to dismiss with regard to Fernley's state constitutional claims "at this time."

16 Given that Fernley's state constitutional claims remained pending after the Nevada Supreme
17 Court's order, the Defendants each filed an answer to Fernley's complaint under Nevada's civil rules
18 following the Supreme Court's order. Because the Defendants filed their answers to Fernley's
19 complaint, the pleadings in this case are now closed. See NRCP 7(a) ("There shall be a complaint and
20 an answer . . . No other pleading shall be allowed, except that the court may order a reply to an answer
21 or a third-party answer."); Smith v. Eighth Jud. Dist. Ct., 113 Nev. 1343, 1346 (1997) ("the only
22 pleadings allowed are complaints, answers and replies."). Moreover, the pleadings in this case will
23 remain closed unless the Court orders or permits any amended or supplemental pleadings pursuant to
24 NRCP 15. See Maniaci v. Georgetown Univ., 510 F. Supp. 2d 50, 60 (D.D.C. 2007) (explaining that

1 "once the defendant had filed an answer, the pleadings were 'closed' for Rule 7(a) and Rule 12(c)
2 purposes. "The fact that under the court's scheduling order there is still time for a party to move for
3 leave to amend does not affect this reasoning." (quoting Nortel Networks Ltd. v. Kyocera Wireless
4 Corp., No. 02-CV-0032-D, 2002 U.S. Dist. LEXIS 17845 (N.D. Tex. Sept. 20, 2002))).

5 Because the pleadings in this case are now closed, a motion to dismiss is no longer a procedurally
6 appropriate means to argue that Fernley's complaint fails to state a claim upon which relief can be
7 granted and that the Defendants are entitled to judgment as a matter of law. Instead, such a motion to
8 dismiss should be treated as a motion for judgment on the pleadings pursuant to NRCP 12(c) and
9 NRCP 12(h)(2). See Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001)
10 ("a motion to dismiss for failure to state a claim . . . that is styled as arising under Rule 12(b) *but is filed*
11 *after the close of pleadings*, should be construed by the district court as a motion for judgment on the
12 pleadings under Rule 12(c).") (emphasis added and footnote omitted)); 2 Moore's Federal Practice-Civil
13 § 12.38 (LexisNexis 2014) (collecting cases for the rule that "a motion to dismiss filed after the
14 pleadings close will be treated as a motion for judgment on the pleadings.").¹

15 Furthermore, because NRCP 12(c) does not provide a time limit for filing a motion for judgment
16 on the pleadings, but only provides that the motion must be filed "within such time as not to delay the
17 trial," a defendant may file such a motion during the course of discovery or even after discovery is
18 completed. See Thomas v. Henderson, 297 F. Supp. 2d 1311, 1314-15 (S.D. Ala. 2003) (finding that a
19 motion for judgment on the pleadings was timely even though it was filed two years after
20 commencement of the action and after discovery was almost completed).

21
22 ¹ When interpreting the provisions of Nevada's civil rules, the Nevada Supreme Court generally looks
23 to federal cases interpreting the analogous provisions of the Federal Rules of Civil Procedure given
24 that such federal cases "are strong presumptive authority, because the Nevada Rules of Civil
Procedure are based in large part upon their federal counterparts." Exec. Mgmt., Ltd. v. Ticor Title
Ins. Co., 118 Nev. 46, 53 (2002) (quoting Las Vegas Novelty, Inc. v. Fernandez, 106 Nev. 113, 119
(1990)).

1 One of the purposes of a motion for judgment on the pleadings is to allow the district court to
2 resolve claims and defenses that present only questions of law. See Duff, 114 Nev. at 568 (holding that
3 a motion for judgment on the pleadings is available to resolve claims or defenses in the pleadings where
4 “only questions of law remain.”). For example, the constitutionality of a statute presents a question of
5 law that may be decided by a motion for judgment on the pleadings. See Mixon v. Ohio, 193 F.3d 389,
6 399-400 & n.9 (6th Cir. 1999) (holding that the district court did not err when it granted the State of
7 Ohio’s motion for judgment on the pleadings regarding the constitutionality of a statute “because the
8 district court made determinations of law on all of the issues based on the pleadings filed in the case.”).
9 The legal defense of immunity also presents a question of law that may be decided by a motion for
10 judgment on the pleadings. See Duff, 114 Nev. at 568. Likewise, any legal defense raising a time-bar,
11 such as the statute of limitations and laches, presents a question of law that may be decided by a motion
12 for judgment on the pleadings. See J.M. Blythe Motor Lines Corp. v. Blalock, 310 F.2d 77, 78-79 (5th
13 Cir. 1962); Miller v. St. Paul Fire & Marine Ins., 480 F. Supp. 32, 34 (W.D. Okla. 1979).

14 When ruling on a motion for judgment on the pleadings, the district court may consider “any of
15 the pleadings, including the complaint, the answer, and any written instruments attached to them.”
16 2 Moore’s Federal Practice-Civil § 12.38 (LexisNexis 2014). The district court may also consider any
17 “matters of which the court may take judicial notice.” Id. For example, the district court may consider
18 official legislative histories of statutes when ruling on a motion for judgment on the pleadings because
19 official legislative histories are public records that are subject to judicial notice. See Fierle v. Perez, 125
20 Nev. 728, 737-38 n.6 (2009) (noting that courts generally “take judicial notice of legislative histories,
21 which are public records.”); Northville Downs v. Granholm, 622 F.3d 579, 586 (6th Cir. 2010)
22 (explaining that when ruling on a motion for judgment on the pleadings regarding the constitutionality
23 of a voter initiative concerning gaming, the district court was allowed to take judicial notice of
24 legislative and constitutional histories regarding gaming regulation in the state without converting the

1 motion for judgment on the pleadings into a motion for summary judgment).

2 Additionally, when ruling on a motion for judgment on the pleadings, the district court may grant
3 a “partial” judgment on the pleadings to the defendants with regard to those claims or defenses in the
4 pleadings where only questions of law remain and the defendants are entitled to judgment as a matter of
5 law. See McLaughlin Transp. Sys. v. Rubinstein, 390 F. Supp. 2d 50, 57 (D. Mass. 2005); VNA Plus,
6 Inc. v. Apria Healthcare Group, Inc., 29 F. Supp. 2d 1253, 1258 (D. Kan. 1998); Chi-Mil Corp. v. W.T.
7 Grant Co., 70 F.R.D. 352, 357-58 (E.D. Wis. 1976), *amended on other grounds*, 422 F. Supp. 46 (E.D.
8 Wis. 1976). By resolving those claims or defenses in a “partial” judgment on the pleadings, the district
9 court furthers the policy goal of efficient resolution of actions by narrowing the claims or defenses that
10 must be addressed at later stages of the proceedings. See McLaughlin Transp., 390 F. Supp. 2d at 57
11 (“The judgment on the pleadings motion presents purely a legal question and can be properly resolved
12 by the undisputed facts included in the pleadings. In an effort to narrow pretrial issues, disposition of
13 this matter by partial judgment on the pleadings is appropriate.”); Chi-Mil Corp., 70 F.R.D. at 358
14 (“When considered in the context of the policy in favor of the expeditious disposition of matters where
15 material facts are not disputed . . . partial judgment on the pleadings is a procedural option open to the
16 federal courts.”).

17 Finally, when ruling on a motion for judgment on the pleadings, if the district court finds it
18 necessary to consider matters outside the pleadings—other than matters of which the court may take
19 judicial notice—the district court may convert the motion for judgment on the pleadings into a motion
20 for summary judgment. NRCP 12(c). But, before doing so, “[a]ll parties must receive notice of the
21 conversion and a reasonable opportunity to present all material made pertinent to the motion by
22 Rule 56.” 2 Moore’s Federal Practice-Civil § 12.38 (LexisNexis 2014). Therefore, as a practical matter,
23 if the district court finds it necessary to consider matters outside the pleadings in order to decide a
24 motion for judgment on the pleadings, the district court must inform the parties that it is converting the

1 motion for judgment on the pleadings into a motion for summary judgment, and the district court must
2 also provide the parties with a reasonable opportunity to present additional material in support of the
3 converted motion. See Max Arnold & Sons, LLC v. W.L. Hailey & Co., 452 F.3d 494, 502-04 (6th Cir.
4 2006) (“Because the district court effectively converted Defendant’s motion for judgment on the
5 pleadings to a motion for summary judgment, it should have given both of the parties notice of such
6 conversion and provided a ‘reasonable opportunity to present all material made pertinent to such a
7 motion.’”):

8 In this case, because the Department’s Renewal of Motion to Dismiss was filed after the close of
9 the pleadings and asks for the resolution of claims and defenses where only questions of law remain, the
10 Department’s Renewal of Motion to Dismiss is not a motion for summary judgment but is properly
11 classified as a motion for judgment on the pleadings pursuant to NRCP 12(c) and NRCP 12(h)(2).

12 As discussed previously, to ensure that the Legislature’s interests are adequately represented and
13 protected if the Court considers the merits of the Department’s motion, it was necessary for the
14 Legislature to file a Joinder in the motion. With all parties properly represented, the Court can enter a
15 final judgment that adjudicates all the rights and liabilities of all the parties and terminates the action
16 pursuant to NRCP 54(b) if the Court rules on the merits of the Department’s motion. Additionally, to
17 guarantee that the Legislature’s interests are adequately represented and protected if the Court grants the
18 Department’s motion, it was necessary for the Legislature to file a Joinder in the motion to ensure that
19 any final judgment disposing of Fernley’s action is entered in favor of all the Defendants, not just in
20 favor of the Department.

21 When ruling on the Department’s motion, the Court may take judicial notice of the official
22 legislative histories of the C-Tax statutes that are already included in the record of this case without
23 converting the Department’s motion for judgment on the pleadings into a motion for summary
24 judgment. Furthermore, because only questions of law remain in order for the Court to decide the merits

1 of Fernley's state constitutional claims and the legal defenses raised by the Defendants, the Court may
2 resolve all outstanding claims and defenses through the Department's motion for judgment on the
3 pleadings. However, if the Court finds it necessary to consider matters outside the pleadings—except
4 for the official legislative histories and any additional matters of which the Court may take judicial
5 notice—in order for the Court to decide the merits of Fernley's state constitutional claims and the legal
6 defenses raised by the Defendants, the Legislature respectfully requests the Court to: (1) inform the
7 parties that it is converting the motion for judgment on the pleadings into a motion for summary
8 judgment; and (2) provide the parties with a reasonable opportunity to present additional material in
9 support of the converted motion.

10 Finally, the Legislature does not object to Fernley's request for a status conference concerning the
11 Department's motion if the Court believes that such a status conference would be helpful in resolving
12 the claims and defenses raised in this case.

13 DATED: This 27th day of May, 2014.

14 Respectfully submitted,

15 **BRENDA J. ERDOES**
16 Legislative Counsel

17 By: 

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 27th day of May, 2014, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true and correct copy of the foregoing DEFENDANT NEVADA LEGISLATURE'S REPLY CONCERNING JOINDER IN NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER'S RENEWAL OF MOTION TO DISMISS, by electronic mail, directed to the following:

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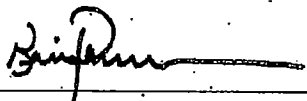
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DEPUTY

1 Case No.: 12 OC 00168 1B

2 Dept. No.: 1

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5
6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY

8
9 CITY OF FERNLEY, NEVADA, a Nevada
municipal corporation,

10 Plaintiff,

11 vs.

12 STATE OF NEVADA, ex rel. THE NEVADA
13 DEPARTMENT OF TAXATION; THE
14 HONORABLE KATE MARSHALL, in her
official capacity as TREASURER OF THE
15 STATE OF NEVADA; NEVADA
LEGISLATURE and DOES 1-20, Inclusive,

16 Defendants,

ORDER

17
18 This matter comes before the Court on Nevada Department of Taxation and Nevada
19 Treasurer's Renewal of Motion to Dismiss filed on May 5, 2014. Defendant Nevada
20 Legislature's Joinder in Nevada Department of Taxation and Nevada Treasure's Renewal of
21 Motion to Dismiss was filed on May 6, 2014. City of Fernley's Response to the Nevada
22 Department of Taxation and Nevada Treasure's Renewal of Motion to Dismiss and to the
23 Nevada Legislature's Joinder Thereto and Request for Status Conference was filed on May 16,
24 2014. Nevada Department of Taxation and Nevada Treasure's Reply to City of Fernley's
25 Response to Renewal of Motion to Dismiss was filed on May 23, 2014. A Request for
26 Submission of Renewal of Motion to Dismiss was filed on May 23, 2014. Defendant Nevada
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1 Legislature's Reply Concerning Joinder in Nevada Department of Taxation and Nevada
2 Treasurer's Renewal of Motion to Dismiss was filed on May 27, 2014.

3 The Court notes that the original Motion to Dismiss was filed by Nevada Department of
4 Taxation and Nevada Treasurer on August 3, 2012. Nevada Legislature's Joinder in Motion to
5 Dismiss and Exhibits to Joinder in Motion to Dismiss were filed on August 16, 2012. City of
6 Fernley's Opposition to Motion to Dismiss was filed on August 20, 2012. Defendants' Reply to
7 Opposition to Motion to Dismiss was filed on August 27, 2012. A Request for Submission of
8 Motion to Dismiss was filed on August 28, 2012. City of Fernley's Opposition to Nevada
9 Legislature's Joinder in Motion to Dismiss was filed on September 28, 2012. Nevada
10 Legislature's Reply in Support of Joinder of Motion to Dismiss was filed on October 8, 2012. An
11 Order was issued by this Court on October 15, 2012. In that Order Granting a Continuance to
12 Complete Discovery, this Court ordered that the Motions to Dismiss were denied at this time in
13 order to allow the Plaintiff a period of time to complete discovery. Additionally, that Order also
14 ordered that the Defendants, upon completion of a reasonable discovery period, be allowed to
15 renew their Motions to Dismiss, which will then be duly considered by the Court.
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19 A Petition for Writ of Mandamus was filed with the Nevada Supreme Court. An Order
20 Granting in Part and Denying in Part Petition for Writ of Mandamus was issued by the Nevada
21 Supreme Court on January 30, 2013. Thereafter, this Court issued an Order Pursuant to Writ of
22 Mandamus on February 22, 2013.

23
24 Firstly, the Court would like to note that the Order from the Nevada Supreme Court in
25 this case Granting in Part and Denying in Part Petition for Writ of Mandamus stated that "the
26 district court was obligated under clear authority to dismiss the federal constitutional claims"
27 because "the City was required to bring its federal constitutional claims within two years of its
28

1 incorporation, and its failure to do so renders those claims barred by the statute of limitations.”

2 Following the Order from the Nevada Supreme Court, this Court issued an Order Pursuant to
3 Writ of Mandamus on February 22, 2013. Said Order granted Defendants’ Motions to Dismiss
4 “in respect to the federal constitutional claims being asserted by Plaintiff.” Therefore, this Court
5 would like to make clear the fact that Plaintiff’s first claim for relief and fifth claim for relief
6 have already been dismissed.
7

8 Secondly, the Court would like to address the issue of immunity. In its Joinder in Motion
9 to Dismiss, the Legislature presented the defense of immunity. The Legislature argued that the
10 Honorable Kate Marshall, in her official capacity as Treasurer of the State of Nevada, enjoys
11 absolute immunity for liability for money damages. According to NRS 41.032(1),
12

13 no action may be brought ... against ... an officer or employee of the State or any
14 of its agencies or political subdivisions which is based upon an act or omission of
15 an officer, employee or immune contractor, exercising due care, in the execution
16 of a statute or regulation, whether or not such statute or regulation is valid, if the
statute or regulation has not been declared invalid by a court of competent
jurisdiction.

17 Additionally, according to NRS 41.032(2),

18 no action may be brought ... against ... an officer or employee of the State or any
19 of its agencies or political subdivisions which is based upon the exercise or
20 performance or the failure to exercise or perform a discretionary function or duty
21 on the part of the State or any of its agencies or political subdivisions or of any
officer, employee or immune contractor of any of these, whether or not the
discretion involved is abused.

22 The Legislature asserted that Treasurer Kate Marshall exercised due care in the execution
23 of the C-Tax statute. The Legislature also asserts that the C-Tax system involves an element of
24 official discretion. Therefore, under either NRS 41.032(1) or NRS 41.032(2), Treasurer Kate
25 Marshall should be granted immunity. The Court is in agreement with the Legislature that
26 Treasurer Kate Marshall should be granted immunity under NRS 41.032(1). Therefore, the Court
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1 has determined that all claims against the Honorable Kate Marshall, in her official capacity as
2 Treasurer of the State of Nevada, shall be dismissed.

3 Thirdly, the Court would like to address the apparent confusion between the parties
4 regarding whether this Court should be deciding this case under a motion to dismiss standard or a
5 motion for summary judgment standard. After the parties filed their pleadings for the motion to
6 dismiss, this Court issued an order on October 15, 2012. That order stated the following:
7

8 The Plaintiff submits that the Court's consideration of the Motions to Dismiss
9 filed in this matter should be considered as Motion for Summary Judgment; and,
10 as such, that it should be given a reasonable opportunity to complete discovery,
11 and therefore have a chance to demonstrate a genuine issue of material fact.
12 [citation omitted]. Therefore, good cause appearing, it is hereby ordered that the
13 Motions to Dismiss are denied at this time in order to allow the Plaintiff a period
14 of time to complete discovery; and it is hereby further ordered that the
15 Defendants, upon completion of a reasonable discovery period, may renew their
16 Motions to Dismiss which will then be duly considered by the Court.

17 The parties were evidentially confused by this ruling. Defendants renewed their Motion
18 to Dismiss a year and a half after the Court entered the foregoing order, so it appears to be
19 Defendants' understanding that the Court would be deciding this case under a motion to dismiss
20 standard. However, Plaintiff argued in its Response to the Renewal of Motion to Dismiss that
21 "[t]he Court's ruling was ... that the Motion to Dismiss should be treated as a Motion for
22 Summary Judgment and that the City of Fernley should have an opportunity to demonstrate a
23 genuine issue of material fact." Therefore, it is apparent that Plaintiff's understanding is that the
24 Court would be deciding this case under a summary judgment standard and that it would be
25 given the opportunity to file a motion for summary judgment outlining the facts that have been
26 discovered during the past year and a half. In its Order Granting in Part and Denying in Part
27 Petition for Writ of Mandamus, the Nevada Supreme Court interpreted this Court's ruling as
28

1 follows: "The district court converted petitioners' motions to dismiss to summary judgment
2 motions, denied those motions without prejudice, and granted the City a continuance."

3 In order to ensure that the parties are on the same page going forward, the Court has
4 determined that it is necessary to outline the following. Pursuant to the Nevada Supreme Court's
5 ruling in its Order Granting in Part and Denying in Part Petition for Writ of Mandamus and
6 pursuant to NRCP 12(b), Defendants' original Motions to Dismiss shall be treated as and
7 converted into Motions for Summary Judgment. Plaintiff shall have twenty (20) days from the
8 date of this Order in which to file an Opposition to the Motions for Summary Judgment.
9 Defendants shall then have until July 14, 2014 in which to file their Replies.
10

11 Finally, the Court would like to notify the parties that it would like Plaintiff's Opposition
12 to the Motions for Summary Judgment and Defendants' Replies to discuss the actual application
13 of the C-Tax system, specifically how the formula is applied to the various municipalities and
14 whether any discretion is permitted in the application of the C-Tax system.
15

16 Therefore, based on the foregoing, and good cause appearing, it is hereby ordered that

- 17 1. The parties are to take notice of the fact that Plaintiff's first claim for relief and fifth
18 claim for relief have already been dismissed.
- 19 2. All claims against the Honorable Kate Marshall, in her official capacity as Treasurer
20 of the State of Nevada, shall be dismissed.
- 21 3. Defendants' original Motions to Dismiss shall be converted into Motions for
22 Summary Judgment. Plaintiff shall have twenty (20) days from the date of this Order
23 in which to file an Opposition to the Motions for Summary Judgment. Defendants
24 shall then have until July 14, 2014 in which to file their Replies to Plaintiff's
25 Opposition.
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1 4. Plaintiff's Opposition to the Motions for Summary Judgment and Defendants'

2 Replies shall discuss the actual application of the C-Tax system, specifically how the
3 formula is applied to the various municipalities and whether any discretion is
4 permitted in the application of the C-Tax system.

5 **IT IS SO ORDERED.**

6 Dated this 6 day of June, 2014.

8 
9 JAMES T. RUSSELL for
10 DISTRICT JUDGE
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CERTIFICATE OF MAILING

I hereby certify that on the 9th day of June, 2014, I served a copy of the foregoing by placing the foregoing in the United States Mail, postage prepaid, addressed as follows:

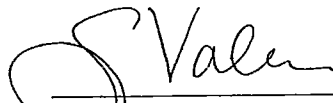
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Law Clerk, Dept. 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel.
DEPARTMENT OF TAXATION;
THE HONORABLE DAN
SCHWARTZ, in his official capacity
as TREASURER OF THE STATE OF
NEVADA; and THE LEGISLATURE
OF THE STATE OF NEVADA,

Respondents.

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

JOINT APPENDIX

VOLUME 7 PART 2

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Index to Joint Appendix
City of Fernley v. State of Nevada et al., Case No. 66851

Volume Number	Document	Filed By	Date	Bates Stamp Number
1	Affidavit of Service Taxation	City of Fernley	07/02/12	17
1	Affidavit of Service Treasurer	City of Fernley	06/20/12	13-16
23	Amended Memorandum of Costs and Disbursements	State of Nevada/Dept Taxation	10/09/15	4058-4177
7	Answer	State of Nevada/Dept Tax/ Treasurer	02/01/13	1384-1389
7	Answer to Plaintiff's Complaint	Nevada Legislature	01/29/13	1378-1383
23	Case Appeal Statement	City of Fernley	11/07/14	4208-4212
1	Complaint	City of Fernley	06/06/12	1-12
21	Defendant Nevada Legislature's Reply in Support of its Motion for Summary Judgment	Nevada Legislature	07/25/14	3747-3768
21	Defendant's Opposition to Motion to Retax Costs and Reply to Opposition to Motion for Costs	State of Nevada/Dept Taxation	10/03/14	3863-3928
22	Defendant's Opposition to Motion to Retax Costs and Reply to Opposition to Motion for Costs (Cont.)	State of Nevada/Dept Taxation	10/03/14	3929-3947
1	Exhibits to Joinder in Motion to Dismiss	Nevada Legislature	08/16/12	104-220
2	Exhibits to Joinder in Motion to Dismiss (Cont.)	Nevada Legislature	08/16/12	221-332
1	Joinder in Motion to Dismiss	Nevada Legislature	08/16/12	62-103
7	Joinder in Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	Nevada Legislature	05/06/14	1421-1423
21	Memorandum of Costs and Disbursements	State of Nevada/Dept Taxation	09/19/14	3788-3793
21	Motion for Costs	State of Nevada/Dept Taxation	09/19/14	3776-3788
12	Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order	City of Fernley	06/18/14	2005-2045
7	Motion for Summary Judgment	City of Fernley	06/13/14	1458-1512
8	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1513-1732
9	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1733-1916
10	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1917-1948
11	Motion for Summary Judgment (Cont.)	City of Fernley	06/13/14	1949-2004
1	Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	08/03/12	41-58
1	Motion to Intervene	Nevada Legislature	08/03/12	18-40
21	Motion to Retax Costs and Opposition to Motion for Costs	City of Fernley	09/24/14	3794-3845
7	Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	05/05/14	1414-1420
7	Nevada Department of Taxation and Nevada Treasurer's Reply to Response to Renewal of Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	05/23/14	1433-1437
12	Nevada Department of Taxation's Opposition to Plaintiff's Motion for Summary Judgment	State of Nevada/Dept Taxation	07/11/14	2053-2224
13	Nevada Department of Taxation's Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	State of Nevada/Dept Taxation	07/11/14	2225-2353

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Volume Number	Document	Filed By	Date	Bates Stamp Number
23	Notice of Appeal	City of Fernley	11/07/14	4205-4207
22	Notice of Entry of Order	Nevada Legislature	10/08/14	4001-4057
23	Notice of Entry of Order	State of Nevada/Dept	10/17/14	4195-4204
7	Notice of Entry of Order Denying City of Fernley's Motion for Reconsideration of Order Dated November 13, 2012	State of Nevada/Dept Tax/ Treasurer	12/19/12	1364-1370
7	Notice of Entry of Order Granting A Continuance to Complete Discovery	City of Fernley	10/19/12	1344-1350
3	Notice of Entry of Order Granting Nevada Legislature's Motion to Intervene	Nevada Legislature	09/04/12	651-657
7	Notice of Entry of Order on Defendant's Motion for Extensions of Time to File Answer	State of Nevada/Dept Tax/ Treasurer	11/15/12	1354-1360
1	Notice of Non-Opposition to Legislature's Motion to Intervene	State of Nevada/Dept Tax/ Treasurer	08/06/12	59-61
2	Opposition to Motion to Dismiss and Motion for Continuance Pursuant to NRCP 56(F)	City of Fernley	08/20/12	331-441
3	Opposition to Motion to Dismiss and Motion for Continuance Pursuant to NRCP 56(F) (Cont.)	City of Fernley	08/20/12	442-625
2	Opposition to Motion to Nevada Legislature's Motion to Intervene	City of Fernley	08/20/12	324-330
13	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	City of Fernley	07/11/14	2354-2445
14	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2446-2665
15	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2666-2819
16	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2820-2851
17	Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss (Cont.)	City of Fernley	07/11/14	2852-2899
4	Opposition to Nevada Legislature's Joinder in Motion to Dismiss	City of Fernley	09/28/12	662-881
5	Opposition to Nevada Legislature's Joinder in Motion to Dismiss (Cont.)	City of Fernley	09/28/12	882-1101
6	Opposition to Nevada Legislature's Joinder in Motion to Dismiss (Cont.)	City of Fernley	09/28/12	1102-1316
17	Opposition to Nevada Legislature's Joinder in Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	City of Fernley	07/11/14	2900-2941
20	Opposition to Plaintiff's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order	Nevada Legislature	07/11/14	3586-3582

Index to Joint Appendix
City of Fernley v. State of Nevada et al., Case No. 66851

Volume Number	Document	Filed By	Date	Bates Stamp Number
12	Opposition to Plaintiff's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order and Countermotion for Order Dismissing Nevada Department of Taxation	State of Nevada/Dept Tax/ Treasurer	07/11/14	2049-2052
17	Opposition to Plaintiff's Motion for Summary Judgment	Nevada Legislature	07/11/14	2942-3071
18	Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	Nevada Legislature	07/11/14	3072-3292
19	Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	Nevada Legislature	07/11/14	3292-3512
20	Opposition to Plaintiff's Motion for Summary Judgment (Cont.)	Nevada Legislature	07/11/14	3515-3567
7	Order (Converting Motion to Dismiss to Motion for Summary Judgment, Setting Briefing Schedule and Dismissing Treasurer)	First Judicial District Court	06/06/14	1451-1457
22	Order and Judgment	First Judicial District Court	10/06/14	3948-4000
7	Order Denying City of Fernley's Motion for Reconsideration of Order Dated November 13, 2012	First Judicial District Court	12/17/12	1361-1363
7	Order Granting A Continuance to Complete Discovery	First Judicial District Court	10/15/12	1341-1343
7	Order Granting in Part and Denying in Part Petition for Writ of Mandamus	Nevada Supreme Court	01/25/13	1373-1377
23	Order Granting Nevada Department of Taxation's Motion for Costs	First Judicial District Court	10/15/14	4190-4194
3	Order Granting Nevada Legislature's Motion to Intervene	First Judicial District Court	08/30/12	648-650
7	Order on Defendant's Motion for Extensions of Time to File Answer	First Judicial District Court	11/13/12	1351-1353
7	Order Pursuant to Writ of Mandamus	First Judicial District Court	02/22/13	1390-1392
21	Order Vacating Trial	First Judicial District Court	09/03/14	3773-3775
23	Plaintiff's Motion to Strike, or Alternatively, Motion to Retax Costs	City of Fernley	10/14/14	4178-4189
21	Plaintiff's Objections to Nevada Legislature's Proposed Order and Request to Submit Proposed Order and Judgment	City of Fernley	10/02/14	3846-3862
7	Pretrial Order	First Judicial District Court	10/10/13	1393-1399
7	Reply Concerning Joinder in Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	Nevada Legislature	05/27/14	1438-1450
7	Reply in Support of Joinder in Motion to Dismiss	Nevada Legislature	10/08/12	1317-1340
3	Reply in Support of Motion to Intervene	Nevada Legislature	08/24/12	626-635
21	Reply in Support of Plaintiff's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order as to Defendant Nevada Legislature	City of Fernley	07/25/14	3709-3746

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Volume Number	Document	Filed By	Date	Bates Stamp Number
20	Reply in Support of Plaintiff's Motion for Summary Judgment Against Defendants Nevada Department of Taxation and Nevada Treasurer	City of Fernley	07/25/14	3674-3708
20	Reply in Support of Plaintiff's Motion for Partial Reconsideration and Rehearing of the Court's June 6, 2014 Order as to Defendant's Nevada Department of Taxation and Nevada Treasurer; Plaintiff's Opposition to Countermotion for Order Dismissing Nevada Department of Taxation	City of Fernley	07/25/14	3641-3673
20	Reply in Support of Plaintiff's Motion for Summary Judgment Against Defendant Nevada Legislature	City of Fernley	07/25/14	3606-3640
21	Reply to Opposition to Countermotion for Order Dismissing Nevada Department of Taxation	State of Nevada/Dept Taxation	08/01/14	3769-3772
3	Reply to Opposition to Motion to Dismiss	State of Nevada/Dept Tax/ Treasurer	08/27/12	636-647
20	Reply to Plaintiff's Opposition to Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss	State of Nevada/Dept Taxation	07/25/14	3583-3605
7	Response to Nevada Department of Taxation	City of Fernley	05/16/14	1424-1432
7	Second Stipulation and Order Regarding Change of Briefing Schedule	Parties/First Judicial District Court	03/17/14	1406-1409
7	Stipulation and Order for an Extension of Time to File Responses to Discovery Requests; Extend Certain Discovery Deadlines and Extend Time to File Dispositive Motions	Parties/First Judicial District Court	04/11/14	1410-1413
7	Stipulation and Order Regarding Change of Briefing Schedule and Plaintiff's Response to Defendant's Motion to Strike Plaintiff's Jury Demand	Parties/First Judicial District Court	02/19/14	1403-1405
12	Stipulation and Order Regarding Change of Briefing Schedule and Setting Hearing for Oral Argument	Parties/First Judicial District Court	06/25/14	2046-2048
7	Stipulation and Order Regarding Defendant's Motion to Strike Plaintiff's Jury Demand	Parties/First Judicial District Court	10/23/13	1400-1402
3	Stipulation and Order Regarding Joinder to Motion to Dismiss	Parties/First Judicial District Court	09/18/12	658-661
23	Transcript of Hearing	Court Reporter	01/07/15	4213-4267
7	Writ of Mandamus	Nevada Supreme Court	01/25/13	1371-1372

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2013 JAN 29 AM 10:36
ALAN GLOVER
CLERK

8
9 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR CARSON CITY**

11 CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

12
13 Plaintiff,

14 vs.

15 STATE OF NEVADA ex rel. THE NEVADA
DEPARTMENT OF TAXATION; THE
16 HONORABLE KATE MARSHALL, in her
official capacity as TREASURER OF THE
17 STATE OF NEVADA; THE LEGISLATURE OF
THE STATE OF NEVADA; and DOES 1-20,
inclusive,

18 Defendants.

Case No. 12 OC 00168 1B
Dept. No. 1

19
20 **NEVADA LEGISLATURE'S**
21 **ANSWER TO PLAINTIFF'S COMPLAINT**
22
23
24

1 **ANSWER TO PLAINTIFF'S COMPLAINT**

2 Defendant, the Legislature of the State of Nevada (Legislature), by and through its counsel, the
3 Legal Division of the Legislative Counsel Bureau under NRS 218F.720, hereby submits the
4 Legislature's Answer to Plaintiff's Complaint, which Plaintiff filed on June 6, 2012.

5 **ADMISSIONS AND DENIALS OF THE ALLEGATIONS**

6 **PARTIES**

7 ¶ 1. The Legislature admits the City of Fernley is a Nevada municipal corporation located in
8 Lyon County, Nevada. The Legislature is without knowledge or information sufficient to form a belief
9 as to the truth of the remaining allegations in paragraph 1 and denies them.

10 ¶¶ 2-3. The Legislature admits the allegations in paragraphs 2-3.

11 **BACKGROUND**

12 ¶¶ 4-18. The Legislature is without knowledge or information sufficient to form a belief as to
13 the truth of the allegations in paragraphs 4-18 and denies them.

14 ¶ 19. The Legislature denies the allegations in paragraph 19.

15 **FIRST CLAIM FOR RELIEF**

16 **(Denial of Equal Protection in Violation of Section 1 of the**
17 **Fourteenth Amendment to the United States Constitution)**

18 ¶¶ 20-27. The Legislature denies the allegations in paragraphs 20-27.

19 **SECOND CLAIM FOR RELIEF**

20 **(Violation of the Separation of Powers Clause of the Nevada Constitution)**

21 ¶¶ 28-36. The Legislature denies the allegations in paragraphs 28-36.

1 **THIRD CLAIM FOR RELIEF**

2 **(Creation of a Special Law in Violation of Article 4, Section 20 of the Nevada Constitution)**

3 ¶ 37-43. The Legislature denies the allegations in paragraphs 37-43.

4 **FOURTH CLAIM FOR RELIEF**

5 **(Violation of Article 4, Section 21 of the Nevada Constitution)**

6 ¶ 44-49. The Legislature denies the allegations in paragraphs 44-49.

7 **FIFTH CLAIM FOR RELIEF**

8 **(Denial of Due Process in Violation of Section 1 of**
9 **the 14th Amendment to the United States Constitution)**

10 ¶ 50-57. The Legislature denies the allegations in paragraphs 50-57.

11 **SIXTH CLAIM FOR RELIEF**

12 **(Declaratory Relief)**

13 ¶ 58-64. The Legislature denies the allegations in paragraphs 58-64.

14 **SEVENTH CLAIM FOR RELIEF**

15 **(Injunctive Relief)**

16 ¶ 65-70. The Legislature denies the allegations in paragraphs 65-70.

17 **AFFIRMATIVE DEFENSES**

18 1. The Legislature pleads as an affirmative defense that the Complaint fails to state a claim upon
19 which relief can be granted.

20 2. The Legislature pleads as affirmative defenses that Plaintiff lacks capacity to sue and
21 standing; that Plaintiff's claims do not present a justiciable case or controversy; that Plaintiff's claims
22 are not ripe for adjudication; and that the Court lacks jurisdiction of the subject matter.

3. The Legislature pleads as an affirmative defense that Plaintiff's claims are barred by the doctrine of immunity, including, without limitation, sovereign immunity, official immunity, discretionary function immunity, absolute immunity and qualified immunity.

4. The Legislature pleads as affirmative defenses that Plaintiff's claims are barred by the statute of limitations, laches, estoppel and waiver.

5. The Legislature pleads as an affirmative defense that, pursuant to NRS 218F.720, the Legislature may not be assessed or held liable for any filing or other court fees or the attorney's fees or other fees, costs or expenses of any other parties.

6. The Legislature reserves its right to plead, raise or assert any additional affirmative defenses which are not presently known to the Legislature, following its reasonable inquiry under the circumstances, but which may become known to the Legislature as a result of discovery, further pleadings, or the acquisition of information from any other source during the course of this litigation.

PRAYER FOR RELIEF

The Legislature prays for the following relief:

1. That the Court enter judgment in favor of the Legislature and against Plaintiff on all claims and prayers for relief directly or indirectly pled in the Complaint;

2. That the Court enter judgment in favor of the Legislature and against Plaintiff for the Legislature's costs and attorney's fees as determined by law; and

3. That the Court grant such other relief in favor of the Legislature and against Plaintiff as the Court may deem just and proper.

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11

11

//

AFFIRMATION

The undersigned hereby affirm that this document does not contain "personal information about any person" as defined in NRS 239B.030 and 603A.040.

DATED: This 29th day of January, 2013.

Respectfully submitted,

BRENDA J. ERDOES
Legislative Counsel

By: _____

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Attorneys for Defendants Nevada Department of Taxation
and Kate Marshall, State Treasurer

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a Nevada
municipal corporation,

Plaintiff,

v.

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; THE LEGISLATURE
OF THE STATE OF NEVADA; and DOES 1-
20, Inclusive,

Defendants,

Case No.: 12 OC 00168 1B

Dept. No.: I

ANSWER

Defendants, the State of Nevada, ex rel. its Department of Taxation and Kate Marshall, in
her official capacity as Treasurer of the State of Nevada, by and through counsel, Catherine
Cortez Masto, Attorney General of the State of Nevada, Gina Session, Chief Deputy
Attorney General, and Andrea Nichols, Senior Deputy Attorney General, hereby answer
Plaintiff's Complaint in the above-entitled action, and admit, deny, and aver as follows:

1 1. Defendants admit the allegations of paragraphs 1, 2, 3, 4, 5, 6, and 7 of
2 Plaintiff's Complaint.

3 2. Answering paragraph 8 of Plaintiff's Complaint, Defendants deny Plaintiff's
4 allegations that, "Tier 1 Distributions go to Nevada's seventeen (17) counties, in varying
5 amounts based on the factors described in paragraph 8 above." Defendants affirmatively
6 allege the factors are in paragraph 7 of Plaintiff's Complaint. Defendants admit the
7 remaining allegations of paragraph 8 of Plaintiff's Complaint.

8 3. Answering paragraph 9 of Plaintiff's Complaint, Defendants admit Plaintiff's
9 allegations that, "Fernley incorporated in 2001. Fernley is the only municipality to
10 incorporate in Nevada since the C-Tax system was implemented in 1997." Defendants also
11 admit Plaintiff's allegations that, "in 2001, the year Fernley incorporated, it received \$110,685
12 in C-Tax distributions. In 2011, Fernley received \$143,143 in C-Tax distributions."
13 Defendants deny the remainder of the allegations of paragraph 9 of Plaintiff's Complaint.

14 4. Answering paragraph 10 of Plaintiff's Complaint, Defendants are without
15 knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegations,
16 and on that basis deny them.

17 5. Defendants deny the allegations of paragraph 11 of Plaintiff's Complaint.

18 6. Answering paragraph 12 of Plaintiff's Complaint, Defendants deny Plaintiff's
19 allegation that the C-Tax distribution for 2010-2011 to Ely was \$1,142,528. Defendants
20 admit the remainder of the allegations of paragraph 12 of Plaintiff's Complaint.

21 7. Defendants admit the allegations of paragraph 13 of Plaintiff's Complaint.

22 8. Defendants deny the allegations of paragraph 14 of Plaintiff's Complaint.

23 9. Defendants are without knowledge or information sufficient to form a belief as
24 to the truth of the allegations of paragraph 15, 16, 17, and 18 of Plaintiff's Complaint, and on
25 that basis deny them.

26 10. Defendants deny the allegations of paragraph 19 of Plaintiff's Complaint.

27 11. Answering paragraph 20 of Plaintiff's Complaint, Defendants repeat, reallege and
28 incorporate by reference their responses to paragraphs 1 through 19 of Plaintiff's Complaint.

1 12. Defendants admit the allegations of paragraph 21 of Plaintiff's Complaint.

2 13. Defendants deny the allegations of paragraphs 22, 23, 24, 25, 26, and 27 of
3 Plaintiff's Complaint

4 14. Answering paragraph 28 of Plaintiff's Complaint, Defendants repeat, reallege and
5 incorporate by reference their responses to paragraphs 1 through 27 of Plaintiff's Complaint.

6 15. Defendants admit the allegations of paragraphs 29, 30, and 31 of Plaintiff's
7 Complaint.

8 16. Defendants deny the allegations of paragraphs 32, 33, 34, 35, and 36 of
9 Plaintiff's Complaint.

10 17. Answering paragraph 37 of Plaintiff's Complaint, Defendants repeat, reallege and
11 incorporate by reference their responses to paragraphs 1 through 36 of Plaintiff's Complaint.

12 18. Defendants admit the allegations of paragraph 38 of Plaintiff's Complaint.

13 19. Defendants deny the allegations of paragraphs 39, 40, 41, 42, and 43 of
14 Plaintiff's Complaint.

15 20. Answering paragraph 44 of Plaintiff's Complaint, Defendants repeat, reallege and
16 incorporate by reference their responses to paragraphs 1 through 43 of Plaintiff's Complaint.

17 21. Defendants admit the allegations of paragraph 45 of Plaintiff's Complaint.

18 22. Defendants deny the allegations of paragraphs 46, 47, 48, and 49 of Plaintiff's
19 Complaint.

20 23. Answering paragraph 50 of Plaintiff's Complaint, Defendants repeat, reallege
21 and incorporate by reference their responses to paragraphs 1 through 49 of Plaintiff's
22 Complaint.

23 24. Defendants admit the allegations of paragraph 51 of Plaintiff's Complaint.

24 25. Defendants deny the allegations of paragraphs 52, 53, 54, 55, 56, and 57
25 Plaintiff's Complaint.

26 26. Answering paragraph 58 of Plaintiff's Complaint, Defendants repeat, reallege
27 and incorporate by reference their responses to paragraphs 1 through 57 of Plaintiff's
28 Complaint.

27. Defendants deny the allegations of paragraphs 59, 60, 61, 62, 63, and 64 of Plaintiff's Complaint.

28. Answering paragraph 65 of Plaintiff's Complaint, Defendants repeat, reallege and incorporate by reference their responses to paragraphs 1 through 64 of Plaintiff's Complaint.

29. Defendants deny the allegations of paragraphs 66, 67, 68, 69, and 70 of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.
2. Plaintiff's claims are barred by laches.
3. Plaintiff's claims are barred by unclean hands.
4. Plaintiff's claims are barred by the doctrine of estoppel.
5. Plaintiff failed to exhaust administrative remedies.
6. Plaintiff lacks standing.
7. Plaintiff failed to mitigate damages, if any.
8. The relief Plaintiff requests is contrary to public policy.
9. Plaintiff's claims for money damages are barred by the doctrine of sovereign immunity.
10. Plaintiff's claims are time barred by the statute of limitations.
11. Defendants are protected by discretionary act immunity.
12. Plaintiffs' claims against the state and persons acting in their official capacities are barred by the Eleventh Amendment.
13. Defendants' conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
14. Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendants' Answer, therefore, Defendants reserve the right to

1 amend this Answer to allege additional affirmative defenses if subsequent investigation
2 warrants.

3 WHEREFORE, Defendants pray as follows:

4 (1) That Plaintiff take nothing by virtue of its Complaint.

5 (2) That Defendants have judgment for their costs and attorney fees as determined
6 by law.

7 (3) For such other and further relief as the Court may deem just and proper.

8 Respectfully submitted this 31ST day of January, 2013.

9 CATHERINE CORTEZ MASTO
10 Attorney General

11 By:



12 ANDREA NICHOLS
13 Senior Deputy Attorney General
14 Nevada Bar No. 6436
15 5420 Kietzke Lane, Suite 202
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17 (775) 688-1818

18 *Attorneys for Defendants*

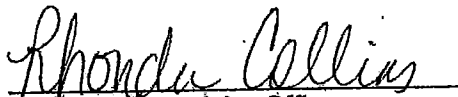
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 15 day of February, 2013, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true copy of the foregoing **ANSWER**, by electronic mail, directed to the following:

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An Employee of the Office
of the Attorney General

REC'D & FILED

2013 FEB 22 AM 9:10

ALAN GLOVER

BY Alan Glover CLERK
DEPUTY

1 CASE NO. 12 OC 000168 1B

2 DEPT. NO. I

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4
5
6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY

8
9 CITY OF FERNLEY, NEVADA, a Nevada
10 municipal corporation,

11 Plaintiff,

12 STATE OF NEVADA ex rel. THE
13 NEVADA DEPARTMENT OF
14 TAXATION; THE HONORABLE KATE
MARSHALL, in her official capacity as
TREASURER OF THE STATE OF
NEVADA; and DOES 1-20, inclusive.

15 Defendants.
16 _____/

**ORDER PURSUANT TO
WRIT OF MANDAMUS**

17 This matter is before this Court on a Writ of Mandamus issued on January 25, 2013 by
18 the Nevada Supreme Court, instructing this Court to vacate its Order of October 15, 2012, to the
19 extent that it refused to dismiss or grant summary judgment on the City's federal constitutional
20 claims and to enter an order dismissing those claims.

21 Pursuant to the Writ of Mandamus and Order Granting in Part and Denying in Part
22 Petition for Writ of Mandamus issued by the Nevada Supreme Court on January 25, 2013, which
23 is incorporated herein by reference,

24 IT IS HEREBY ORDERED that this Court's Order of October 15, 2012 is vacated to the
25 extent that it denied the Defendants' Motion to Dismiss in regard to the federal constitution
26 claims being asserted by Plaintiff, and the Motion to Dismiss filed on August 3, 2012, by the
27 Defendants, State of Nevada, ex rel. its Department of Taxation and Kate Marshall, in her
28 official capacity as Treasurer of the State of Nevada, and joined into by the Intervenor-

1 Defendant, the Legislature of the State of Nevada, is hereby granted in respect to the federal
2 constitutional claims being asserted by Plaintiff and denied at this time in respect to the other
3 claims being asserted therein.

4 DATED this 21st day of February, 2013.

5
6 
7 JAMES T. RUSSELL
8 District Judge
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CERTIFICATE OF SERVICE

The undersigned, an employee of the District Judge, hereby certifies that on the 22nd day of February, 2013, I served the foregoing by depositing a copy thereof in the U.S. Mail at Carson City, Nevada, postage paid, addressed as follows:

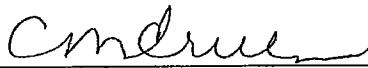
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Christine Erven
Judicial Assistant, Department I

Case No. 12 OC 00168 1B

Dept. No. 1

REC'D & FILED

2013 OCT 10 AM 11:42

ALAN GLOVER

BY Alan Glover CLERK
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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CITY OF FERNLEY, NEVADA, a Nevada
municipal corporation,

Plaintiff,

vs.

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 DOES 1-20, inclusive,

Defendants.

PRETRIAL ORDER

A trial of this matter has been scheduled by the parties for May 12, 2014, beginning at
1:30 p.m. and lasting 8 ½ days. Therefore,

IT IS HEREBY ORDERED that:

I. MANDATORY PRETRIAL CONFERENCE

A. Counsel for the parties shall set a mandatory pretrial conference with the Court to be
held within 60 days of the trial date. The dates set out in this Order may be changed as a result
of the pretrial conference.

B. The purpose of this conference is to expedite settlement or other appropriate
disposition of the case. Counsel and the parties must be prepared to discuss the following:

1. status of 16.1 settlement discussions and a review of possible court assistance;

- 1 2. alternative dispute resolution techniques appropriate to this case;
- 2 3. simplification of issues;
- 3 4. the nature, extent, limitations, and timing of all discovery;
- 4 5. any special case management procedures appropriate to this case;
- 5 6. any trial setting issues;
- 6 7. any possible amendments to pleading or additional parties; and
- 7 8. any other matters that may aid in the prompt disposition of this action. (See NRCP 1)

8 C. The following persons are required to attend the conference unless excused by the
9 Court, which can be accomplished at the setting.

- 10 1. trial or lead counsel for all parties; and
- 11 2. the parties (if the party is an entity, an authorized representative).
- 12 3. if the parties wish to discuss settlement, a representative with negotiating and settling
13 authority.

14 D. Parties desiring a settlement conference before another judge shall so notify the court
15 at the setting.

16 II. DISCOVERY

17 A. The parties will complete discovery in this case no later than **April 11, 2014**.

18 B. Expert disclosures pursuant to NRCP 16.1(a)(2) shall be made no later than
19 **February 11, 2014** and rebuttal expert disclosures pursuant to NRCP 16.1(a)(2) shall be made
20 no later than **February 26, 2014**. The Court may, upon good cause or by stipulation of the
21 parties, relieve a party of the duty to prepare a written report pursuant to NRCP 16.1 (a)(2)B.

22 C. Prior to filing any discovery motion, the attorney for the moving party must consult
23 with opposing counsel about the disputed issues. Counsel for each side must present to each
24 other the merits of their respective positions with the same candor, specificity, and support as
25 during the briefing of discovery motions.

26 D. If both sides desire a dispute resolution conference pursuant to NRCP 16.1(d),
27 counsel must contact the Court's Judicial Assistant at (775) 882-1996 to obtain a date and time
28 for the conference that is convenient to all parties and the Court. If the parties cannot agree on

the need for a conference, the party seeking the conference must file and submit a motion in that regard.

E. A continuance of trial does not extend the deadline for completing discovery. A request for an extension of the discovery deadline, if needed, must be included as part of any motion for continuance.

F. A party objecting to a written discovery request must, in the original objection, specifically detail the reasons that support the objection, and include affidavits or other evidence for any factual assertions upon which an objection is based.

G. Any materials which are requested by either party to which an objection is made on the grounds of privilege, work product or relevance are to be produced to the Court in camera on or before the date upon which the response to those requests are due. This procedure will apply to any request to which a reply is required, regardless of its for or when it is made.

III. PRETRIAL MOTIONS

A. All motions to amend pleadings, add parties or motions that are dispositive shall be served, filed and submitted for decision no later than **March 28, 2014**.

B. Motions in limine shall be served, filed and submitted for decision no later than **April 25, 2014**. Except upon a showing of unforeseen extraordinary circumstances, the Court will not entertain any pretrial motions filed or orally presented after these deadlines.

C. Unless the Court orders otherwise, legal memoranda submitted in support of any motion shall not exceed fifteen (15) pages in length; opposition memoranda shall not exceed fifteen (15) pages in length, and reply memoranda shall not exceed five (5) pages in length. These limitations are exclusive of exhibits.

IV. TRIAL STATEMENT

A. A trial statement on behalf of each party, pursuant to Rule 10 of F.J.D.C.R., shall be hand-delivered to opposing counsel, filed herein and a copy delivered to chambers no later than **5:00 o'clock p.m., May 7, 2014, five (5) calendar days before trial**.

B. The trial statement shall contain:

1. A concise statement of the claimed facts supporting the party's claims or defenses.

2. A statement of admitted or undisputed facts.
3. A statement of issues of law supported by a memorandum of points and authorities.
4. In non-jury cases, a list of summaries or schedules referring to attached itemized exhibits concerning any subject matter which involves accounting, computation, chronology, or similar detail data reasonably calling for orderly itemization (e.g., wages, income, expenses, inventories, business operations, tax computations, disability periods, property losses, itemizations of claimed losses or injuries, the data and reasons upon which an expert bases his or her opinion (not the opinion itself) which clearly reflects the claims, defenses, or offers of proof of the party in such respects, together with reference to the records or other source upon which such summaries or schedules are based.
5. The names and addresses of all witnesses, except impeaching witnesses.
6. A list of special questions requested to be propounded to prospective jurors.
7. Any other appropriate comment, suggestion, or information which may assist the Court in the trial or disposition of the case.

V. JURY INSTRUCTIONS

A. The parties shall exchange all proposed jury instructions and verdict forms one week prior to trial. The parties should then meet, confer, and submit to the Court, if possible, one complete set of agreed-upon jury instructions and verdict forms.

B. If the parties do not agree to all proposed instructions, they shall jointly submit a set containing only those instructions that are mutually agreeable. Each party may individually submit any additional proposed jury instructions and/or verdict forms.

C. All jury instructions and verdict forms, whether agreed upon by both parties or proposed by a party individually, shall be exchanged with all parties and delivered to the court five (5) days prior to trial. Additionally, the parties shall provide all instructions and verdict form, whether agreed upon or not, by email to the Court in Word or WordPerfect.

D. All original instructions shall be accompanied by a separate copy of the instruction containing a citation to the form instruction, statutory or case authority supporting that instruction. All modifications made to instructions taken from statutory authority, Nevada

1 Pattern Jury Instructions, Devitt and Blackmar, CALJIC, BAJI or other form instructions shall be
2 specifically noted on the citation page. The instructions shall include copies of the instruction
3 form for any further instruction submitted from any source other than Nevada Pattern Jury
4 Instructions.

5 **VI. MISCELLANEOUS**

6 A. The Court expects that all counsel will cooperate to try the case within the time set.
7 Trial counsel are strongly encouraged to meet and confer regarding the order of witnesses,
8 stipulated exhibits and any other matters which will expedite trial of the case.

9 B. Jurors will be permitted to take notes and propose written questions during the
10 trial through the Judge.

11 C. Trial counsel for all parties shall contact the Carson City Court Clerk's Office at
12 (775) 887-2082 no later than one week prior to trial, to arrange a date and time to mark trial
13 exhibits. All exhibits shall be marked in one numbered series (Exhibit 1, 2, 3, etc.). All exhibits
14 shall be placed in binders provided by counsel with a bound copy provided to the Court. Once
15 trial exhibits are marked by the clerk, they shall remain in the custody of the clerk. When
16 marking exhibits with the clerk, counsel shall advise the clerk of all exhibits which may be
17 admitted without objection and those that may be admissible subject to reserved objections.

18 D. If a party wishes to have a copy of the juror questionnaires for prospective jurors,
19 that party should contact the Carson City Court Clerk's Office at least twenty-four (24) hours in
20 advance at (775) 887-2082. It takes at least twenty-four (24) hours to make the copies of the
21 juror questionnaires.

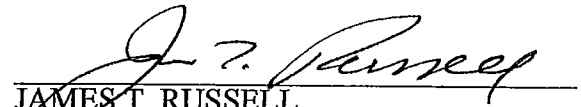
22 E. Any memorandum of costs and disbursements must comply with *Bergmann v.*
23 *Boyce*, 109 Nev. 670, 856 P.2d 560 (1993) and *Bobby Berosini v. PETA*, 114 Nev. 1348, 971
24 P.2d 383 (1998).

25 F. All applications for attorney's fees shall state services rendered and fees incurred
26 for such services with sufficient specificity to enable an opposing party and the Court to review
27 such application.

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1 Failure to comply with any provision of this Pretrial Order may result in the imposition
2 of sanctions.

3 DATED this 10 day of October, 2013.

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6 JAMES T. RUSSELL
District Judge

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CERTIFICATE OF MAILING

I hereby certify that on the 10th day of October, 2013, I placed a copy of
the foregoing in the United States Mail, postage prepaid, addressed as follows:

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LCB Legal Division
401 S. Carson Street
Carson City NV 89701

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Reno NV 89501

Andrea Nichols, Esq.
Senior Deputy Attorney General
5420 Kietzke Lane #202
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CHRISTINE ERVEN
Judicial Assistant

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595 Silver Lace Blvd.
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Attorneys for the City of Fernley, Nevada

IN THE FIRST JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR CARSON CITY

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

v.

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 DOES 1-20,
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

**STIPULATION REGARDING
DEFENDANT'S MOTION TO STRIKE
PLAINTIFF'S JURY DEMAND**

COMES NOW, Plaintiff City of Fernley, Nevada (hereinafter "Plaintiff") and
Defendants, 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 Nevada
Legislature (hereinafter "Defendants") and stipulate as follows:

1. On October 8, 2013, Defendants filed a Motion to Strike Plaintiff's Jury Demand;

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Case No. 66851

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ALAN BLOVER
C. ERVEN
BY TIFPITY CLERK

2. That a responsive pleading and/or opposition to that Motion would be due from Plaintiff on or about October 22, 2013;

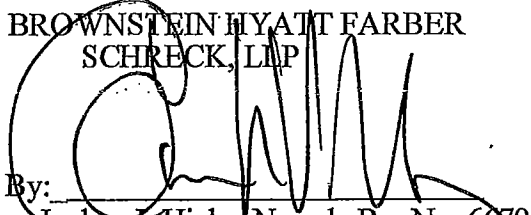
3. That the parties hereby stipulate that the time for the Plaintiff to file a responsive pleading and/or opposition shall be continued and extended up to and including March 3, 2014;

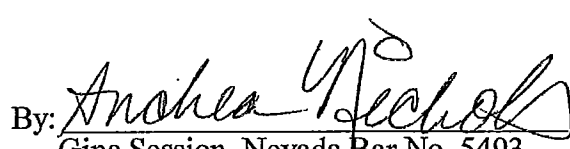
4. That Defendant's Reply in Support of the Motion to Strike Plaintiff's Jury Demand shall be filed on or before March 17, 2014.

DATED this 17th day of October, 2013

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

OFFICE OF THE ATTORNEY GENERAL

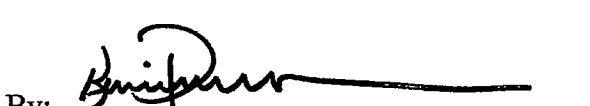
By: 
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Telephone: 775-688-1818

Attorneys for Plaintiff City of Fernley, Nevada

*Attorneys for Defendants Nevada Department of
Taxation and Kate Marshall, State Treasurer*

LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION

By: 
Kevin C. Powers, Nevada Bar No. 6781
J. Daniel Yu, Nevada Bar No. 10806
401 South Carson Street
Carson City, Nevada 89701
Telephone: 775-684-6830

*Attorneys for Defendant Legislature of the
State of Nevada*

IT IS SO ORDERED.

DATE: October 22, 2013


DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of October, 2013, I placed a copy of
the foregoing in the United States Mail, postage prepaid, addressed as follows:

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CHRISTINE ERVEN
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6 Brandi L. Jensen, Nevada Bar No. 8509
7 Fernley City Attorney
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10 Fernley, Nevada 89408

9 *Attorneys for the City of Fernley, Nevada*

10 **IN THE FIRST JUDICIAL DISTRICT COURT**

11 **OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

12 CITY OF FERNLEY, NEVADA, a
13 Nevada municipal corporation,

14 Plaintiff,

15 v.

16 STATE OF NEVADA ex rel. THE NEVADA
17 DEPARTMENT OF TAXATION; THE
18 HONORABLE KATE MARSHALL, in her
19 official capacity as TREASURER OF THE
20 STATE OF NEVADA; and DOES 1-20,
21 inclusive,

19 Defendants,

20 NEVADA LEGISLATURE,

21 Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

**STIPULATION REGARDING CHANGE
OF BRIEFING SCHEDULE AND
PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO STRIKE
PLAINTIFF'S JURY DEMAND AND ORDER**

23 On October 11, 2013, this Court issued a Pretrial Order setting this matter for trial on May
24 12, 2014. The Order additionally provided that Discovery would be concluded on April 11, 2014,
25 and that Dispositive Motions would be served, filed and submitted for decision no later than
26 March 28, 2014.

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ALAN GLOVER

BY
CLERK

1 Because of the complex and unique nature of the issues raised by this lawsuit and
2 defenses, the Parties have mutually agreed that a coordinated briefing scheduled be prepared so as
3 to coordinate the expected motions in this case.

4 As such, Plaintiff, City of Fernley, Nevada (hereinafter "Plaintiff") and Defendants, State
5 of Nevada ex rel. The Nevada Department of Taxation; The Honorable Kate Marshall, in her
6 official capacity as Treasurer Of The State Of Nevada; and the Nevada Legislature (hereinafter
7 "Defendants") agree and stipulate as follows:

8 1. That the trial date of May 12, 2014, be vacated and that the parties appear for a
9 new trial setting on February 19, 2014;

10 2. That all dispositive motions be filed on or before May 23, 2014, and have a page
11 limit of not more than 30 pages;

12 3. Any oppositions to any dispositive motions shall be filed no later than June 13,
13 2014, and be limited to not more than 30 pages;

14 4. That all replies in support of dispositive motions shall be filed no later than June
15 27, 2014, and be limited to not more than 20 pages;

16 5. That the Parties previous Stipulation to Extend the time for Plaintiff's Opposition
17 to Defendant's Motion to Strike Plaintiff's Jury Demand be vacated and that Plaintiff's
18 Opposition to Defendant's Motion to Strike Plaintiff's Jury Demand will now be due not less than
19 65 days before the newly set trial date.

20 6. It is additionally stipulated and agreed that the Defendant's Reply in Support of the
21 Motion to Strike Plaintiff's Jury Demand shall be due not less than 55 days before the newly set
22 trial date.

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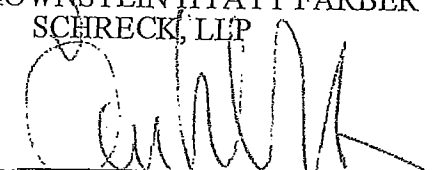
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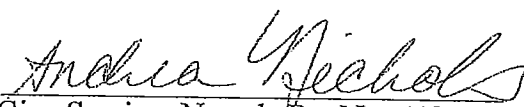
7. That all the other dates, including the Close of Discovery date of April 11, 2014, shall remain the same.

DATED this 14th day of February, 2014.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

OFFICE OF THE ATTORNEY GENERAL


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Attorneys for Plaintiff City of Fernley, Nevada

*Attorneys for Defendants Nevada Department of
Taxation and Kate Marshall, State Treasurer*

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Carson City, Nevada 89701
Telephone: 775-684-6830

*Attorneys for Defendant Legislature of the
State of Nevada*

IT IS SO ORDERED.

DATE: February 19, 2014


DISTRICT COURT JUDGE

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Attorneys for the City of Fernley, Nevada

IN THE FIRST JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR CARSON CITY

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

v.

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 DOES 1-20,
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

**SECOND STIPULATION AND
[PROPOSED] ORDER REGARDING
CHANGE OF BRIEFING SCHEDULE**

On October 11, 2013, this Court issued a Pretrial Order setting this matter for trial on May 12, 2014. The Order additionally provided that Discovery would be concluded on April 11, 2014, and that Dispositive Motions would be served, filed and submitted for decision no later than March 28, 2014.

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ALAN GLOVER
BY CLERK
DEPUTY

1 Because of the complex and unique nature of the issues raised by this lawsuit and
2 defenses, the Parties submitted a Stipulation Regarding Change of Briefing Schedule and
3 Plaintiff's Response to Defendant's Motion to Strike Plaintiff's Jury Demand which was signed
4 by the Court on February 19, 2014. The Court also issued an Amended Trial Date Memo setting a
5 trial date commencement of November 12, 2014.

6 It has since come to the Parties attention, that there were two additional dates that should
7 have been addressed in the Stipulation.

8 As such, Plaintiff, City of Fernley, Nevada (hereinafter "Plaintiff") and Defendants, State
9 of Nevada ex rel. The Nevada Department of Taxation; The Honorable Kate Marshall, in her
10 official capacity as Treasurer Of The State Of Nevada; and the Nevada Legislature (hereinafter
11 "Defendants") agree and stipulate as follows:

12 1. That all Motions in Limine shall be served, filed and submitted for decision no
13 later than October 27, 2014; and

14 2. Trial statements pursuant to Rule 10 of F.J.D.C.R. shall be hand delivered to
15 opposing counsel, filed with the Court and a copy delivered to the Judge's chambers no later than
16 5:00 p.m., November 5, 2014.

17 DATED this 11th day of March, 2014.

18 BROWNSTEIN HYATT FARBER
19 SCHRECK, LLP

OFFICE OF THE ATTORNEY GENERAL

20 By: 

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26 *Attorneys for Plaintiff City of Fernley, Nevada*

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*Attorneys for Defendants Nevada Department of
Taxation and Kate Marshall, State Treasurer*

1 LEGISLATIVE COUNSEL BUREAU,
2 LEGAL DIVISION

3 By: 

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6 401 South Carson Street
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Telephone: 775-684-6830

7 *Attorneys for Defendant Legislature of the*
8 *State of Nevada*

9 IT IS SO ORDERED.

10 DATE: March 17, 2014


11 DISTRICT COURT JUDGE

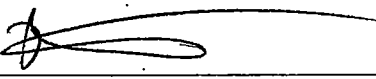
CERTIFICATE OF MAILING

I hereby certify that on the 17 day of March, 2014, I served a copy of the foregoing by placing the foregoing in the United States Mail, postage prepaid, addressed as follows:

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Angela Jeffries
Judicial Assistant, Dept. 1

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Attorneys for the City of Fernley, Nevada

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CITY OF FERNLEY, NEVADA, a
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Plaintiff,

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DEPARTMENT OF TAXATION; THE
HONORABLE KATE MARSHALL, in her
official capacity as TREASURER OF THE
STATE OF NEVADA; and DOES 1-20,
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

**STIPULATION AND [PROPOSED]
ORDER FOR AN EXTENSION OF
TIME TO FILE RESPONSES TO
DISCOVERY REQUESTS; EXTEND
CERTAIN DISCOVERY DEADLINES
AND EXTEND TIME TO FILE
DISPOSITIVE MOTIONS**

On March 6, 2014, Plaintiff, City of Fernley, Nevada (hereinafter "Plaintiff"), served its objections to Defendants, State of Nevada Department of Taxation (hereinafter "Department") and Nevada Legislature (hereinafter "Legislature"), with regard to the Legislature's responses to Plaintiff's First Requests for Admissions, Interrogatories and Production of Documents and the Department's responses to Plaintiff's First Set of Interrogatories and First Request for Production of Documents.

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ALAN GLOYER

DEPUTY

1 The Legislature responded to the objections and participated in a "meet and confer" with
2 the Plaintiff on March 20, 2014, and the Department responded to the objections and participated
3 in a "meet and confer" with the Plaintiff on March 27, 2014.

4 In addition, on March 11, 2014, Plaintiff served its Second Request for the Production of
5 Documents to the Department and the Legislature. Responses to these requests are due on or
6 before April 11, 2014. The close of discovery in this matter is set for April 11, 2014.

7 The Department and the Legislature have requested an extension of time to and including
8 May 2, 2014, to produce and serve supplemental responses and documents to Plaintiff's First
9 Requests for Admissions, Interrogatories and Production of Documents and to respond to
10 Plaintiff's Second Request for the Production of Documents.

11 All parties will need time to review the responses and documents that are produced by
12 May 2, 2014, and supplemental discovery may be needed thereafter by all parties, limited to those
13 responses and documents.

14 Further, the date for filing of dispositive motions, oppositions and replies will need to be
15 extended to accommodate the additional time to respond.

16 As such, Plaintiff, and Defendants, State of Nevada ex rel. the Nevada Department of
17 Taxation; the Honorable Kate Marshall, in her official capacity as Treasurer of the State of
18 Nevada; and the Nevada Legislature (hereinafter "Defendants") agree and stipulate as follows:

19 1. The deadline for Defendants to produce and serve their supplemental responses and
20 documents to Plaintiff's First Requests for Admissions, Interrogatories and Production of
21 Documents and to produce and serve their responses and documents to Plaintiff's Second Request
22 for the Production of Documents is extended from April 11, 2014, to May 2, 2014.

23 2. If any party needs to conduct supplemental discovery based on the responses and
24 documents that are produced and served by the Department or the Legislature on or before May 2,
25 2014, the party may conduct such supplemental discovery for this limited purpose only, but the
26 party must serve its request for such supplemental discovery not later than May 23, 2014.

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1 3. Each party reserves its rights to file motions to compel based on the responses and
2 documents that are produced and served on the party on or before May 2, 2014, and also based on
3 the responses and documents that are produced and served on the party in response to any
4 supplemental discovery requests that are made by the party after May 2, 2014, but on or before
5 May 23, 2014.

6 4. The parties further stipulate that each party must file and serve any such motions to
7 compel not later than June 6, 2014.

8 5. The parties further stipulate that if any such motions to compel are filed and served on
9 or before June 6, 2014, the parties waive any objections as to the timeliness of the motions, but
10 the parties do not waive any other objections to any such motions to compel.

11 6. The parties further stipulate that the due date for dispositive motions is moved from
12 May 23, 2014, to June 13, 2014; the due date for oppositions is moved from June 13, 2014, to
13 July 11, 2014; and the due date for replies is moved from June 27, 2014 to July 25, 2014.

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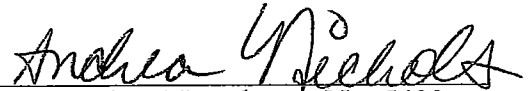
7. All other dates remain as previously set by the Court or by signed stipulation.

DATED this 9th day of April, 2014.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

OFFICE OF THE ATTORNEY GENERAL

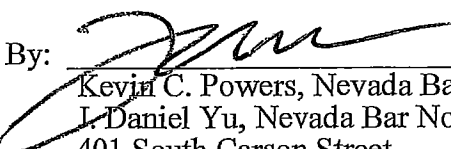
By: 
Joshua J. Hicks, Nevada Bar No. 6679
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Attorneys for Plaintiff City of Fernley, Nevada

*Attorneys for Defendants Nevada Department of
Taxation and Kate Marshall, State Treasurer*

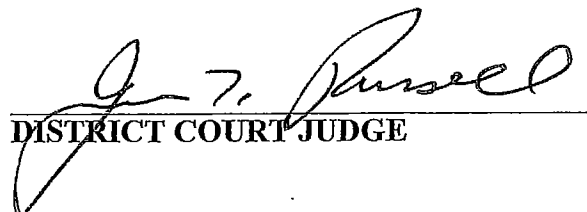
LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION

By: 
Kevin C. Powers, Nevada Bar No. 6781
L. Daniel Yu, Nevada Bar No. 10806
401 South Carson Street
Carson City, Nevada 89701
Telephone: 775-684-6830

*Attorneys for Defendant Legislature of the
State of Nevada*

IT IS SO ORDERED.

DATE: April 10th


DISTRICT COURT JUDGE

1 CATHERINE CORTEZ MASTO, Attorney General
2 GINA C. SESSION, Chief Deputy Attorney General
3 Nevada Bar No. 5493
4 E-mail: gsession@ag.nv.gov
5 ANDREA NICHOLS, Senior Deputy Attorney General
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9 (775) 688-1818
10 E-mail: anichols@ag.nv.gov

11 *Attorneys for Defendants Nevada Department of Taxation*
12 *and Kate Marshall, State Treasurer*

13
14 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

15 **IN AND FOR CARSON CITY**

16 CITY OF FERNLEY, NEVADA, a Nevada
17 municipal corporation,

18 Plaintiff,

19 v.

20 STATE OF NEVADA, ex rel. THE NEVADA
21 DEPARTMENT OF TAXATION; THE
22 HONORABLE KATE MARSHALL, in her
23 official capacity as TREASURER OF THE
24 STATE OF NEVADA; and DOES 1-20,
25 Inclusive,

26 Defendants,

27 NEVADA LEGISLATURE,

28 Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

**NEVADA DEPARTMENT OF TAXATION
AND NEVADA TREASURER'S
RENEWAL OF MOTION TO DISMISS**

21 Defendants, State of Nevada, ex rel. its Department of Taxation ("Department") and
22 Kate Marshall, in her official capacity as Treasurer of the State of Nevada ("Treasurer"), by
23 and through counsel, Catherine Cortez Masto, Attorney General of the State of Nevada,
24 Gina Session, Chief Deputy Attorney General, and Andrea Nichols, Senior Deputy Attorney
25 General, hereby renew their Motion to Dismiss and again move this court for its order
26 dismissing this action.

27 This Motion is made pursuant to Rules 1 and 12(b)(5) of the Nevada Rules of Civil
28 Procedure ("NRCP") and in accordance with this Court's Order of October 15, 2012, which,

1 among other things, ordered "that the Defendants, upon completion of a reasonable
2 discovery period, may renew their Motions to Dismiss which will then be duly considered by
3 this Court."

4 **I. INTRODUCTION**

5 In the interests of judicial economy, the Department and Treasurer ask this Court to
6 consider whether Plaintiff's Complaint alleging violations of the Nevada Constitution states a
7 claim upon which relief can be granted. The issues to be decided by this Court are legal
8 rather than factual and may be decided under the standard for a motion to dismiss which
9 would save the parties the time and expense of filing motions for summary judgment.

10 **II. PROCEDURAL POSTURE**

11 Plaintiff, City of Fernley ("Fernley") filed its Complaint on June 6, 2012, alleging
12 Nevada's C-Tax system violates both the United States Constitution and the Nevada
13 Constitution, and seeking declaratory and injunctive relief. On August 3, 2012, Defendants,
14 the Department and Treasurer filed their Motion to Dismiss. That same date, the Nevada
15 Legislature ("Legislature") filed a Motion to Intervene. The Legislature was allowed to
16 intervene and also to join in the Department and Treasurer's Motion to Dismiss. On October
17 15, 2012, this Court issued an order denying the Motions to Dismiss to allow Fernley a
18 period of time to complete discovery and allowing Defendants to renew their Motions to
19 Dismiss upon completion of a reasonable discovery period.

20 On November 5, 2012, the Department, Treasurer and Legislature filed a Petition for
21 Writ of Mandamus in the Nevada Supreme Court. The Nevada Supreme Court issued its
22 Order on January 25, 2013, finding Fernley's federal constitutional claims were barred by a
23 two year statute of limitations. The Nevada Supreme Court made no comment on the
24 remainder of Defendants' arguments and declined to exercise its discretion to entertain
25 Defendants' Writ Petition with regard to those issues.

26 This Court issued its order pursuant to Writ of Mandamus on February 22, 2013,
27 granting Defendants' Motions to Dismiss in respect to the federal constitutional claims being
28 asserted by Fernley. The only remaining issues are whether or not Nevada's C-Tax system

1 violates the Nevada Constitution and, if so, whether Femley is entitled to declaratory and/or
2 injunctive relief.

3 The parties filed their Joint Case Conference Report on April 24, 2013, and have
4 engaged in discovery since that date. Many thousands of pages of documents have been
5 produced. By stipulation of the parties, the discovery deadline was extended to May 2,
6 2014, with dispositive motions due on June 13, 2014. It is anticipated that all parties will file
7 motions for summary judgment.

8 In the interests of judicial economy, the Department and Treasurer renew their Motion
9 to Dismiss and request this Court review Femley's claims under the standard set forth in
10 NRCP 12(b)(5) before matters outside the pleadings are presented pursuant to NRCP Rule
11 56.

12 **III. ARGUMENT**

13 NRCP Rule 1 provides in relevant part that the rules, "shall be construed and
14 administered to secure the just, speedy, and inexpensive determination of every action." In
15 order to avoid unnecessary time and expense, the Department and Treasurer ask this Court
16 to review the remaining issues in Femley's Complaint under the standard of review for a
17 Motion to Dismiss - whether Femley's Complaint states a claim upon which relief may be
18 granted. Even if matters outside the pleadings are presented to the Court, if the Court's
19 decision does not rely on documents outside of the pleadings, the Court may apply the
20 NRCP 12(b)(5) standard of review. *Blackjack Bonding v. City of Las Vegas Municipal Court*,
21 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). The Court may also take judicial notice of
22 public records without converting a motion to dismiss into a motion for summary judgment.
23 *Brelia v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 p.2d 1258, 1261 (1993).

24 The United States Supreme Court discussed the standard of review for motions to
25 dismiss in *Bell Atlantic Corporation et al., v. Twombly*, 550 U.S. 544, 555-57 (2007) and
26 *Ashcroft v. Iqbal*, 556 U.S. 662, 678-82 (2009). The Supreme Court found that to survive a
27 motion to dismiss a complaint must contain sufficient factual matter to raise a claim from
28 speculative to plausible. *Twombly*, at 555-56; *Iqbal*, at 678-79. The Court must accept

1 factual allegations as true but it is not bound to accept legal conclusions couched as factual
2 allegations. *Id.* "While legal conclusions can provide the framework of a complaint they
3 must be supported by factual allegations." *Iqbal*, at 679. Where plaintiffs "have not nudged
4 their claims across the line from conceivable to plausible their complaint must be dismissed."
5 *Twombly*, at 570.

6 The Nevada Supreme Court subjects orders granting motions to dismiss to "a
7 rigorous standard of review on appeal." *Stubbs v. Strickland*, 129 Nev. Adv. Op. 15, 297
8 P.3d 326, 328-29 (2013) citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-
9 28, 181 P.3d 670, 672 (2008).

10 This court presumes all factual allegations in the complaint are
11 true and draws all inferences in favor of the plaintiff. Dismissal is
12 appropriate when it appears beyond a doubt that the plaintiff
could prove no set of facts, which, if true, would entitle the plaintiff
to relief. [The Court] review[s] all legal conclusions de novo.

13 *Id.*

14 In this case Fernley's claims are legal rather than factual. For this reason there are
15 no facts which, if proved, would entitle Fernley to any relief. Accordingly, Fernley's
16 Complaint should be dismissed pursuant to NRCP Rule 12(b)(5) for the reasons set forth in
17 Defendants' Motion to Dismiss, filed August 3, 2012; Nevada Legislature's Joinder in Motion
18 to Dismiss, filed August 16, 2012; Defendants' Reply to Opposition to Motion to Dismiss filed
19 August 27, 2012; and, Nevada Legislature's Reply in Support of Joinder in Motion to
20 Dismiss, filed October 8, 2012, (collectively "Motions to Dismiss").

21 As is set forth in detail in the Motions to Dismiss, Fernley's claims are barred as a
22 matter of law because Defendants have immunity pursuant to NRS 41.032. The claims are
23 also barred by the applicable statute of limitations and by the doctrine of laches. Further,
24 Fernley lacks standing to bring a Separation of Powers claim against the State.

25 Even if Fernley's claims were not barred as a matter of law, the claims are so lacking
26 in merit that there are no facts which, if proven true, would entitle Fernley to relief. Nevada's
27 C-Tax system does not violate the Separation of Powers Clause found in Art. 3 § 1 of the
28 Nevada Constitution. Fernley admits that the Department is not allowed to make any

1 meaningful adjustments to the C-Tax system. Complaint, p. 4, ll. 16-21. Where, as here, the
2 statute is clear and leaves nothing to the discretion of the Department or Treasurer, there is
3 no violation of the Separation of Powers Clause of the Nevada Constitution.

4 The C-Tax system is not a local or special law for the assessment and collection of
5 taxes which would violate Nev. Const. Art. 4 § 20. First, because the Constitutional provision
6 at issue applies to the assessment and collection of taxes not the disbursement of taxes.
7 Secondly, the law is applied to Fernley in the same manner as any other local government
8 entity. Even if it could be construed as a local or special law, the C-Tax system must still be
9 upheld since a general law could not be made applicable.

10 Finally, because the facts alleged in Fernley's Complaint do not show a violation of
11 the Nevada Constitution, there is no basis for declaratory or injunctive relief.

12 Fernley's Complaint fails to allege sufficient facts to support its claims for relief.
13 Rather, the Complaint is replete with legal conclusions. These bald legal assertions that
14 Nevada's C-Tax system violates the Nevada Constitution fail as a matter of law. Even under
15 the rigorous standard of review employed by the Nevada Supreme Court, it is beyond doubt
16 that Fernley can prove no set of facts which would entitle it to relief. Dismissal of the claims
17 for relief remaining in Fernley's Complaint is therefore warranted.

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IV. CONCLUSION

In light of the foregoing, Defendants, State of Nevada, ex rel. its Department of Taxation and Kate Marshall, in her official capacity as Treasurer of the State of Nevada, respectfully request that this Court enter its order dismissing Plaintiff's claims against them.

DATED this 5th day of May, 2014.

CATHERINE CORTEZ MASTO
Attorney General

By: Andrea Nichols
ANDREA NICHOLS
Senior Deputy Attorney General
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5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775) 688-1818

*Attorneys for Defendants
Nevada Department of Taxation
and Nevada Treasurer*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 5th day of May, 2014, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true copy of the foregoing, **RENEWAL OF MOTION TO DISMISS**, by electronic mail, directed to the following:

Joshua Hicks, Esq.
Brownstein Hyatt Farber Schreck, LLP
50 W. Liberty Street, Suite 1030
Reno, NV 89501
jhicks@bhfs.com

Clark Vellis, Esq.
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cvellis@nevadafirm.com

Brandi Jensen, Fernley City Attorney
Office of the City Attorney
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bjensen@cityoffernley.org

Kevin Powers, Esq.
Dan Yu, Esq.
Legislative Counsel Bureau
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dan.yu@lcb.state.nv.us



An Employee of the Office
of the Attorney General

BRENDA J. ERDOES, Legislative Counsel
KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
J. DANIEL YU, Principal Deputy Legislative Counsel
Nevada Bar No. 10806
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
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kpowers@lcb.state.nv.us; Dan.Yu@lcb.state.nv.us
Attorneys for Defendant Legislature of the State of Nevada

REC'D & FILED

2014 MAY -6 AM 9:03

ALAN GLOVER
BY Alan Glover CLERK
DEPUTY

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

vs.

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; THE LEGISLATURE OF
THE STATE OF NEVADA; and DOES 1-20,
inclusive,

Defendants.

Case No. 12 OC 00168 1B
Dept. No. 1

**DEFENDANT NEVADA LEGISLATURE'S JOINDER IN
NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER'S
RENEWAL OF MOTION TO DISMISS**

Defendant, the Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau under NRS 218F.720, hereby submits the following Joinder in response to the Renewal of Motion to Dismiss filed on May 5, 2014, by Defendants Nevada Department of Taxation and Nevada Treasurer (collectively the Department). If the Court considers the merits of the Department's Renewal of Motion to Dismiss, the Legislature respectfully requests that the Court enter an order dismissing, with prejudice under NRCP 12(b)(5), all causes of action and claims

1 alleged in the complaint filed by Plaintiff City of Fernley on June 6, 2012, for the reasons set forth in:
2 (1) the Department's Motion to Dismiss filed on August 3, 2012; (2) the Legislature's Joinder in Motion
3 to Dismiss filed on August 16, 2012; (3) the Department's Reply to Opposition to Motion to Dismiss
4 filed on August 27, 2012; and (4) the Legislature's Reply in Support of Joinder in Motion to Dismiss
5 filed on October 8, 2012.

6 DATED: This 6th day of May, 2014.

7 Respectfully submitted,

8 **BRENDA J. ERDOES**
9 Legislative Counsel

10 By: 

KEVIN C. POWERS

Chief Litigation Counsel

Nevada Bar No. 6781

kpowers@lcb.state.nv.us

J. DANIEL YU

Principal Deputy Legislative Counsel

Nevada Bar No. 10806

Dan.Yu@lcb.state.nv.us

LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

401 S. Carson Street

Carson City, NV 89701

Tel: (775) 684-6830; Fax: (775) 684-6761

Attorneys for the Legislature

CERTIFICATE OF SERVICE

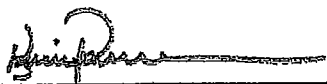
I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 6th day of May, 2014, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true and correct copy of the foregoing DEFENDANT NEVADA LEGISLATURE'S JOINDER IN NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER'S RENEWAL OF MOTION TO DISMISS, by electronic mail, directed to the following:

JOSHUA J. HICKS
BROWNSTEIN HYATT FARBER SCHRECK, LLP
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Reno, NV 89501
jhicks@bhfs.com

CLARK V. VELLIS
cvellis@nevadafirm.com
c/o: Joshua J. Hicks

*Attorneys for Plaintiff
City of Fernley, Nevada*

CATHERINE CORTEZ MASTO
Attorney General
GINA C. SESSION
Chief Deputy Attorney General
ANDREA NICHOLS
Senior Deputy Attorney General
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5420 Kietzke Ln., Suite 202
Reno, NV 89511
gsession@ag.nv.gov; anichols@ag.nv.gov
*Attorneys for Defendants Nevada Department
of Taxation and Kate Marshall, State Treasurer*



An Employee of the Legislative Counsel Bureau

Joshua J. Hicks, Nevada Bar No. 6679
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Email: jhicks@bhfs.com

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

Attorneys for the City of Fernley, Nevada

IN THE FIRST JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA IN AND FOR CARSON CITY

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

v.

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 DOES 1-20,
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

**CITY OF FERNLEY'S RESPONSE TO THE NEVADA DEPARTMENT OF
TAXATION AND NEVADA TREASURER'S RENEWAL OF MOTION TO DISMISS
AND TO THE NEVADA LEGISLATURE'S JOINDER THERETO AND REQUEST
FOR STATUS CONFERENCE**

COMES NOW Plaintiff CITY OF FERNLEY, (hereinafter "Plaintiff"), by and through
their attorneys of record, Brownstein Hyatt Farber Schreck, LLP, and hereby files this Response

REC'D & FILED

2014 MAY 16 AM 11:12

ALAN GLOVER
CLERK
BY V. Alegria
DEPUTY

1 to the Nevada Department of Taxation and Nevada Treasurer's Renewal of Motion to Dismiss.

2 On May 5, 2014, the City of Fernley was served with the Nevada Department of Taxation
3 and Nevada Treasurer's (collectively, the "State") Renewal of Motion to Dismiss. This filing
4 purports to renew the Motion to Dismiss filed by the State on August 3, 2012. By Order dated
5 October 15, 2012, that Motion to Dismiss was denied by this Court "in order to allow the Plaintiff
6 a period of time to complete discovery . . ." The Court's ruling was consistent with the City of
7 Fernley's position that the Motion to Dismiss should be treated as a Motion for Summary
8 Judgment and that the City of Fernley should have an opportunity to demonstrate a genuine issue
9 of material fact. A copy of the Order is attached hereto as Exhibit 1.

10 By Order dated February 9, 2014, this Court set in place a stipulated briefing schedule for
11 the parties and also ordered that dispositive motions "have a page limit of not more than 30
12 pages." By Order dated April 11, 2014, this Court stated that dispositive motions must be filed
13 no later than June 13, 2013, that oppositions to dispositive motions must be filed no later than
14 July 11, 2014, and reply briefs must be filed no later than July 25, 2014.

15 The State's Motion to Dismiss, or more accurately Motion for Summary Judgment, is a
16 dispositive motion and is therefore covered by the Orders of this Court pertaining to the briefing
17 schedule and page limits. Because the State's Renewal of Motion to Dismiss was filed so far in
18 advance of the July 11, 2014 date for oppositions, the City of Fernley felt it was necessary to alert
19 this Court that its opposition to that Motion to Dismiss will be filed pursuant to the Court-ordered
20 briefing schedule and using the Court authorized discovery, so that the Court is aware that an
21 opposition from the City of Fernley is not due for some time.

22 To add to the procedural confusion created by the State's renewal of its Motion to
23 Dismiss, the Nevada Legislature filed a Joinder in the renewal, and incorporated into that Joinder
24 four other briefs filed in 2012, including the Legislature's forty-one page Joinder in the State's
25 Motion to Dismiss, which was actually a separate dispositive motion in and of itself, as it raised
26 arguments not raised by the State. As the Legislature apparently has renewed its own dispositive
27 Motion to Dismiss by way of the Joinder, Plaintiff will respond to that dispositive motion as well
28 within the court-ordered briefing schedule and including offering evidence obtained in discovery

1 in opposition to these dispositive motions, including raising any arguments with respect to page
2 limits.

3 To the extent that the Court has concerns with the foregoing, Plaintiff requests a status
4 conference to clarify all issues related to this renewal, the dispositive motions referenced therein,
5 and to preserve the right of the City of Fernley to file opposition briefs to the various dispositive
6 motions.

7 DATED this 15th day of May, 2014.

8 BROWNSTEIN HYATT FARBER SCHRECK, LLP

9
10 By: 

11 Joshua J. Hicks, Nevada Bar No. 6679

12 50 West Liberty Street, Suite 1030

13 Reno, Nevada 89501

14 Telephone: 775-622-9450

15 *Attorneys for the City of Fernley, Nevada*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of BROWNSTEIN HYATT FARBER
SCHRECK, LLP, and that on this 15th day of May, 2014, I caused to be served via
email a true and correct copy of the above foregoing **CITY OF FERNLEY'S RESPONSE TO
THE NEVADA DEPARTMENT OF TAXATION AND NEVADA TREASURER'S
RENEWAL OF MOTION TO DISMISS** properly addressed to the following:

Andrea Nichols, Esq.
anichols@ag.nv.gov
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511

Brenda J. Erdoes, Esq.
Kevin Powers, Esq.
kpowers@lcb.state.nv.us
J. Daniel Yu, Esq.
dan.yu@lcb.state.nv.us
Legislative Counsel Bureau
401 South Carson Street
Carson City, Nevada 89701



Employee of Brownstein Hyatt Farber Schreck, LLP

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,
Plaintiff,

v.

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 DOES 1-20, inclusive,
Defendants,

NEVADA LEGISLATURE,
Intervenor.

Case No.: 12 OC 00168 1B; Dept. No.: I

INDEX OF EXHIBITS

Exhibit 1 Order Granting A Continuance to Complete Discovery

3 Pages

EXHIBIT 1

1 CASE NO. 12 OC 000168 1B

2 DEPT. NO. I

REC'D & FILED

2012 OCT 15 AM 10:30

ALAN GLOVER

BY Alan Glover CLERK
DEPUTY

3
4
5
6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY
8

9 CITY OF FERNLEY, NEVADA, a Nevada
10 municipal corporation,

Plaintiff,

11 STATE OF NEVADA, ex rel. THE
12 NEVADA DEPARTMENT OF
13 TAXATION; THE HONORABLE KATE
14 MARSHALL, in her official capacity as
TREASURER OF THE STATE OF
NEVADA; and DOES 1-20, inclusive.

15 Defendants.
16

**ORDER GRANTING A
CONTINUANCE TO COMPLETE
DISCOVERY**

17 This matter is before this Court on Plaintiff's Motion for Continuance Pursuant to NRCP
18 56(f) and Notice of Non-Opposition filed on August 20, 2012, as part of an Opposition to
19 Motion to Dismiss.

20 Initially, it should be pointed out that there was an Opposition filed against the Motion as
21 set forth in the Nevada Legislature's Reply in Support of Joinder in Motion to Dismiss filed on
22 October 8, 2012, on page 5, lines 5-8.

23 The Plaintiff submits that the Court's consideration of the Motions to Dismiss filed in
24 this matter should be considered as Motion for Summary Judgment; and, as such, that it should
25 be given a reasonable opportunity to complete discovery, and therefore have a chance to
26 demonstrate a genuine issue of material fact. Citing to *Aviation Ventures, Inc. v. Joan Morris,*
27 *Inc.*, 121 Nev. 113, 118-119, 110 P. 3rd 59 (2005).

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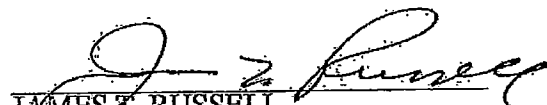
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Therefore, good cause appearing,

IT IS HEREBY ORDERED that the Motions to Dismiss are DENIED at this time in order to allow the Plaintiff a period of time to complete discovery; and

IT IS HEREBY FURTHER ORDERED that the Defendants, upon completion of a reasonable discovery period, may renew their Motions to Dismiss which will then be duly considered by the Court.

DATED this 12 day of October, 2012.


JAMES T. RUSSELL
District Judge

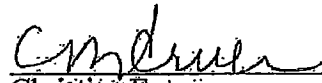
CERTIFICATE OF SERVICE

The undersigned, an employee of the District Judge, hereby certifies that on the 15th day of October, 2012, I served the foregoing by depositing a copy thereof in the U.S. Mail at Carson City, Nevada, postage paid, addressed as follows:

Brenda J. Erdoes, Esq.
Kevin C. Powers, Esq.
J. Daniel Yu, Esq.
Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City NV 89701

Joshua J. Hicks, Esq.
Clark V. Vellis, Esq.
Sean D. Lyttle, Esq.
Brownstein Hyatt Farber Schreck, LLP
9210 Prototype Drive #250
Reno NV 89521

Catherine Cortez Masto, Esq.
Gina C. Session, Esq.
Andrea Nichols, Esq.
Office of the Attorney General
5420 Kietzke Lane #202
Reno NV 89511


Christine Erven
Judicial Assistant, Department I

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel.
DEPARTMENT OF TAXATION;
THE HONORABLE DAN
SCHWARTZ, in his official capacity
as TREASURER OF THE STATE OF
NEVADA; and THE LEGISLATURE
OF THE STATE OF NEVADA,

Respondents.

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Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

JOINT APPENDIX

VOLUME 7 PART 1

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8
9 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR CARSON CITY**

11 CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

12
13 Plaintiff,

14 vs.

15 STATE OF NEVADA ex rel. THE NEVADA
DEPARTMENT OF TAXATION; THE
16 HONORABLE KATE MARSHALL, in her
official capacity as TREASURER OF THE
17 STATE OF NEVADA; and DOES 1-20,
inclusive,

18 Defendants.
19

Case No. 12 OC 00168 1B
Dept. No. 1

20 **NEVADA LEGISLATURE'S REPLY IN**
21 **SUPPORT OF JOINDER IN MOTION TO DISMISS**
22
23
24

1 **REPLY**

2 Intervenor-Defendant, the Legislature of the State of Nevada (Legislature), by and through its
3 counsel, the Legal Division of the Legislative Counsel Bureau (LCB) under NRS 218F.720, hereby files
4 this Reply in Support of the Legislature's Joinder in the Motion to Dismiss filed by the Defendants, the
5 State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity
6 (collectively the State Defendants). The Legislature's Reply is made and based upon the following
7 Memorandum of Points and Authorities, all pleadings, documents and exhibits on file in this case and
8 any oral arguments that the Court may allow.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. Statement of the case.**

11 On June 6, 2012, Plaintiff City of Fernley (Fernley) filed a Complaint seeking money damages
12 and declaratory and injunctive relief against the State Defendants. Fernley challenges the
13 constitutionality of Nevada's system of allocating certain statewide tax revenues which are deposited
14 and consolidated in the Local Government Tax Distribution Account and distributed to Nevada's local
15 governmental entities under NRS 360.600-360.740. The system is administered by the Department of
16 Taxation and the State Treasurer, and it is commonly referred to as the consolidated tax system or the C-
17 Tax system.

18 On August 3, 2012, the State Defendants filed a Motion to Dismiss the Complaint, and the
19 Legislature filed a Motion to Intervene. On August 16, 2012, the Legislature filed a Joinder in the
20 Motion to Dismiss. On August 20, 2012, Fernley filed an Opposition to the State Defendants' Motion to
21 Dismiss, and Fernley moved for a continuance under NRCP 56(f) in its Opposition. On August 27,
22 2012, the State Defendants filed a Reply in support of their Motion to Dismiss.

23 Shortly thereafter on August 30, 2012, the Court entered an order granting the Legislature's
24 Motion to Intervene. On September 18, 2012, the Court approved a Stipulation and Order in which the

1 parties agreed to treat the Legislature's Joinder in the Motion to Dismiss filed by the State Defendants as
2 the Legislature's own Motion to Dismiss. The parties also agreed to a briefing schedule for the
3 Legislature's Motion to Dismiss. Pursuant to that Stipulation and Order, Fernley filed an Opposition to
4 the Legislature's Motion to Dismiss on September 28, 2012, and the Legislature is hereby filing this
5 Reply in support of its Motion to Dismiss.

6 **II. Argument.**

7 **A. The Court is not required to treat the Legislature's Motion to Dismiss as a motion for** 8 **summary judgment.**

9 Because the Legislature attached public records as exhibits to its Motion to Dismiss, Fernley
10 contends that the Court must treat the Legislature's Motion to Dismiss as a motion for summary
11 judgment. (Opp'n to Leg.'s Mot. to Dismiss at 6.) As a general rule under NRCP 12(b), the Court must
12 treat a motion to dismiss as a motion for summary judgment if "matters outside the pleading are
13 presented to and not excluded by the court." However, it is well established that in deciding a motion to
14 dismiss, the Court may take judicial notice of public records without converting the motion to dismiss
15 into a motion for summary judgment. Breliant v. Preferred Equities Corp., 109 Nev. 842, 847 (1993);
16 Nevada v. Burford, 708 F.Supp. 289, 292 (D.Nev. 1989) ("this court may take judicial notice of facts
17 outside the pleadings such as matters of public record, without converting [Defendant's] Motion to
18 Dismiss to one for summary judgment."). It is also well established that "courts generally may take
19 judicial notice of legislative histories, which are public records." Fierle v. Perez, 125 Nev. 728, 737-38
20 n.6 (2009).

21 The Legislature attached two exhibits to its Motion to Dismiss, both of which are public records
22 that are part of the legislative history of Senate Bill No. 254 (SB254), 1997 Nev. Stat., ch. 660, at 3278-
23 3304, which enacted the C-Tax system codified in NRS 360.600-360.740. The first exhibit is a public
24 record of the 1997 report and recommendations made by the interim legislative committee to study

1 Nevada's laws governing the distribution of certain statewide tax revenues to local governmental
2 entities. LCB Bulletin No. 97-5 (Nev. LCB Research Library, Jan. 1997) (Leg. Ex. 1). The second
3 exhibit is a public record of the committee minutes, bill amendments and other documents contained in
4 the Legislative History of SB254, 69th Leg. (Nev. LCB Research Library 1997) (Leg. Ex. 2).

5 Because the two exhibits attached to the Legislature's Motion to Dismiss are public records, the
6 Court may take judicial notice of the attached public records without converting the Legislature's
7 Motion to Dismiss into a motion for summary judgment. Therefore, contrary to Fernley's contentions,
8 the Court is not required to treat the Legislature's Motion to Dismiss as a motion for summary judgment.

9 **B. The Court should not grant Fernley a continuance under NRCP 56(f) to conduct**
10 **discovery because all of Fernley's claims are barred as a matter of law and discovery of**
additional facts would not change the result of this case.

11 Based on its erroneous contention that the Court must treat the Legislature's Motion to Dismiss as
12 a motion for summary judgment, Fernley requests a continuance under NRCP 56(f) to conduct
13 discovery to oppose the Legislature's purported motion for summary judgment. (Opp'n to Leg.'s Mot.
14 to Dismiss at 7.) However, because the Legislature's Motion to Dismiss is not a motion for summary
15 judgment, Fernley's request for a continuance under NRCP 56(f) is procedurally improper because such
16 a request is appropriate only in response to a motion for summary judgment, not a motion to dismiss.
17 Therefore, the Court should reject Fernley's request for a continuance under NRCP 56(f) because it is
18 not a procedurally appropriate response to the Legislature's Motion to Dismiss.

19 Fernley also erroneously contends that the Legislature has not opposed its request for a
20 continuance under NRCP 56(f). (Opp'n to Leg.'s Mot. to Dismiss at 7.) However, Fernley first
21 requested a continuance under NRCP 56(f) in its Opposition to the *State Defendants'* Motion to Dismiss,
22 which Fernley filed on August 20, 2012. (Opp'n to State Defs.' Mot. to Dismiss at 5-7.) At that time,
23 the Court had not yet granted the Legislature's Motion to Intervene, and the Legislature was not a party.
24 Therefore, although Fernley requested a continuance in response to the *State Defendants'* Motion to

1 Dismiss on August 20, 2012, Fernley did not request a continuance in response to the *Legislature's*
2 Motion to Dismiss until September 28, 2012, when Fernley filed its Opposition to the Legislature's
3 Motion to Dismiss pursuant to the parties' stipulated briefing schedule. Consequently, the Legislature is
4 timely opposing Fernley's request for a continuance under NRCP 56(f).

5 Finally, even if the Court treats the Legislature's Motion to Dismiss as a motion for summary
6 judgment, the Court should not grant Fernley a continuance under NRCP 56(f) to conduct discovery
7 because all of Fernley's claims are barred as a matter of law and discovery of additional facts would not
8 change the result of this case. A district court may grant a continuance under NRCP 56(f) for a plaintiff
9 to conduct discovery only if such discovery would lead to the creation of genuine issues of material fact.
10 Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118 (2005). However, when there are no genuine
11 issues of material fact because all of the plaintiff's claims are barred as a matter of law, the district court
12 must deny the plaintiff's request for a continuance under NRCP 56(f) because discovery of additional
13 facts would not change the result of the case and would just burden the other parties with time-
14 consuming and costly discovery that is pointless and futile. See, e.g., Nylund v. Carson City, 117 Nev.
15 913, 917 & n.10 (2001), *overruled in part on other grounds*, ASAP Storage v. Sparks, 123 Nev. 639
16 (2007); J.E. Dunn Nw., Inc. v. Corus Constr. Venture, 127 Nev. ___, 249 P.3d 501, 508 n.7 (2011).

17 As thoroughly discussed in the Legislature's Motion to Dismiss and this Reply, there are no
18 genuine issues of material fact in this case because all of Fernley's claims are barred as a matter of law.
19 Therefore, even if the Court treats the Legislature's Motion to Dismiss as a motion for summary
20 judgment, the Court should not grant Fernley a continuance under NRCP 56(f) to conduct discovery
21 because discovery of additional facts would not change the result of this case and would just burden the
22 other parties with time-consuming and costly discovery that is pointless and futile.

1 **C. Fernley's claims for money damages are barred by sovereign immunity, and the state is**
2 **entitled to judgment as a matter of law.**

3 In its Motion to Dismiss, the Legislature argues that Fernley's prayer for money damages on its
4 federal constitutional claims must be dismissed as a matter of law because it is barred by sovereign
5 immunity under federal law. (Leg.'s Mot. to Dismiss at 10-11.) In its Opposition, Fernley fails to make
6 any argument or cite any authority to refute the Legislature's argument and authority. (Opp'n to Leg.'s
7 Mot. to Dismiss at 7-9.) Therefore, given that Fernley has failed to oppose the Legislature's argument
8 and authority, Fernley's prayer for money damages on its federal constitutional claims must be
9 dismissed as a matter of law because it is barred by sovereign immunity under federal law.

10 In its Motion to Dismiss, the Legislature also argues that Fernley's prayer for money damages on
11 its state constitutional claims must be dismissed as a matter of law because it is barred by sovereign
12 immunity under subsection 1 *and* subsection 2 of NRS 41.032. (Leg.'s Mot. to Dismiss at 11-13.) Each
13 subsection of NRS 41.032 provides a separate basis for claiming sovereign immunity. Hagblom v. State
14 Dir. Mtr. Vehs., 93 Nev. 599, 603-05 (1977).

15 In its Opposition, although Fernley makes an argument and cites authority regarding sovereign
16 immunity under subsection 2 of NRS 41.032, Fernley does not make any argument or cite any authority
17 regarding sovereign immunity under subsection 1 of NRS 41.032. (Opp'n to Leg.'s Mot. to Dismiss at
18 7-9.) Therefore, given that Fernley has failed to oppose the Legislature's argument and authority
19 regarding sovereign immunity under subsection 1 of NRS 41.032, Fernley's prayer for money damages
20 on its state constitutional claims must be dismissed as a matter of law because it is barred by sovereign
21 immunity under subsection 1 of NRS 41.032.

22 In addition, Fernley's prayer for money damages on its state constitutional claims is also barred by
23 sovereign immunity under subsection 2 of NRS 41.032. Government agencies and officials are entitled
24 to sovereign immunity under subsection 2 of NRS 41.032 when their actions are based on the

1 performance of official duties which involve an element of official discretion or judgment and are
2 grounded in the creation or *execution* of social, economic or political policy. Martinez v. Maruszczak,
3 123 Nev. 433, 445-47 (2007); Scott v. Dep't Commerce, 104 Nev. 580, 583-86 (1988). As a general
4 rule, this test is met when government agencies and officials are performing official duties to execute or
5 carry out the policy of a statutory scheme. See Boulder City v. Boulder Excavating, 124 Nev. 749, 757-
6 60 (2008). Thus, sovereign immunity protects government agencies and officials from liability for
7 money damages whenever "the injury-producing conduct is an integral part of governmental policy-
8 making or planning." Martinez, 123 Nev. at 446.

9 In this case, the alleged injury-producing conduct arises from the State Defendants' performance
10 of official duties to execute and carry out the social, economic and political policy of the C-Tax statutes
11 which are an integral part of governmental policy-making or planning. Even though the State
12 Defendants must perform their official duties within clearly defined statutory parameters, the State
13 Defendants still must exercise official discretion and judgment within those statutory parameters to
14 execute and carry out the policy of the statutory scheme. Under such circumstances, the State
15 Defendants are entitled to sovereign immunity from money damages under subsection 1 of NRS 41.032.
16 Therefore, Fernley's prayer for money damages on its state constitutional claims must be dismissed as a
17 matter of law because it is barred by sovereign immunity under subsection 1 of NRS 41.032.

18 Finally, Fernley contends that issues of sovereign immunity under NRS 41.032 are mixed
19 questions of law and fact which should not be summarily adjudicated at the motion-to-dismiss stage.
20 (Opp'n to Leg.'s Mot. to Dismiss at 8.) However, when it is apparent from the face of the complaint
21 that the defendants are entitled to sovereign immunity under NRS 41.032 as a matter of law, dismissal is
22 required. See, e.g., Foster v. Washoe County, 114 Nev. 936, 941-43 (1998); Nevada Power v. Clark
23 County, 107 Nev. 428, 428-30 (1991); Ramirez v. Harris, 105 Nev. 219, 220 (1989); Scott v. Dep't
24 Commerce, 104 Nev. 580, 583-85 (1988); Hagblom v. State Dir. Mtr. Vehs., 93 Nev. 599, 599-605

1 (1977). As thoroughly discussed in the Legislature's Motion to Dismiss and this Reply, it is apparent
2 from the face of Fernley's Complaint that the State Defendants are entitled to sovereign immunity under
3 subsections 1 and 2 of NRS 41.032 as a matter of law. Therefore, dismissal is required.

4 **D. Fernley's claims are time-barred by the statute of limitations, and the state is entitled to**
5 **judgment as a matter of law.**

6 In its Motion to Dismiss, the Legislature argues that Fernley's federal and state constitutional
7 claims are time-barred by the statute of limitations because the events that form the basis of Fernley's
8 constitutional claims occurred when Fernley incorporated in 2001, more than a decade before Fernley
9 commenced this action in 2012. (Leg.'s Mot. to Dismiss at 13-17.) Fernley contends that its
10 constitutional claims are not time-barred based on the continuing violations doctrine. (Opp'n to Leg.'s
11 Mot. to Dismiss at 9-10.)

12 Turning first to Fernley's federal constitutional claims, it is true that lower federal courts have
13 recognized a continuing violations doctrine for federal constitutional claims. However, the United
14 States Supreme Court substantially limited the continuing violations doctrine in National Railway
15 Passenger Corp. v. Morgan, 536 U.S. 101 (2002), and lower federal courts must now follow the Morgan
16 limitations when applying the continuing violations doctrine to federal constitutional claims under
17 section 1983. Cherosky v. Henderson, 330 F.3d 1243, 1246 n.3 (9th Cir. 2003); RK Ventures v. Seattle,
18 307 F.3d 1045, 1058, 1061 (9th Cir. 2002). After Morgan, lower federal courts must look solely to
19 when the operative governmental action or decision occurred to trigger the statute of limitations, and
20 they must disregard any continuing harmful effects or consequences produced by the operative action or
21 decision because those continuing harmful effects or consequences are not separately actionable. RK
22 Ventures, 307 F.3d at 1058 ("in determining when an act occurs for statute of limitations purposes, we
23 look at when the 'operative decision' occurred, and separate from the operative decision[] those
24 inevitable consequences that are not separately actionable.") (citations omitted).

1 In this case, the operative governmental action occurred when Fernley incorporated in 2001, and
2 the State Defendants did not increase Fernley's C-Tax distribution as a result of its incorporation. At
3 that time, Fernley knew the State Defendants would continue to calculate and adjust Fernley's C-Tax
4 distribution using Fernley's original base amount under section 35-36 of SB254 and the statutory
5 formulas in NRS 360.680 and 360.690, unless Fernley began to provide the requisite public services or
6 assumed the functions of another local governmental entity. NRS 360.740; NRS 354.598747. Because
7 Fernley did not provide the requisite public services or assume the functions of another local
8 governmental entity, the State Defendants did not change the basis for calculating Fernley's C-Tax
9 distribution as a result of its incorporation in 2001. Consequently, the operative governmental action
10 which allegedly harmed Fernley occurred in 2001, when the State Defendants did not increase Fernley's
11 C-Tax distribution as a result of its incorporation.

12 Thus, even though Fernley alleges that each C-Tax distribution since 2001 has violated its
13 constitutional rights, the constitutional violation occurred, if at all, when the State Defendants did not
14 increase Fernley's C-Tax distribution as a result of its incorporation in 2001. Even if the amount of each
15 C-Tax distribution to Fernley since 2001 has been deficient, each deficiency is nothing more than a
16 continuing harmful effect or consequence of the operative governmental action which allegedly harmed
17 Fernley in 2001. Therefore, because the operative governmental action which allegedly harmed Fernley
18 occurred in 2001 and because Fernley did not commence this action until 2012, Fernley's federal
19 constitutional claims are time-barred by the statute of limitations as a matter of law.

20 Turning next to Fernley's state constitutional claims, the Nevada Supreme Court has not
21 recognized a continuing violations doctrine for state constitutional claims. Nevertheless, Fernley
22 contends that its constitutional rights are violated "every time a dollar is collected and distributed under
23 the C-Tax formula." (Opp'n to Leg.'s Mot. to Dismiss at 10.)
24

1 Under Nevada law, "[t]he general rule concerning statutes of limitation is that a cause of action
2 accrues when the wrong occurs and a party sustains injuries for which relief could be sought." Petersen
3 v. Bruen, 106 Nev. 271, 274 (1990). Fernley argues that a separate "wrong" has occurred with each C-
4 Tax distribution since 2001. Although the Nevada Supreme Court has not addressed an argument
5 similar to Fernley's, other courts have considered and rejected similar arguments where the alleged
6 "wrong" is the government's use of an unlawful formula and where alleged deficiencies in future
7 distributions are simply continued ill effects resulting from use of the allegedly unlawful formula. See,
8 e.g., Brown Park Estates-Fairfield Dev. Co. v. United States, 127 F.3d 1449, 1456 (Fed.Cir. 1997)
9 (where HUD allegedly used unlawful formula to calculate government rent subsidies, "wrong" occurred
10 when HUD first used formula to calculate subsidies and alleged deficiencies in future subsidies are not
11 separate "wrongs" for statute-of-limitations purposes); Davidson v. United States, 66 Fed.Cl. 206, 207-
12 10 (Fed.Cl. 2005) (where Defense Department allegedly used unlawful formula to recalculate survivor
13 benefit payments, "wrong" occurred when Defense Department first recalculated the payments and
14 alleged deficiencies in future payments are not separate "wrongs" for statute-of-limitations purposes).

15 In this case, even though Fernley alleges that a separate "wrong" has occurred with each C-Tax
16 distribution since 2001, any "wrong" occurred, if at all, when the State Defendants used an allegedly
17 unlawful formula to calculate Fernley's C-Tax distribution as a result of its incorporation in 2001. Even
18 if the amount of each C-Tax distribution to Fernley since 2001 has been deficient, the deficiencies are
19 simply continued ill effects resulting from use of the allegedly unlawful formula in 2001. Therefore,
20 because the alleged "wrong" to Fernley occurred in 2001 and because Fernley did not commence this
21 action until 2012, Fernley's state constitutional claims are time-barred by the statute of limitations as a
22 matter of law.

1 **E. Fernley's claims are time-barred by laches, and the state is entitled to judgment as a**
2 **matter of law.**

3 In its Motion to Dismiss, the Legislature argues that Fernley's federal and state constitutional
4 claims are time-barred by laches. (Leg.'s Mot. to Dismiss at 17-19.) In its Opposition, Fernley does not
5 contest that it delayed bringing its constitutional challenge to the C-Tax system for at least eleven years.
6 (Opp'n to Leg.'s Mot. to Dismiss at 10-11.) However, Fernley contends that laches does not apply
7 because it has never acquiesced in the alleged inequities of the C-Tax system but "has actively, albeit
8 unsuccessfully, sought a C-Tax adjustment before both the executive and legislative branches of state
9 government." *Id.* at 11 Fernley also contends that its eleven-year delay has not "prejudiced other
10 participants in the C-Tax system." *Id.* Neither of Fernley's contentions defeats the bar of laches.

11 First, it is well established that, for purposes of laches, public opposition in the political branches
12 does not excuse the plaintiff's failure to promptly commence a judicial action. *See, e.g., Batiste v. New*
13 *Haven*, 239 F.Supp.2d 213, 225 (D.Conn. 2002); *Mussington v. St. Luke's-Roosevelt Hosp.*, 824
14 F.Supp. 427, 434 (S.D.N.Y. 1993), *aff'd*, 18 F.3d 1033 (2d Cir. 1994). In *Batiste* and *Mussington*, the
15 plaintiffs argued that laches did not bar their untimely constitutional claims because they had engaged in
16 "vociferous public opposition" to the defendants' construction projects at the local agency level before
17 they commenced their judicial actions. The courts rejected the plaintiffs' arguments and found that their
18 claims were barred by laches because "despite the plaintiffs' 'vociferous public opposition' to the
19 defendants' construction plans, the plaintiffs were required to address their grievance in court, not in the
20 political arena, in order to preserve their claims." *Batiste*, 239 F.Supp. at 225; *Mussington*, 824 F.Supp.
21 at 434.

22 In this case, even assuming Fernley diligently endeavored to find a remedy to the alleged
23 inequities of the C-Tax system before the executive and legislative branches of state government,
24 Fernley's efforts before the political branches do not excuse Fernley's *eleven-year* delay in commencing

1 this judicial action. Indeed, nothing stopped Fernley during the past eleven years from timely pursuing
2 legal remedies in a judicial action while concurrently pursuing other remedies in the political branches.
3 Thus, Fernley's claims are time-barred by laches because Fernley unreasonably and inexcusably delayed
4 bringing its judicial action for at least eleven years.

5 Furthermore, Fernley's delay has prejudiced both the other participants in the C-Tax system and
6 the state. For the past eleven years, the other participants in the C-Tax system have reasonably relied on
7 the validity of the C-Tax system for purposes of budgeting and fiscal planning. In addition, the state has
8 reasonably relied on the validity of the C-Tax system for purposes of providing supplemental funding to
9 augment the operations of local government. If the C-Tax system is declared invalid now after such a
10 long period of operation, such a declaration would bring chaos to Nevada's tax distribution system and
11 would clearly upset the settled expectations of the other participants in the C-Tax system and the state.
12 Therefore, because consideration of Fernley's claims after an unreasonable and inexcusable eleven-year
13 delay would upset settled expectations, would work to the disadvantage and prejudice of others, and
14 would make the granting of relief inequitable, Fernley's federal and state constitutional claims are time-
15 barred by laches as a matter of law.

16 **F. Fernley does not have standing to bring Fourteenth Amendment claims against the**
17 **state, and the state is entitled to judgment as a matter of law.**

18 In its Motion to Dismiss, the Legislature argues that Fernley does not have standing to bring
19 Fourteenth Amendment claims against the state. (Leg.'s Mot. to Dismiss at 20-21.) Although Fernley
20 acknowledges the rule that a municipality does not have standing to bring Fourteenth Amendment
21 claims against the state, Fernley contends that courts in other jurisdictions have found limited exceptions
22 to this rule. (Opp'n to State Defs.' Mot. to Dismiss at 7-9.) However, the Nevada Supreme Court has
23 never recognized such exceptions. Therefore, under the doctrine of stare decisis, this Court must follow
24 the prior decisions of the Nevada Supreme Court which hold that a municipality does not have standing

1 to bring Fourteenth Amendment claims against the state. State ex rel. List v. County of Douglas, 90
2 Nev. 272, 279-81 (1974); Reno v. County of Washoe, 94 Nev. 327, 329-31 (1978); Boulder City v.
3 State, 106 Nev. 390, 392 (1990); see also 20 Am.Jur.2d Courts § 142 (2005) (“under the doctrine of
4 stare decisis, a decision of the state’s highest or supreme court binds the state’s court of appeals and the
5 trial courts.”). Furthermore, as amply demonstrated in the State Defendants’ Reply, none of the
6 exceptions claimed by Fernley would apply in this case. (State Defs.’ Reply to Opp’n to Mot. to
7 Dismiss at 4-5.) Consequently, because Fernley does not have standing to bring Fourteenth Amendment
8 claims against the state, the claims are barred as a matter of law.

9 **G. Even if Fernley had standing to bring Fourteenth Amendment claims against the state,**
10 **those claims would have no merit, and the state would be entitled to judgment as a matter of**
law.

11 In its Motion to Dismiss, the Legislature argues that there is simply no constitutional right under
12 the Equal Protection or Due Process Clauses of the Fourteenth Amendment to an equal receipt of tax
13 revenues distributed by the state. See N.Y. Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938)
14 (“The power to make distinctions exists with full vigor in the field of taxation, where no ‘iron rule’ of
15 equality has ever been enforced upon the states.”). Therefore, even if Fernley’s allegation is true that the
16 C-Tax system is “non-uniform and unequal in its effect upon Fernley as compared to other similarly
17 situated Nevada towns and cities,” the lack of uniformity in the C-Tax system is insufficient as a matter
18 of law to prove an equal protection or due process claim. The only way for Fernley to prove an equal
19 protection or due process claim is to establish that there is no rational basis for the method of
20 distribution chosen by the Legislature in the C-Tax system. Because Fernley does not even make such
21 an allegation in its equal protection and due process claims, those claims fail as a matter of law.
22 Furthermore, even if Fernley had made allegations to that effect, its equal protection and due process
23 claims would still fail as a matter of law because there is a rational basis for the method of distribution
24 chosen by the Legislature in the C-Tax system. (Leg.’s Mot. to Dismiss at 21-30.)

1 In its Opposition, Fernley contends that a rational-basis analysis cannot be conducted until the
2 facts of the case are developed through discovery. (Opp'n to Leg.'s Mot. to Dismiss at 11-12.)
3 Fernley's contention is wrong as a matter of law because a court may decide a Fourteenth Amendment
4 challenge to a tax statute on a motion to dismiss "if any state of facts reasonably can be conceived that
5 would sustain [the tax statute]" under the rational-basis test. N.Y. Rapid Transit, 303 U.S. at 578
6 (affirming lower court's dismissal of complaint for failure to state a claim where challenged tax statute
7 satisfied rational-basis test under Equal Protection and Due Process Clauses). As thoroughly explained
8 in the Legislature's Motion to Dismiss, many states of facts reasonably can be conceived that would
9 sustain the C-Tax statutes under the rational-basis test. Therefore, the state is entitled to dismissal of
10 Fernley's Fourteenth Amendment claims as a matter of law, and Fernley is not entitled to any discovery.

11 Fernley also contends that it did not need to plead in its Complaint that there is no rational basis
12 for the method of distribution chosen by the Legislature in the C-Tax system. (Opp'n to Leg.'s Mot. to
13 Dismiss at 11-12.) Fernley's contention is wrong as a matter of law because a court may strike down a
14 tax statute under the Fourteenth Amendment only if the tax statute fails to satisfy the rational-basis test.
15 Armour v. Indianapolis, ___ U.S. ___, 132 S.Ct. 2073, 2080-81 (2012).

16 In Armour, the United States Supreme Court reiterated its long-standing rules for reviewing
17 Fourteenth Amendment challenges to tax statutes. So long as a distinction made in a tax statute "has a
18 rational basis, that distinction does not violate the Equal Protection Clause." 132 S.Ct. at 2079-80.
19 Therefore, disparity in treatment in a tax statute "cannot run afoul of the Equal Protection Clause if there
20 is a rational relationship between the disparity of treatment and some legitimate governmental purpose."
21 Id. at 2080 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)). Moreover, "rational basis review
22 requires deference to reasonable underlying legislative judgments," and courts must remain mindful that
23 "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes."
24 Id. (quoting Regan v. Taxation With Representation, 461 U.S. 540, 547 (1983)). Under the rational-

1 basis test, tax classifications must be upheld if “there is any reasonably conceivable state of facts that
2 could provide a rational basis for the classification.” Id. (quoting FCC v. Beach Commc’ns, 508 U.S.
3 307, 313 (1993)). And “because the classification is presumed constitutional, the ‘burden is on the one
4 attacking the legislative arrangement to negative every conceivable basis which might support it.” Id.
5 at 2080-81 (quoting Heller, 509 U.S. at 320).

6 Given the long-standing rules for reviewing Fourteenth Amendment challenges to tax statutes, it is
7 clear that Fernley needed to plead in its Complaint that there is no rational basis for the method of
8 distribution chosen by the Legislature in the C-Tax system. Because Fernley’s Complaint does not
9 contain any allegations to that effect, its equal protection and due process claims must be dismissed as a
10 matter of law.

11 Furthermore, even if Fernley’s Complaint had contained allegations to that effect, its equal
12 protection and due process claims would still fail as a matter of law because there is a rational basis for
13 the method of distribution chosen by the Legislature in the C-Tax system. As thoroughly explained in
14 the Legislature’s Motion to Dismiss, the Legislature enacted the C-Tax system based on “the idea of
15 distributing governmental revenues to governments performing governmental functions.” Legislative
16 History of SB254, at 50 (Leg. Ex. 2). The state clearly has a legitimate interest in ensuring that more tax
17 revenues are distributed to those local governments which provide more public services, such as police
18 and fire-protection services. Thus, as a matter of economic and fiscal policy, the Legislature could have
19 rationally concluded that those local governments which provide more public services should receive
20 more C-Tax distributions to offset their increased expenditures. Because Fernley does not provide
21 police and fire-protection services, it is not similarly situated to other cities and towns which provide
22 those services, so there is a rational basis for treating Fernley differently under the C-Tax system. That
23 rational basis is sufficient to defeat Fernley’s equal protection and due process claims. Therefore, even
24

1 if Fernley had standing to bring Fourteenth Amendment claims against the state, those claims would
2 have no merit, and the state would be entitled to judgment as a matter of law.

3 **H. Fernley does not have standing to bring separation-of-powers claims against the state,**
4 **and the state is entitled to judgment as a matter of law.**

5 In its Motion to Dismiss, the Legislature argues that a political subdivision does not have standing
6 to bring claims against the state alleging violations of state constitutional provisions, unless the state
7 constitutional provisions exist for the protection of political subdivisions of the state. (Leg.'s Mot. to
8 Dismiss at 30-31.) Fernley contends that "a local government lacks standing to challenge certain
9 decisions in which the State itself takes or gives rights or powers to a local government. However, that
10 does not mean that a local government cannot allege that the state government is acting outside the
11 confines of its constitutionally defined scope of authority." (Opp'n to Leg.'s Mot. to Dismiss at 13
12 (citation omitted).)

13 Fernley's contention is wrong as a matter of law because a local government has standing to allege
14 that the state government is acting outside the confines of its constitutionally defined scope of authority
15 *only if* the state constitutional provisions at issue exist for the protection of political subdivisions of the
16 state. Reno v. County of Washoe, 94 Nev. 327, 329-32 (1978). For example, Nevada's political
17 subdivisions have standing to bring claims against the state for violations of Article 4, §§20-21 of the
18 Nevada Constitution because those provisions "exist for the protection of political subdivisions of the
19 State. Their effect is to limit the Legislature, in certain instances, to the enactment of general; rather
20 than special or local, laws." Id. at 332.

21 The reason that political subdivisions are generally prohibited from bringing claims against the
22 state alleging constitutional violations is that political subdivisions are not independent sovereigns with
23 plenary authority to act contrary to the will of their creator. State ex rel. List v. County of Douglas, 90
24 Nev. 272, 279-81 (1974). Rather, political subdivisions are created by the state for the convenient

1 administration of government, and they are entitled to challenge the actions of their creator *only if* a
2 constitutional provision is enacted specifically to protect political subdivisions from the state's actions.
3 Reno, 94 Nev. at 329-32.

4 Therefore, contrary to Fernley's contentions, the Legislature is not arguing that "only a branch of
5 state government has standing to assert a separation of powers claim." (Opp'n to Leg.'s Mot. to Dismiss
6 at 12.) Instead, the Legislature is arguing that a *political subdivision* does not have standing to assert a
7 separation-of-powers claim against the state. Whether any other person or entity has standing to assert a
8 separation-of-powers claim against the state is irrelevant to this case.

9 The reason a *political subdivision* does not have standing to assert a separation-of-powers claim
10 against the state is because the Separation-of-Powers Clause of the Nevada Constitution does not exist
11 for the protection of political subdivisions of the state. It exists for the protection of *state* government
12 by prohibiting one branch of state government from impinging on the functions of another branch of
13 state government. Nev. Const. art. 3, §1(1). Because the Separation-of-Powers Clause of the Nevada
14 Constitution does not exist for the protection of political subdivisions of the state, Fernley lacks standing
15 to bring separation-of-powers claims against the state, and its separation-of-powers claims must be
16 dismissed as a matter of law.

17 **I. Even if Fernley had standing to bring separation-of-powers claims against the state,**
18 **those claims would have no merit, and the state would be entitled to judgment as a matter of**
law.

19 In its Motion to Dismiss, the Legislature argues that because the Legislature has lawfully
20 delegated administrative and ministerial duties to the Department of Taxation and State Treasurer under
21 the C-Tax system which they must perform in accordance with clearly defined statutory standards, there
22 has been no unconstitutional delegation of legislative authority, and Fernley's separation-of-powers
23 claims must be dismissed as a matter of law. (Leg.'s Mot. to Dismiss at 31-36.) Fernley contends that
24 the C-Tax system violates separation of powers because "the Legislature may not constitutionally

1 delegate the 'power of the purse' to an administrative branch. Appropriation determinations involve
2 fundamental, wide policy and discretionary judgments, and cannot be delegated even with clear enough
3 standards." (Opp'n to State Defs.' Mot. to Dismiss at 10.)

4 Fernley's contention is wrong as a matter of law because the Legislature may enact an
5 appropriation that operates prospectively on a recurrent basis in future years so long as the Legislature
6 has provided a method whereby the exact amount to be appropriated may be ascertained under the law
7 in future years. Norcross v. Cole, 44 Nev. 88, 93 (1920). The Nevada Constitution provides that "[n]o
8 money shall be drawn from the treasury but in consequence of appropriations made by law."
9 Nev.Const. art.4, §19. Under this constitutional provision, "[i]t is not necessary that all expenditures be
10 authorized by the general appropriation bill. The language in any act which shows that the legislature
11 intended to authorize the expenditure, and which fixes the amount and indicates the fund, is sufficient."
12 State v. Eggers, 29 Nev. 469, 475 (1907). Furthermore, the Legislature may enact an appropriation that
13 operates prospectively on a recurrent basis in future years so long as "a method is provided whereby the
14 exact amount to be expended in pursuance of the act may be ascertained." Norcross, 44 Nev. at 93;
15 State v. LaGrave, 23 Nev. 25, 26-27 (1895) ("an appropriation may be prospective, that is, it may be
16 made in one year of the revenues to accrue in another or future years, the law being so framed as to
17 address itself to such future revenues." (quoting Ristine v. State, 20 Ind. 328, 339 (1863))).

18 With regard to the C-Tax statutes, the Legislature has provided a method whereby the exact
19 amount to be appropriated from the Local Government Tax Distribution Account may be ascertained
20 under the C-Tax statutes in future years. In particular, all distributions under the C-Tax system are done
21 in accordance with specific statutory formulas. NRS 360.600-360.740. Determinations of the amount to
22 be allocated to local governments under the statutory formulas leave no discretionary authority to the
23 Department of Taxation. Instead, the Department of Taxation can only apply its findings of fact, based
24 on fiscal data, to the mathematical equations to arrive at the exact amount to be appropriated from the

1 Local Government Tax Distribution Account. Because the Department of Taxation functions as nothing
2 more than a factfinder under the C-Tax system and must perform its duties in accordance with clearly
3 defined statutory standards, there has been no unconstitutional delegation of legislative authority.
4 Therefore, even if Fernley had standing to bring separation-of-powers claims against the state, those
5 claims would have no merit, and the state would be entitled to judgment as a matter of law.

6 **J. Because the C-Tax statutes are general laws and not local or special laws, Article 4,
7 §§20-21 of the Nevada Constitution are not applicable, and the state is entitled to judgment as a
matter of law.**

8 In its Motion to Dismiss, the Legislature argues that because the C-Tax statutes apply uniformly to
9 all similarly situated local governments embraced in classes founded upon natural, intrinsic and rational
10 distinctions, the C-Tax statutes are general laws of uniform operation throughout the state, and they do
11 not violate Article 4, §§20-21. (Leg.'s Mot. to Dismiss at 36-37.) Fernley contends that because it is the
12 only municipality to incorporate since the implementation of the C-Tax system, it is not on equal footing
13 with the other participants in the C-Tax system and that, as applied to Fernley, the C-Tax system is a
14 special or local law. (Opp'n to State Defs.' Mot. to Dismiss at 13-14.)

15 Fernley's contention is wrong as a matter of law because a statute that applies "upon all persons
16 similarly situated is a general law." Youngs v. Hall, 9 Nev. 212, 222 (1874). In other words, "[a] law is
17 general when it applies equally to all persons embraced in a class founded upon some natural, intrinsic,
18 or constitutional distinction." Clean Water Coalition v. M Resort, 127 Nev. ___, 255 P.3d 247, 254
19 (2011) (quoting Colman v. Utah State Land Bd., 795 P.2d 622, 636 (Utah 1990)). The determination of
20 whether a law is general "is based on how it is applied, not on how it actually operates." Id. at 255.

21 The C-Tax statutes apply statewide to all similarly situated local governments, and the C-Tax
22 statutes do not single out Fernley by name or subject it to specialized burdens that would not be imposed
23 on other similarly situated cities or towns. Cf. Clean Water Coalition, 255 P.3d at 253-62 (holding that a
24 statute which singled out a political subdivision by name and subjected it to specialized burdens not

1 imposed on other political subdivisions was not a general law). Although the C-Tax statutes may
2 actually *operate* on Fernley differently from other local governments, any differences in operation are
3 because Fernley is in a different class founded upon natural, intrinsic and constitutional distinctions.

4 Under the C-Tax statutes, if Fernley provided the requisite public services, it would be placed in
5 the same class as other similarly situated cities and towns which provide those public services.
6 NRS 360.740; NRS 354.598747. But because Fernley does not provide the requisite public services, it
7 is not similarly situated to those other cities and towns, so there is a rational basis for placing Fernley in
8 a different class from those other cities and towns. Thus, because the C-Tax statutes apply uniformly to
9 all similarly situated local governments embraced in classes founded upon natural, intrinsic and rational
10 distinctions, the C-Tax statutes are general laws of uniform operation throughout the state, and they do
11 not violate Article 4, §§20-21. Therefore, Fernley's Article 4, §§20-21 claims must be dismissed as a
12 matter of law.

13 **K. Even if the C-Tax statutes were local or special laws, they still would not violate**
14 **Article 4, §§20-21, and the state would be entitled to judgment as a matter of law.**

15 In its Motion to Dismiss, the Legislature argues that because the C-Tax statutes do not involve the
16 assessment and collection of taxes, but only involve the *distribution* of the proceeds of the taxes after
17 they are assessed and collected, the C-Tax statutes could not be classified as local or special laws "[f]or
18 the assessment and collection of taxes" under Article 4, §20. (Leg.'s Mot. to Dismiss at 37-38.) Fernley
19 contends that "the C-Tax system is both a collection and distribution scheme" and that because "the
20 collection of revenues from its residents vastly exceeds the amounts distributed," the C-Tax system "is a
21 violation in and of itself." (Opp'n to State Defs.' Mot. to Dismiss at 15.)

22 Fernley's contentions are wrong as a matter of law because they give Article 4, §20 a meaning that
23 was never intended by the framers of the constitutional provision. The prohibition in Article 4, §20
24 "simply prohibits special legislation regulating those acts which the assessors and collectors of taxes

1 generally perform, and which are denominated 'assessment' and 'collection of taxes.'" Gibson v.
2 Mason, 5 Nev. 283, 305 (1869). A law cannot violate Article 4, §20 when it "contains no provision
3 whatever respecting the assessment or collection of the tax complained of, in the sense in which those
4 words are employed in the Constitution." Id.

5 The six statewide taxes whose proceeds are deposited in the Local Government Tax Distribution
6 Account are all collected under different general laws that are separate from the C-Tax statutes.¹
7 Fernley does not allege that any of the different general laws governing the collection of the six
8 statewide taxes violates Article 4, §20. Instead, all of Fernley's allegations concern the distribution of
9 the proceeds of the taxes after they are assessed and collected. Furthermore, the C-Tax statutes contain
10 no provisions dealing with the assessment or collection of the six statewide taxes that are deposited in
11 the Account. The C-Tax statutes deal only with distribution of the proceeds of the taxes after they are
12 assessed and collected. Thus, even if the C-Tax statutes were local or special laws, they would not be
13 local or special laws "[f]or the assessment and collection of taxes" which violate Article 4, §20.
14 Therefore, Fernley's Article 4, §20 claims must be dismissed as a matter of law.

15 Finally, in its Motion to Dismiss, the Legislature argues that even if the C-Tax statutes were local
16 or special laws, they still would be constitutional under Article 4, §21 because no general law could
17 have been made applicable to meet the unique and peculiar needs of Fernley's circumstances. (Leg.'s
18 Mot. to Dismiss at 38-40.) Fernley argues that the C-Tax statutes violate Article 4, §21 because "a
19 general law can easily be made applicable with respect to the collection and appropriation of the six
20 taxes that make up the C-Tax system. Instead of an automatic appropriation based on a complex
21 mathematical formula . . . the taxes could simply be collected, deposited into a fund segregated for local
22

23 ¹ The proceeds from the following six statewide taxes are deposited in the Account: (1) the liquor tax—
24 NRS 369.173; (2) the cigarette tax—NRS 370.260; (3) the real property transfer tax—NRS 375.070;
(4) the basic city-county relief tax—NRS 377.055; (5) the supplemental city-county relief tax—
NRS 377.057; and (6) the basic governmental services tax—NRS 482.181.

1 governments, and appropriated biennially by the Legislature after a careful review of local government
2 budgets.” (Opp’n to State Defs.’ Mot. to Dismiss at 17.)

3 Fernley’s argument is defeated by its own example. Under that example, the Legislature would be
4 required to make individualized local and special appropriations during each regular session to each
5 separate local government based on an individualized local and special review of each separate local
6 government budget. That is the antithesis of a law that is “general and of uniform operation throughout
7 the State.” Nev.Const. art.4, §21. What Fernley’s example amply demonstrates is that even if the C-
8 Tax statutes were local or special laws, they still would not violate Article 4, §21 because given the
9 unique and peculiar differences and circumstances among local governments, a general law could not be
10 made applicable to meet the unique and peculiar needs of each particular local and special situation.
11 Therefore, Fernley’s Article 4, §21 claims must be dismissed as a matter of law.

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1 **CONCLUSION**

2 Based upon the foregoing, the Legislature respectfully asks the Court to enter an order dismissing,
3 with prejudice under NRCP 12(b)(5), all causes of action and claims alleged in the Complaint filed by
4 the Plaintiff on June 6, 2012.

5 The undersigned hereby affirm that this document does not contain "personal information about
6 any person" as defined in NRS 239B.030 and 603A.040.

7 DATED: This 8th day of October, 2012.

8 Respectfully submitted,

9 **BRENDA J. ERDOES**
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10
11 By: 

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18 *Attorneys for the Legislature*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 8th day of October, 2012, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true and correct copy of the Legislature's Reply in Support of Joinder in Motion to Dismiss, by electronic mail, directed to the following:

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1 CASE NO. 12 OC 000168 1B

2 DEPT. NO. I

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2012 OCT 15 AM 10:30

ALAN GLOVER

BY Alan Glover CLERK
DEPUTY

6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR CARSON CITY

9 CITY OF FERNLEY, NEVADA, a Nevada
municipal corporation,

10 Plaintiff,

11 STATE OF NEVADA ex rel. THE
12 NEVADA DEPARTMENT OF
TAXATION; THE HONORABLE KATE
13 MARSHALL, in her official capacity as
TREASURER OF THE STATE OF
14 NEVADA; and DOES 1-20, inclusive.

15 Defendants.
16 _____/

**ORDER GRANTING A
CONTINUANCE TO COMPLETE
DISCOVERY**

17 This matter is before this Court on Plaintiff's Motion for Continuance Pursuant to NRCP
18 56(f) and Notice of Non-Opposition filed on August 20, 2012, as part of an Opposition to
19 Motion to Dismiss.

20 Initially, it should be pointed out that there was an Opposition filed against the Motion as
21 set forth in the Nevada Legislature's Reply in Support of Joinder in Motion to Dismiss filed on
22 October 8, 2012, on page 5, lines 5-8.

23 The Plaintiff submits that the Court's consideration of the Motions to Dismiss filed in
24 this matter should be considered as Motion for Summary Judgment; and, as such, that it should
25 be given a reasonable opportunity to complete discovery, and therefore have a chance to
26 demonstrate a genuine issue of material fact. Citing to *Aviation Ventures, Inc. v. Joan Morris,*
27 *Inc.*, 121 Nev. 113, 118-119, 110 P. 3d 59 (2005).

28 ///

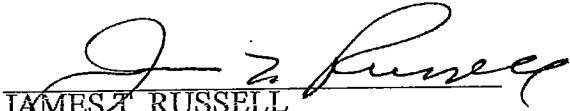
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Therefore, good cause appearing,

IT IS HEREBY ORDERED that the Motions to Dismiss are DENIED at this time in order to allow the Plaintiff a period of time to complete discovery; and

IT IS HEREBY FURTHER ORDERED that the Defendants, upon completion of a reasonable discovery period, may renew their Motions to Dismiss which will then be duly considered by the Court.

DATED this 12 day of October, 2012.


JAMES T. RUSSELL
District Judge


CERTIFICATE OF SERVICE

The undersigned, an employee of the District Judge, hereby certifies that on the 15th day of October, 2012, I served the foregoing by depositing a copy thereof in the U.S. Mail at Carson City, Nevada, postage paid, addressed as follows:

Brenda J. Erdoes, Esq.
Kevin C. Powers, Esq.
J. Daniel Yu, Esq.
Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City NV 89701

Joshua J. Hicks, Esq.
Clark V. Vellis, Esq.
Sean D. Lyttle, Esq.
Brownstein Hyatt Farber Schreck, LLP
9210 Prototype Drive #250
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Catherine Cortez Masto, Esq.
Gina C. Session, Esq.
Andrea Nichols, Esq.
Office of the Attorney General
5420 Kietzke Lane #202
Reno NV 89511


Christine Erven
Judicial Assistant, Department I

Joshua J. Hicks, Nevada Bar No. 6679
Clark V. Vellis, Nevada Bar No. 5533
Sean D. Lyttle, Nevada Bar No. 11640
BROWNSTEIN HYATT FARBER SCHRECK, LLP
50 West Liberty Street, Suite 1030
Reno, Nevada 89501
Telephone: 775-622-9450
Facsimile: 775-622-9554
Email: jhicks@bhfs.com
Email: cvellis@bhfs.com
Email: slyttle@bhfs.com

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

**IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

v.

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 DOES 1-20,
inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

NOTICE OF ENTRY OF ORDER

1 TO ALL INTERESTED PARTIES:

2 PLEASE TAKE NOTICE that an Order Granting a Continuance to Complete Discovery
3 was entered on the 15th day of October, 2012. A copy of said Order is attached hereto as
4 Exhibit 1.

5 DATED this 18th day of October, 2012.

6 BROWNSTEIN HYATT FARRER SCHRECK, LLP

7
8 By: 

9 Joshua J. Hicks, Nevada Bar No. 6679
10 Clark V. Vellis, Nevada Bar No. 5533
11 Sean D. Lyttle, Nevada Bar No. 11640
12 50 West Liberty Street, Suite 1030
13 Reno, Nevada 89501
14 Telephone: 775-622-9450

15 *Attorneys for the City of Fernley, Nevada*
16
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on this 18th of October, 2012, I caused to be served via electronic mail and U.S. Mail, a true and correct copy of the above foregoing **NOTICE OF ENTRY OF ORDER** properly addressed to the following:

Catherine Cortez Masto, Esq.
Gina C. Session, Esq.
gsession@ag.nv.gov
100 North Carson Street
Carson City, Nevada 89701-4717

Andrea Nichols, Esq.
Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
anichols@ag.nv.gov

Brenda J. Erdoes, Esq.
Kevin Powers, Esq.
kpowers@lcb.state.nv.us
J. Daniel Yu, Esq.
dan.yu@lcb.state.nv.us
Legislative Counsel Bureau
401 South Carson Street
Carson City, Nevada 89701

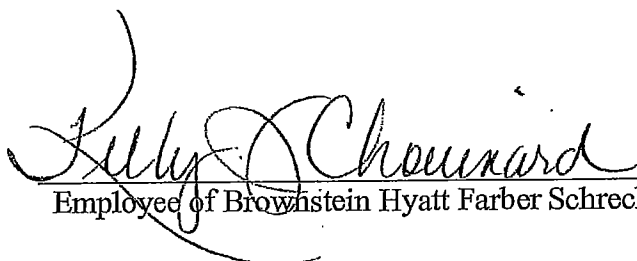

Employee of Brownstein Hyatt Farber Schreck, LLP

EXHIBIT 1

1 CASE NO. 12 OC 000168 1B

2 DEPT. NO. I

REC'D & FILED

2012 OCT 15 AM 10:30

ALAN GLOVER

BY Alan Glover CLERK
DEPUTY

3
4
5
6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR CARSON CITY
8

9 CITY OF FERNLEY, NEVADA, a Nevada
municipal corporation,

10 Plaintiff,

11 STATE OF NEVADA ex rel. THE
12 NEVADA DEPARTMENT OF
TAXATION; THE HONORABLE KATE
13 MARSHALL, in her official capacity as
TREASURER OF THE STATE OF
14 NEVADA; and DOES 1-20, inclusive.

15 Defendants.
16 _____/

**ORDER GRANTING A
CONTINUANCE TO COMPLETE
DISCOVERY**

17 This matter is before this Court on Plaintiff's Motion for Continuance Pursuant to NRC
18 56(f) and Notice of Non-Opposition filed on August 20, 2012, as part of an Opposition to
19 Motion to Dismiss.

20 Initially, it should be pointed out that there was an Opposition filed against the Motion as
21 set forth in the Nevada Legislature's Reply in Support of Joinder in Motion to Dismiss filed on
22 October 8, 2012, on page 5, lines 5-8.

23 The Plaintiff submits that the Court's consideration of the Motions to Dismiss filed in
24 this matter should be considered as Motion for Summary Judgment; and, as such, that it should
25 be given a reasonable opportunity to complete discovery, and therefore have a chance to
26 demonstrate a genuine issue of material fact. Citing to *Aviation Ventures, Inc. v. Joan Morris,*
27 *Inc.*, 121 Nev. 113, 118-119, 110 P. 3rd 59 (2005).

28 ///

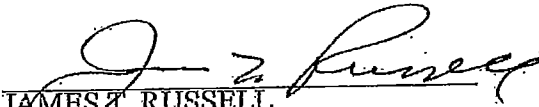
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Therefore, good cause appearing,

IT IS HEREBY ORDERED that the Motions to Dismiss are DENIED at this time in order to allow the Plaintiff a period of time to complete discovery; and

IT IS HEREBY FURTHER ORDERED that the Defendants, upon completion of a reasonable discovery period, may renew their Motions to Dismiss which will then be duly considered by the Court.

DATED this 12 day of October, 2012.


JAMES T. RUSSELL
District Judge


CERTIFICATE OF SERVICE

The undersigned, an employee of the District Judge, hereby certifies that on the 15th day of October, 2012, I served the foregoing by depositing a copy thereof in the U.S. Mail at Carson City, Nevada, postage paid, addressed as follows:

Brenda J. Brdões, Esq.
Kevin C. Powers, Esq.
J. Daniel Yu, Esq.
Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City NV 89701

Joshua J. Hicks, Esq.
Clark V. Vellis, Esq.
Sean D. Lyttle, Esq.
Brownstein Hyatt Farber Schreck, LLP
9210 Prototype Drive #250
Reno NV 89521

Catherine Cortez Masto, Esq.
Gina C. Session, Esq.
Andrea Nichols, Esq.
Office of the Attorney General
5420 Kietzke Lane #202
Reno NV 89511


Christine Erven
Judicial Assistant, Department I

REC'D & FILED

2012 NOV 13 PM 4:09

ALAN G. LEE
V. GUTIERREZ
BY _____
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

vs.

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; THE LEGISLATURE
OF THE STATE OF NEVADA; and DOES 1-
20,
inclusive,

Defendants.

Case No. 12 OC 00168 1B
Dept. No. 1

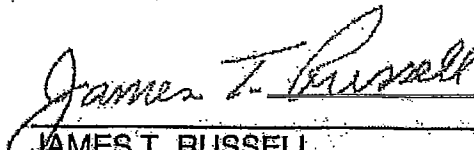
ORDER ON DEFENDANTS' MOTION
FOR EXTENSION OF TIME TO FILE
ANSWERS

This matter is before this Court on Defendants' Motion for Extension of Time to File Answers filed herein on November 5, 2012, requesting that the time to file answers be extended until five (5) days after the Nevada Supreme Court enters a final order that decides the Defendants' Petition for Writ of Mandamus.

Based on review of the Motion, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion for Extension of Time to File Answers is granted and Defendants' Answers to Plaintiff's Complaint in this matter shall be due five (5) days after the Nevada Supreme Court enters a final order that decides the Defendants' Petition for Writ of Mandamus.

DATED this 13th day of November, 2012.


JAMES T. RUSSELL
DISTRICT COURT JUDGE

Case No. 66851
JA 1351

1 The Proposed Order on Defendants' Motion for Extension of Time to File Answers is
2 respectfully submitted.

3
4 Dated: This 9th day of November, 2012. Dated: This 9th day of November, 2012.

5 CATHERINE CORTEZ MASTO
6 Attorney General

BRENDA J. ERDOES
Legislative Counsel

7 By: AC. Smith

By: B. Powers


8 GINA C. SESSION
9 Chief Deputy Attorney General
10 Nevada Bar No. 5493
11 gsession@ag.nv.gov
12 OFFICE OF THE ATTORNEY GENERAL
13 5420 Kietzke Ln., Suite 202
14 Reno, NV 89511
15 Tel: (775) 688-1818
16 Fax: (775) 688-1822
17 *Attorneys for Defendants*
18 *Nevada Department of Taxation*
19 *and Kate Marshall, State Treasurer*

KEVIN C. POWERS
Chief Litigation Counsel
Nevada Bar No. 6781
kpowers@lcb.state.nv.us
LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION
401 S. Carson Street
Carson City, NV 89701
Tel: (775) 684-6830
Fax: (775) 684-6761
Attorneys for Defendant
Legislature of the State of Nevada

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the Office of the Attorney General of the State
3 of Nevada, and that on the 9th day of November, 2012, pursuant to NRCP 5(b) and the
4 parties' stipulation and consent to service by electronic means, I served a true and correct
5 copy of the foregoing Proposed Order on Motion for Extension of Time to File Answers, by
6 electronic mail, directed to the following:

7 JOSHUA J. HICKS
8 CLARK V. VELLIS
9 SEAN D. LYTTLE
10 BROWNSTEIN HYATT FARBER SCHRECK, LLP
11 50 W. Liberty St., Suite 1030
12 Reno, NV 89501
13 jhicks@bhfs.com
cvellis@bhfs.com
slyttle@bhfs.com
Attorneys for Plaintiff
City of Fernley, Nevada

14 
15 Sally A. Bullard
16 An Employee of the Office
of the Attorney General

CATHERINE CORTEZ MASTO
Attorney General
GINA C. SESSION
Chief Deputy Attorney General
Nevada Bar No. 5493
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ANDREA NICHOLS
Senior Deputy Attorney General
Nevada Bar No. 6436
5420 Kietzke Lane, Suite 202
Reno, NV 89511
(775) 688-1818
anichols@ag.nv.gov

Attorneys for Defendants Nevada Department of Taxation
and Kate Marshall, State Treasurer

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a Nevada
municipal corporation,

Plaintiff,

v.

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 DOES 1-20,
Inclusive,

Defendants,

NEVADA LEGISLATURE,

Intervenor.

Case No.: 12 OC 00168 1B

Dept. No.: I

NOTICE OF ENTRY OF ORDER

....

....

....

Case No. 66851
JA 1354

1 PLEASE TAKE NOTICE that on November 13, 2012, an Order on Defendants' Motion
2 for Extension of Time to File Answers was entered in the First Judicial District Court of the
3 State of Nevada. A copy of said document is attached hereto as Exhibit "1."

4 DATED this 15th day of November, 2012.

5 CATHERINE CORTEZ MASTO
6 Attorney General

7 By:



8 ANDREA NICHOLS
9 Senior Deputy Attorney General
10 Nevada Bar No. 6436
11 5420 Kietzke Lane, Suite 202
12 Reno, NV 89511
13 (775) 688-1818

14 *Attorneys for Defendants*

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Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Case No. 66851
JA 1355

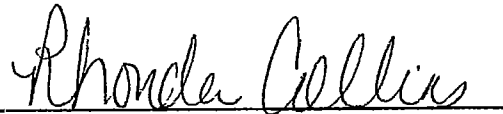
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 15th day of November, 2012, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER**, by mailing a true copy, postage prepaid, to:

Joshua Hicks, Esq.
Clark Vellis, Esq.
Sean Lyttle, Esq.
Brownstein Hyatt Farber Schreck, LLP
9210 Prototype Drive, Suite 250
Reno, NV 89521

Brandi Jensen, Fernley City Attorney
Office of the City Attorney
595 Silver Lace Blvd.
Fernley, NV 89408

Kevin Powers, Esq.
Legislative Counsel Bureau
401 S. Carson Street
Carson City, NV 89701



An Employee of the Office
of the Attorney General

EXHIBIT 1

EXHIBIT 1

Case No. 66851
JA 1357

REC'D & FILED

2012 NOV 13 PM 6:09

ALAN G. GLENN

BY _____

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

vs.

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; THE LEGISLATURE
OF THE STATE OF NEVADA; and DOES 1-
20,
inclusive,

Defendants.

Case No. 12 OC 00168 1B
Dept. No. 1

ORDER ON DEFENDANTS' MOTION
FOR EXTENSION OF TIME TO FILE
ANSWERS

This matter is before this Court on Defendants' Motion for Extension of Time to File Answers filed herein on November 5, 2012, requesting that the time to file answers be extended until five (5) days after the Nevada Supreme Court enters a final order that decides the Defendants' Petition for Writ of Mandamus.

Based on review of the Motion, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion for Extension of Time to File Answers is granted and Defendants' Answers to Plaintiff's Complaint in this matter shall be due five (5) days after the Nevada Supreme Court enters a final order that decides the Defendants' Petition for Writ of Mandamus.

DATED this 13th day of November, 2012.


JAMES T. RUSSELL
DISTRICT COURT JUDGE

Case No. 66851
JA 1358

1 The Proposed Order on Defendants' Motion for Extension of Time to File Answers is
2 respectfully submitted.

3
4 Dated: This 9th day of November, 2012. Dated: This 9th day of November, 2012.

5 CATHERINE CORTEZ MASTO
6 Attorney General

BRENDA J. ERDOES
Legislative Counsel

7 By: AC. Smith

By: Brenda J. Erdoes

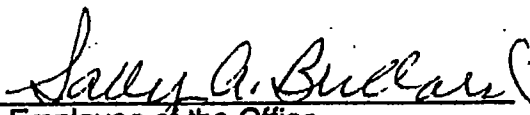
8 GINA C. SESSION
9 Chief Deputy Attorney General
10 Nevada Bar No. 5493
11 gsession@ag.nv.gov
12 OFFICE OF THE ATTORNEY GENERAL
13 5420 Kietzke Ln., Suite 202
14 Reno, NV 89511
15 Tel: (775) 688-1818
16 Fax: (775) 688-1822
17 *Attorneys for Defendants*
18 *Nevada Department of Taxation*
19 *and Kate Marshall, State Treasurer*

KEVIN C. POWERS
Chief Litigation Counsel
Nevada Bar No. 6781
kpowers@lcb.state.nv.us
LEGISLATIVE COUNSEL BUREAU,
LEGAL DIVISION
401 S. Carson Street
Carson City, NV 89701
Tel: (775) 684-6830
Fax: (775) 684-6761
Attorneys for Defendant
Legislature of the State of Nevada

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of the Office of the Attorney General of the State
3 of Nevada, and that on the 9th day of November, 2012, pursuant to NRCP 5(b) and the
4 parties' stipulation and consent to service by electronic means, I served a true and correct
5 copy of the foregoing Proposed Order on Motion for Extension of Time to File Answers, by
6 electronic mail, directed to the following:

7 JOSHUA J. HICKS
8 CLARK V. VELLIS
9 SEAN D. LYTTLE
10 BROWNSTEIN HYATT FARBER SCHRECK, LLP
11 50 W. Liberty St., Suite 1030
12 Reno, NV 89501
13 jhicks@bhfs.com
cvellis@bhfs.com
slyttle@bhfs.com
Attorneys for Plaintiff
City of Fernley, Nevada

14 
15 Sally A. Billard
16 An Employee of the Office
17 of the Attorney General
18
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REC'D & FILED

2012 DEC 17 PM 2: 37

ALAN GLOVER

~~J. DEAN~~ CLERK
DEPUTY

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

**CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,**

Plaintiff,

vs.

**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; THE LEGISLATURE OF
THE STATE OF NEVADA; and DOES 1-20,
inclusive,**

Defendants.

**Case No. 12 OC 00168 1B
Dept. No. 1**

**ORDER DENYING CITY OF FERNLEY'S MOTION FOR
RECONSIDERATION OF ORDER DATED NOVEMBER 13, 2012**

This case involves a constitutional challenge by Plaintiff City of Fernley (Fernley) to Nevada's consolidated tax system or C-Tax system codified in NRS 360.600-360.740. Fernley pleads federal constitutional claims and state constitutional claims and alleges that the C-Tax system, on its face and as applied, is invalid, unenforceable or unconstitutional. Fernley prays for money damages and declaratory and injunctive relief against Defendants State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity (collectively the State). On August 30, 2012, the Court granted the Legislature's motion to intervene as a Defendant.

1 In response to Fernley's complaint, the State filed a motion to dismiss, and the Legislature filed a
2 joinder in that motion to dismiss, which the parties agreed by stipulation to treat as the Legislature's own
3 motion to dismiss. On October 15, 2012, the Court entered an order denying both motions to dismiss to
4 allow Fernley a period of time to complete discovery.

5 On November 5, 2012, the Defendants filed a Petition for Writ of Mandamus with the Nevada
6 Supreme Court that asks the Supreme Court to review this Court's order denying the Defendants'
7 motions to dismiss. On that same date, the Defendants filed a Motion for Extension of Time to File
8 Answers which asked this Court to extend the time to file answers until 5 days after the Supreme Court
9 enters a final order that decides the Defendants' mandamus petition.

10 On November 13, 2012, the Supreme Court issued an order directing Fernley to file an answer to
11 the mandamus petition in which the Supreme Court stated that "[h]aving reviewed the petition, it
12 appears that petitioners have set forth issues of arguable merit and that petitioners may have no plain,
13 speedy, and adequate remedy at law."

14 Also on November 13, 2012, this Court granted the Defendants' Motion for Extension of Time to
15 File Answers and ordered that the Defendants' answers to Fernley's complaint in this matter shall be due
16 5 days after the Supreme Court enters a final order that decides the Defendants' mandamus petition.
17 Fernley moves this Court to reconsider its order dated November 13, 2012, granting the Defendants'
18 Motion for Extension of Time to File Answers.

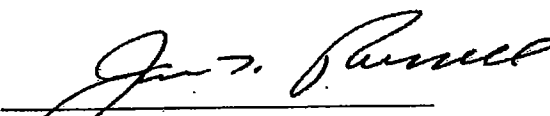
19 The Court may reconsider an order that it has entered in a pending case "for sufficient cause
20 shown," such as "when there has been a change of circumstances." Trail v. Faretto, 91 Nev. 401, 403
21 (1975). However, "[m]ere disagreement with a previous order is an insufficient basis for
22 reconsideration." Haw. Stevedores, Inc. v. HT&T Co., 363 F. Supp. 2d 1253, 1269 (D. Haw. 2005).
23 Instead, "[a] motion to reconsider must provide a court with valid grounds for reconsideration by:
24 (1) showing some valid reason why the court should reconsider its prior decision, and (2) setting forth

1 facts or law of *a strongly convincing nature* to persuade the court to reverse its prior decision." Frasure
2 v. United States, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003) (emphasis added).

3 The Court finds that Fernley has not established any valid grounds for reconsideration of its
4 previous order dated November 13, 2012, granting the Defendants' Motion for Extension of Time to
5 File Answers. Because the Supreme Court's consideration of the Defendants' mandamus petition has
6 the potential to render any further proceedings in this Court unnecessary, this Court's previous order
7 advanced policies of sound judicial economy and administration. And because the Supreme Court has
8 recognized the need to address the issues in the Defendants' mandamus petition on an expedited basis,
9 Fernley should not be prejudiced by any delay in the district court proceedings. Therefore, because this
10 Court's previous order was well within this Court's authority under NRCP 1 and NRCP 6(b)(1) and its
11 inherent power to control its docket and promote the efficient use of judicial resources, and because
12 Fernley has not shown sufficient cause for reconsideration,

13 IT IS HEREBY ORDERED THAT Fernley's Motion for Reconsideration of the Court's order
14 dated November 13, 2012, is DENIED.

15 DATED: This 17th day of December, 2012.

16
17 
18 District Judge

18 Submitted by:

19 Andrea Nichols
20 Senior Deputy Attorney General
21 Nevada Bar No. 6436
22 OFFICE OF THE ATTORNEY GENERAL
23 5420 Kietzke Ln., Suite 202
24 Reno, NV 89511
Tel: (775) 688-1818; Fax: (775) 688-1822
anichols@ag.nv.gov
Attorneys for Defendants Nevada Department
of Taxation and Kate Marshall, State Treasurer

Kevin C. Powers
Chief Litigation Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson Street
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
kpowers@lcb.state.nv.us
Attorneys for Defendant Legislature

1 CATHERINE CORTEZ MASTO
Attorney General
2 GINA C. SESSION
Chief Deputy Attorney General
3 Nevada Bar No. 5493
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4 Carson City, Nevada 89701-4717
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ANDREA NICHOLS
6 Senior Deputy Attorney General
Nevada Bar No. 6436
7 5420 Kietzke Lane, Suite 202
Reno, NV 89511
8 (775) 688-1818
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9

10 Attorneys for Defendants Nevada Department of Taxation
and Kate Marshall, State Treasurer

11
12 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
13 **IN AND FOR CARSON CITY**

14 CITY OF FERNLEY, NEVADA, a Nevada
15 municipal corporation,

16 Plaintiff,

17 v.

18 STATE OF NEVADA, ex rel. THE NEVADA
DEPARTMENT OF TAXATION; THE
19 HONORABLE KATE MARSHALL, in her
official capacity as TREASURER OF THE
20 STATE OF NEVADA; and DOES 1-20,
Inclusive,

21 Defendants,

22 NEVADA LEGISLATURE,

23 Intervenor.
24

Case No.: 12 OC 00168 1B

Dept. No.: I

25 **NOTICE OF ENTRY OF ORDER**
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1 PLEASE TAKE NOTICE that on December 17, 2012, an Order Denying City of
2 Fernley's Motion for Reconsideration of Order Dated November 13, 2012 was entered in the
3 First Judicial District Court of the State of Nevada. A copy of said document is attached
4 hereto as Exhibit "1."

5 DATED this 19th day of December, 2012.

6 CATHERINE CORTEZ MASTO
7 Attorney General

8 By:

Andrea Nichols
9 ANDREA NICHOLS
10 Senior Deputy Attorney General
11 Nevada Bar No. 6436
12 5420 Kietzke Lane, Suite 202
13 Reno, NV 89511
14 (775) 688-1818

15 *Attorneys for Defendants*

16
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Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Office of the Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 19th day of December, 2012, pursuant to NRCP 5(b) and the parties' stipulation and consent to service by electronic means, I served a true copy of the foregoing **NOTICE OF ENTRY OF ORDER**, by electronic mail, directed to the following:

Joshua Hicks, Esq.
Clark Vellis, Esq.
Sean Lyttle, Esq.
Brownstein Hyatt Farber Schreck, LLP
50 W. Liberty Street, Suite 1030
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jhicks@bhfs.com
cvelis@bhfs.com
slyttle@bhfs.com

Kevin Powers, Esq.
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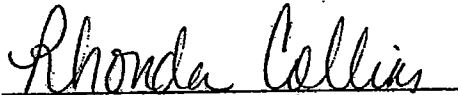

An Employee of the Office
of the Attorney General

EXHIBIT 1

EXHIBIT 1

Case No. 66851
JA 1367

REC'D & FILED

2012 DEC 17 PM 2: 37

ALAN GLOVER

~~J. BOYCE~~ CLERK
DEPUTY

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY**

CITY OF FERNLEY, NEVADA, a
Nevada municipal corporation,

Plaintiff,

vs.

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; THE LEGISLATURE OF
THE STATE OF NEVADA; and DOES 1-20,
inclusive,

Defendants.

Case No. 12 OC 00168 1B
Dept. No. 1

**ORDER DENYING CITY OF FERNLEY'S MOTION FOR
RECONSIDERATION OF ORDER DATED NOVEMBER 13, 2012**

This case involves a constitutional challenge by Plaintiff City of Fernley (Fernley) to Nevada's consolidated tax system or C-Tax system codified in NRS 360.600-360.740. Fernley pleads federal constitutional claims and state constitutional claims and alleges that the C-Tax system, on its face and as applied, is invalid, unenforceable or unconstitutional. Fernley prays for money damages and declaratory and injunctive relief against Defendants State of Nevada, the Department of Taxation, and the State Treasurer acting in her official capacity (collectively the State). On August 30, 2012, the Court granted the Legislature's motion to intervene as a Defendant.

1 In response to Fernley's complaint, the State filed a motion to dismiss, and the Legislature filed a
2 joinder in that motion to dismiss, which the parties agreed by stipulation to treat as the Legislature's own
3 motion to dismiss. On October 15, 2012, the Court entered an order denying both motions to dismiss to
4 allow Fernley a period of time to complete discovery.

5 On November 5, 2012, the Defendants filed a Petition for Writ of Mandamus with the Nevada
6 Supreme Court that asks the Supreme Court to review this Court's order denying the Defendants'
7 motions to dismiss. On that same date, the Defendants filed a Motion for Extension of Time to File
8 Answers which asked this Court to extend the time to file answers until 5 days after the Supreme Court
9 enters a final order that decides the Defendants' mandamus petition.

10 On November 13, 2012, the Supreme Court issued an order directing Fernley to file an answer to
11 the mandamus petition in which the Supreme Court stated that "[h]aving reviewed the petition, it
12 appears that petitioners have set forth issues of arguable merit and that petitioners may have no plain,
13 speedy, and adequate remedy at law."

14 Also on November 13, 2012, this Court granted the Defendants' Motion for Extension of Time to
15 File Answers and ordered that the Defendants' answers to Fernley's complaint in this matter shall be due
16 5 days after the Supreme Court enters a final order that decides the Defendants' mandamus petition.
17 Fernley moves this Court to reconsider its order dated November 13, 2012, granting the Defendants'
18 Motion for Extension of Time to File Answers.

19 The Court may reconsider an order that it has entered in a pending case "for sufficient cause
20 shown," such as "when there has been a change of circumstances." Trail v. Faretto, 91 Nev. 401, 403
21 (1975). However, "[m]ere disagreement with a previous order is an insufficient basis for
22 reconsideration." Haw. Stevedores, Inc. v. HT&T Co., 363 F. Supp. 2d 1253, 1269 (D. Haw. 2005).
23 Instead, "[a] motion to reconsider must provide a court with valid grounds for reconsideration by:
24 (1) showing some valid reason why the court should reconsider its prior decision, and (2) setting forth

1 facts or law of *a strongly convincing nature* to persuade the court to reverse its prior decision." Frasure
2 v. United States, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003) (emphasis added).

3 The Court finds that Fernley has not established any valid grounds for reconsideration of its
4 previous order dated November 13, 2012, granting the Defendants' Motion for Extension of Time to
5 File Answers. Because the Supreme Court's consideration of the Defendants' mandamus petition has
6 the potential to render any further proceedings in this Court unnecessary, this Court's previous order
7 advanced policies of sound judicial economy and administration. And because the Supreme Court has
8 recognized the need to address the issues in the Defendants' mandamus petition on an expedited basis,
9 Fernley should not be prejudiced by any delay in the district court proceedings. Therefore, because this
10 Court's previous order was well within this Court's authority under NRCP 1 and NRCP 6(b)(1) and its
11 inherent power to control its docket and promote the efficient use of judicial resources, and because
12 Fernley has not shown sufficient cause for reconsideration,

13 IT IS HEREBY ORDERED THAT Fernley's Motion for Reconsideration of the Court's order
14 dated November 13, 2012, is DENIED.

15 DATED: This 17th day of December, 2012.

16
17 
District Judge

18 Submitted by:

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Attorneys for Defendant Legislature

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA
DEPARTMENT OF TAXATION; THE
HONORABLE KATE MARSHALL, IN
HER 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 THE COUNTY OF
CARSON CITY; AND THE
HONORABLE JAMES TODD RUSSELL,
DISTRICT JUDGE,

Respondents,

and

THE CITY OF FERNLEY, A NEVADA
MUNICIPAL CORPORATION,
Real Party in Interest.

No. 62050

WRIT OF MANDAMUS

TO: The Honorable James Todd Russell, Judge of the First Judicial
District Court:

WHEREAS, this Court having made and filed its written decision
that a writ of mandamus issue,

NOW, THEREFORE, you are instructed to vacate the challenged
order to the extent it refused to dismiss or grant summary judgment on
the City's federal constitutional claims and to enter an order dismissing
those claims, in the case entitled City of Fernley v. State, Department of
Taxation, Case No. 12 OC 00168 1B.

WITNESS The Honorables Kristine Pickering, Chief Justice, Mark Gibbons, James W. Hardesty, Ron Parraguirre, Michael L. Douglas, Michael A. Cherry, and Nancy M. Saitta, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 25th day of January, 2013.



Maie K. Smider
Supreme Court Clerk

RECEIVED
JAN 25 2013

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA DEPARTMENT
OF TAXATION; THE HONORABLE KATE
MARSHALL, IN HER 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 THE COUNTY OF CARSON CITY;
AND THE HONORABLE JAMES TODD
RUSSELL, DISTRICT JUDGE,

Respondents,

and

THE CITY OF FERNLEY, A NEVADA
MUNICIPAL CORPORATION,
Real Party in Interest.

No. 62050

FILED

JAN 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying motions to dismiss in a constitutional law action.

This matter arises from an action brought by real party in interest the City of Fernley challenging the constitutionality of the State's consolidated-tax system, which distributes six statewide taxes to local governments. The City's complaint alleges that this tax system violates certain of its rights under both the federal and state constitutions. Petitioners moved the district court to dismiss the action, and in opposing those motions, the City argued that the motions should be treated as summary judgment motions and requested a continuance under NRCP

56(f) to conduct further discovery. The district court converted petitioners' motions to dismiss to summary judgment motions, denied those motions without prejudice, and granted the City a continuance. This petition followed.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; International Game Tech. v. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether a petition for extraordinary relief will be considered is purely discretionary with this court. Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). This court has held that it may exercise its discretion to consider a petition challenging the denial of a motion to dismiss or for summary judgment where "no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." Smith v. District Court, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997); accord Advanced Countertop Design v. Dist. Ct., 115 Nev. 268, 269, 984 P.2d 756, 758 (1999) ("Although [this court] generally decline[s] to consider writ petitions that challenge district court orders denying [such motions] . . . , we may exercise our discretion when no factual disputes exist and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule.").

Actions for violations of federal constitutional rights under 42 U.S.C. § 1983 (1996) are governed by the state's statute of limitations for personal injury actions.¹ Wilson v. Garcia, 471 U.S. 261, 276 (1985).

¹Although the City did not expressly plead a § 1983 claim in its complaint, when alleging a federal constitutional violation, a plaintiff does not have a direct cause of action under the United States Constitution, but

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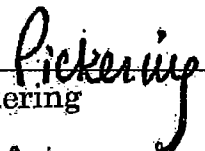
Nevada's statute of limitations for personal injury claims is two years. NRS 11.190(4)(e). Neither party disputes that, at the time of the City's incorporation in 2001, the City was aware that absent specific circumstances, its base consolidated-tax distributions would be set by its previous distributions and would remain at that level. See NRS 360.680(2); NRS 360.740; NRS 354.59874. Indeed, at oral argument the City conceded that its federal constitutional claims would be barred unless this court applied an exception to allow it to avoid the expiration of the limitations period, and we find that no such exception applies here. Under these circumstances, the City was required to bring its federal constitutional claims within two years of its incorporation, and its failure to do so renders those claims barred by the statute of limitations. See Wilson, 471 U.S. at 276. Therefore, the district court was obligated under clear legal authority to dismiss the federal constitutional claims and our intervention by way of extraordinary relief is warranted to compel the district court to comply with this requirement. Smith, 113 Nev. at 1345, 950 P.2d at 281. As to the remaining issues raised in the petition, although we make no comment on the merits of these arguments, we

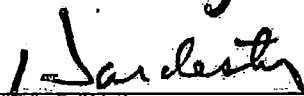
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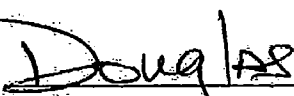
must plead the claim under 42 U.S.C. § 1983. See Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001) ("[A] litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983."); Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992) (same). Federal courts have determined that when a plaintiff alleges federal constitutional violations, but fails to plead civil rights claims under § 1983, the court will nevertheless "construe [the plaintiff's] allegations under the umbrella of § 1983." Bank of Lake Tahoe v. Bank of America, 318 F.3d 914, 917 (9th Cir. 2003).


nonetheless decline to exercise our discretion to entertain this writ petition with regard to these issues. Smith, 107 Nev. at 677, 818 P.2d at 851. Accordingly, we

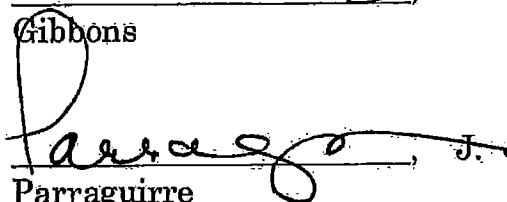
ORDER the petition GRANTED IN PART AND DENIED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate the challenged order to the extent it refused to dismiss or grant summary judgment on the City's federal constitutional claims and to enter an order dismissing those claims.

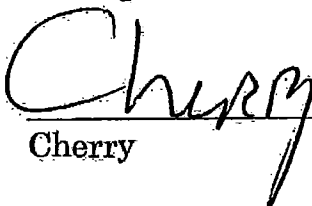

Pickering, C.J.


Hardesty, J.


Douglas, J.



Gibbons, J.


Parraguirre, J.


Cherry, J.

SAITTA, J., concurring in part and dissenting in part:

While I concur with the decision to grant the petition as to the City's federal constitutional claims, I would have granted the balance of the petition and directed the district court to dismiss the City's claims in their entirety.


Saitta, J.

cc: Hon. James Todd Russell, District Judge
Attorney General/Reno
Attorney General/Carson City
Legislative Counsel Bureau Legal Division
Brownstein Hyatt Farber Schreck, LLP/Reno
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Carson City Clerk