IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 78792

CITY OF LAS VEGAS, a political subdivision of the State of Nevada,

Petitioner

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and the Honorable Timothy C. Williams, District Judge,

Respondents

and

180 LAND CO, LLC, a Nevada limited-liability company,

Real Party in Interest

District Court Case No.: A-17-758528-J
Eighth Judicial District Court of Nevada

CITY OF LAS VEGAS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR REHEARING

LEONARD LAW, PC Debbie Leonard (#8260) 955 S. Virginia St., Suite 220 Reno, Nevada 89502 Phone: 775.964.4656 debbie@leonardlawpc.com	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com	LAS VEGAS CITY ATTORNEY'S OFFICE Bradford R. Jerbic (#1056) Philip R. Byrnes (#166) Seth T. Floyd (#11959) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 bjerbic@lasvegasnevada.gov pbyrnes@lasvegasnevada.gov sfloyd@lasvegasnevada.gov

Attorneys for Petitioner

INTRODUCTION

Pursuant to NRAP 27, the City of Las Vegas respectfully moves the Court for leave to file a reply in support of its petition for rehearing to address misleading arguments presented in the Developer' Answer.

ARGUMENT

A. Property Ownership Alone Does Not Create A Constitutional Right to Alter An Approved Use of Property

1. The Developer Has No Protected Property Interest In A Use That Does Not Exist

Because neither mere ownership of property, nor a zoning designation, creates a vested right to redevelop property into a new use, the Developer's Answer is grossly misleading. "The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of *vested property rights*…." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994) (emphasis added). Under Nevada law, a vested property right is something that is "fixed and established." *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949). A proposed new use of the golf course property is neither "fixed" nor "established" because it does not currently exist. The Developer therefore lacks vested rights to have its redevelopment applications approved.

In arguing otherwise, the Developer ignores a long line of precedent that holds there is no vested right to a discretionary land use approval. "In order for rights in a

proposed development project to vest, zoning or use approvals ***must not be subject to further governmental discretionary action*** affecting project commencement, and the developer must prove considerable reliance on the approvals granted." *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (emphasis added); *see also Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527–28, 96 P.3d 756, 759–60 (2004) (holding that because City's site development review process under Title 19.18.050 involved discretionary action by Council, the project proponent had no vested right to construct). The zoning designation on the property does not alter this conclusion because "compatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest." *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992).

The Developer does not dispute that the City Council had discretion to deny the applications it submitted for a general plan amendment, tentative map, site development review and waiver. Nor does the Developer dispute the *Stratosphere* holding that no vested right exists in a proposed project that is subject to City Council discretion. Instead, it draws a false distinction between its inverse condemnation claims and the Court's long line of land use cases that clearly show the Developer has no vested rights to have its redevelopment applications approved. This distinction is unsupported by the law:

> [Property interests are] of course ... not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understanding that secure certain benefits and that support claims of entitlement to those benefits. [To have such a property interest], "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The Developer's incongruous syllogism (at p.6) regarding property ownership does not alter this conclusion. Nevada landowners do indeed have certain rights inherent to property ownership. But the right to have redevelopment applications approved is not one of them. *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112. If the Developer's argument were accepted, every single government action, even if valid, would give rise to a potential claim for compensation. This negates the entire notion of discretionary land use decision making embodied in NRS Chapter 278 and, if deemed true, would cause local government to grind to a halt. In short, the desire to change an existing use of property, the approval of which is subject to the City's discretion, does not transform into a vested right simply by virtue of property ownership.

///

///

2. *Stratosphere*, Not *Sisolak*, Governs the Discretionary Denial of Redevelopment Applications

In arguing that mere ownership of property is enough to trigger a taking for the discretionary denial of land use applications, the Developer relies on inapposite cases related to the government's physical invasion of, and ouster from, property. Ans. at 1, 6-9, *citing McCarran Intl Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006); *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645 (2007); *Schwartz v. State*, 111 Nev. 998, 900 P.2d 939 (1995). There is no allegation in the FAC – nor could there be – that the City Council's denial of redevelopment applications for the golf course property constituted a physical invasion of, or ouster from, the golf course property.

Furthermore, in *Sisolak*, the Court simply interpreted the word "vested" in NRS 493.040, which states that "[t]he ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath." *Id.* at 659, 137 P.3d at 1120, *quoting* NRS 493.040. Based on that statute, the Court concluded that physical invasion by airplanes flying below the minimum altitudes needed for flight established by the FAA warranted compensation. *Id.* at 658-59, 137 P.3d at 1119-20. *Sisolak* does nothing to alter the well-established case law that there can be no vested right to redevelop property into a new use where the necessary governmental approvals are subject to discretionary decision making. *See Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60 (post-dating *Sisolak*).

A municipality's discretion in land use decisions is recognized and enforced in NRS Chapter 278, not NRS 493.040. *See* NRS 278.020.

Schwartz also involved a physical invasion in which the state condemned the landowner's easement to access its property, which the Court deemed a special class of property right protected by NRS 37.110(3). *Schwartz*, 111 Nev. at 1003, 900 P.2d at 942. *ASAP Storage* involved the government's "physical[] appropriate[ion of] … private property by ouster." *Id.* at 648, 173 P.3d at 740. The action that the Developer challenges here – denial of redevelopment applications that sought to convert an already-approved golf course into a use not authorized by the City's General Plan – is simply not analogous.[1]

B. This Case Alleges a Taking For Denial of Redevelopment Applications For Specific Property, Not to Challenge a Blanket Regulation

Contrary to what the Developer would have the Court believe, this case does not arise from a government ordinance such as those at issue in *Sisolak* and *Lucas*. The cases cited by the Developer involved a regulatory restriction imposed on multiple properties through an ordinance that expressed some sort of government

[1] The only claim asserted in the FAC is that the City Council's June 21, 2017 denial of four discretionary applications to redevelop the 35-Acre Property constituted a taking. 1(28-44). As a result, the Developer's citation to matters that post date that action are irrelevant and cannot be considered. Moreover, they are the subject of other lawsuits. 3(422-482) (Complaints in Case Nos. A-18-775804-J and A-18-780184-C). By relying on these matters to make its points, the Developer essentially concedes that it cannot prove that the June 21, 2017 decision was actionable.

policy. For example, the plaintiff in *Lucas* claimed a taking through the government agency's enactment of a statute that rendered numerous coastal properties, including his land, "valueless." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006 (1992).

> Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives.

Id. at 1009. The Developer erroneously construes these background facts as creating a "holding" that any proper exercise of governmental discretion is subject to an inverse condemnation claim. That is not what *Lucas* says.

The Supreme Court granted certiorari in *Lucas* to address the issue of whether the Beachfront Management Act, which absolutely prohibited construction of "habitable improvements" on coastal properties and totally wiped out the economic value of the Lucas' property accomplished a taking of private property. *Lucas*, 505 U.S. at 1007. The Supreme Court did not, however, reach the ultimate issue of whether a taking occurred. Instead, the Court established a framework for identifying property interests that qualify for protection under the Fifth and Fourteenth Amendments using state law "background principles" to analyze regulations that deprive land of all economically beneficial use. *See id.* at 1027-1032. Nowhere in the Court's holding is there any discernable language that the proper

exercise of discretion to deny specific land use applications automatically constitutes a taking.

The Developer's reliance on *Lucas* is also misplaced because the Developer does not assert a facial challenge to any land use regulation. A facial challenge involves "a claim that the mere enactment of a statute constitutes a taking," while an as-applied challenge involves "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir. 1993) (emphasis added), *citing Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). Since a facial takings claim presents no concrete controversy concerning the application of regulations to a specific piece of land, the only issue is whether the mere enactment of a regulation deprives an owner of all economic use of its land. *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981). That is not what the Developer asserts here.

Unlike *Lucas*, the Developer's inverse condemnation claims are necessarily "as-applied" claims since they challenge the City's application of existing regulations to a specific piece of property, namely the denial of the 35-Acre Applications, which the district court correctly concluded was a proper exercise of the Council's discretion. When the government acts within the bounds of its discretion as to specific development applications, as-applied takings claims

necessarily fail as a matter of law because "[l]ocal zoning authorities must have the ability to protect important natural resources and the interests of their local communities through reasonable land use restrictions without being forced … to pay compensation to every frustrated developer that had hoped to maximize its bottom line." *Pulte Home Corp. v. Montgomery Cty., Maryland*, 909 F.3d 685, 696 (4th Cir. 2018). As the Supreme Court succinctly stated, "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). The Developer's argument that the discretionary adoption of a regulation is analogous to the discretionary denial of specific land use applications misrepresents the law.

C. The City's Approval of Some of the Developer's Redevelopment Applications and the Developer's Continued Ability to Use The Property As a Golf Course Belies The Developer's Contention That It Has Been Deprived "All" Use of the Property

The Developer also misrepresents the property interest that should be evaluated in the takings analysis, failing to inform the Court that the City granted some of the Developer's applications to redevelop the golf course and denied others. The Supreme Court recently made clear that, to determine whether a taking has occurred, the Court must look at the regulated property as a whole. *Murr v.*

Wisconsin, 137 S. Ct. 1933, 1944, 1948 (2017) (quoting *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987) to explain what constitutes the unit of property that is "the denominator" in a takings analysis). The Developer would have the Court ignore that (1) the golf course property is part of a master planned area in which the Peccole Trust set aside the golf course as open space in order to enhance the value of adjacent lots and the overall project; (2) the Developer has never alleged that the City deprived it of the right to use the property as a golf course, the purpose for which its predecessor sought, and obtained approval from, the City; and (3) the City ***approved*** applications filed by the Developer to redevelop a 17-acre portion of the golf course property. 1(77-90); 1(209-210, 223-225); 1(205-206); 6(905-926, 947). As a result, under no interpretation of reality can the Developer's assertion that the City has denied "all use" of its land be deemed true.

///

///

///

///

///

///

///

///

CONCLUSION

Because the Developer attempts to mislead the Court as to the applicable law and the redevelopment applications at issue, the City respectfully requests leave to file a reply in support of its Petition for Rehearing to address these and other matters presented in the Answer.

DATED this 24th day of July, 2019.

BY: /s/ Debbie Leonard

LEONARD LAW, PC Debbie Leonard (#8260) 955 S. Virginia St., Suite 220 Reno, Nevada 89502 Phone: 775.964.4656 debbie@leonardlawpc.com	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com	LAS VEGAS CITY ATTORNEY'S OFFICE Bradford R. Jerbic (#1056) Philip R. Byrnes (#166) Seth T. Floyd (#11959) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 bjerbic@lasvegasnevada.gov pbyrnes@lasvegasnevada.gov sfloyd@lasvegasnevada.gov

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this motion complies with the page limitation of NRAP 27(d)(2) because it does not exceed 10 pages.

Pursuant to NRAP 28.2, I hereby certify that I have read this motion, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this motion complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this motion is not in conformity with the requirements of the Rules of Appellate Procedure.

DATED this 24th day of July, 2019.

BY: /s/ Debbie Leonard

LEONARD LAW, PC Debbie Leonard (#8260) 955 S. Virginia St., Suite 220 Reno, Nevada 89502 Phone: 775.964.4656 debbie@leonardlawpc.com	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com	LAS VEGAS CITY ATTORNEY'S OFFICE Bradford R. Jerbic (#1056) Philip R. Byrnes (#166) Seth T. Floyd (#11959) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 bjerbic@lasvegasnevada.gov pbyrnes@lasvegasnevada.gov sfloyd@lasvegasnevada.gov

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on this 24th day of July, 2019, a copy of the foregoing **PETITIONER'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR REHEARING** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system and others not registered will be served via U.S. mail as follows:

The Honorable Timothy C. Williams
District Court Department XVI
Regional Justice Center
200 Lewis Avenue,
Las Vegas, Nevada 89155
dept16lc@clarkcountycourts.us
Respondent

PISANELLI BICE PLLC
Todd L. Bice (4534)
Dustun H. Holmes (12776)
400 S. Seventh St., Suite 300
Las Vegas NV 89101
tlb@pisanellibice.com
Attorneys for Intervenors

KAEMPFER CROWELL
Christopher L. Kaempfer (1264)
Stephanie H. Allen (8486)
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
ckaempfer@kcnvlaw.com
sallen@kcnvlaw.com
Attorneys for Real Party in Interest
180 Land Company, LLC

LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq., Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq., Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq., Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq., Bar No. 8917
autumn@kermittwaters.com
Michael K. Wall, Esq., Bar No. 2098
mwall@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Real Party in Interest
180 Land Company, LLC

HUTCHISON & STEFFEN, PLLC
Mark A. Hutchison (4639)
Joseph S. Kistler (3458)
Matthew K. Schriever (10745)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
mhutchison@hutchlegal.com
jkistler@hutchlegal.com
mschriever@hutchlegal.com
Attorneys for Real Party in Interest
180 Land Company, LLC

/s/ Tricia Trevino
An employee of Leonard Law, PC