IN THE SUPREME COURT OF THE STATE OF NEVADA

SOPHIE LAU, an individual; JEFFREY LAU, an individual; GOOD EARTH ENTERPRISES, INC., a California Corporation; and LIG LAND DEVELOPMENT, LLC, a California Limited Liability Company,

Appellants/Cross-Respondents,

v.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; CAROLYN GOODMAN, as Mayor of the City of Las Vegas; CITY OF LAS VEGAS DEPARTMENT OF BUILDING & SAFETY, CODE ENFORCEMENT DIVISION, a department of the city of Las Vegas; VICKI OZUNA, Code Enforcement Manager; EMILY WETZSTEIN, Code Enforcement Assistant; KEVIN MCOSKER, director, Building and Safety department; JOHN BOYER, as City Council Designee,

Respondents/Cross-Appellants.

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CASE No. 82720

DC CASE NO. A-19-806797-W

RESPONDENTS/CROSS-APPELLANTS' COMBINED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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RESPONDENTS/CROSS-APPELLANTS CITY OF LAS VEGAS, a political subdivision of the State of Nevada; CAROLYN GOODMAN, as Mayor of the City of Las Vegas; CITY OF LAS VEGAS DEPARTMENT OF BUILDING & SAFETY, CODE ENFORCEMENT DIVISION, a department of the city of Las Vegas; VICKI OZUNA, Code Enforcement Manager; EMILY WETZSTEIN, Code Enforcement Assistant; KEVIN MCOSKER, director, Building and Safety department; and JOHN BOYER, as City Council Designee (collectively referred to hereinafter as "**City Respondents**"), through their attorneys of record, BRYAN K. SCOTT, City Attorney, by DAVID E. BAILEY, Deputy City Attorney, file their COMBINED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL, as follows:

ANSWERING BRIEF ON APPEAL

I.

JURISDICTIONAL STATEMENT

Per NRAP 3(b)(1), City Respondents (1) agree that the Nevada Supreme Court has jurisdiction over Appellants' appeal; and (2) assert that this Court also has jurisdiction over City Respondents' Cross-Appeal. Both the appeal and the Cross-Appeal are from the same March 2, 2021 District Court final order/judgment in the underlying petition for judicial review action which Appellants (hereinafter "**property owners**") commenced in District Court.

Property owners timely filed and served their Notice of Appeal with the District Court on March 29, 2021. City Respondents timely filed their Notice of Cross-Appeal with the District Court on March 31, 2021, which was within the NRAP 4(a)(2) fourteen (14) day period to do so following the date property owners served their Notice of Appeal.

II.

ROUTING STATEMENT

Per NRAP 28(b)(2), to provide information in addition to that provided by property owners, City Respondents agree that property owners' appeal and City Respondent's Cross-Appeal are properly presumptively retained by the Nevada Supreme Court per NRAP 17(a)(11) as a matter raising as a principal issue a question of first impression involving common law. Existing case law needs clarification concerning the power and authority of the District Court when hearing a matter on petition for judicial review that is not brought under NRS 223B (Nevada's Administrative Procedures Act), specifically review of a City Council Designee's Decision pursuant to City Code that was adopted per NRS 268.4122.

III.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court improperly substitute its opinion for the City Council Designee's and conclude that the Designee abused his discretion by not

reducing the amount of daily civil penalties by seventy-five percent (75%) based upon the Court's decision that property owners complied with seventy-five percent (75%) of City's abatement requirements, rather than determining whether or not Designee's Decision was supported by substantial evidence?

2. Did the District Court exceed its powers on review by ordering a reduction in the amount of penalties by seventy-five percent (75%)?

3. Did the District Court improperly order a change in the amount of penalties instead of remanding the case to the Designee for further proceedings?

IV.

STATEMENT OF THE CASE

City of Las Vegas Code Enforcement dealt with property owners' three (3) dilapidated buildings in downtown Las Vegas for years, none of which had been occupied or properly maintained by property owners for over ten (10) years. Finally, after several fires and other issues, City was on the cusp on demolishing the buildings after declaring them imminent hazards per Las Vegas Municipal Code (hereinafter "**LVMC**"). Property owners then finally acted to address the imminent hazards and had the demolition work done to avoid the City from doing so, but they did not fully and timely abate public nuisances as required by City Respondents' Notice and Orders. As a result, City Respondents sought to assess out of pocket costs, fees, and daily civil penalties against the properties.

Pursuant to City Code, City scheduled a hearing before the City Council Designee (hereinafter "**Designee**") to approve assessments. Following the hearing, Designee approved the costs and fees and all but $150.00 of the penalties and issued his written Decision (hereinafter "**Decision**").

Property owners filed a Petition for Judicial Review in District Court to challenge the Designee's Decision. The District Court affirmed the full amount of the costs and fees but improperly reduced the penalties by seventy-five percent (75%). The District Court substituted its judgment for that of Designee and

determined that property owners complied with seventy-five percent (75%) of City's abatement requirements.

Property owners filed their Appeal seeking to have this Court overturn the District Court's Order and overturn and reverse the costs, fees, and penalties. City Respondents filed their Cross-Appeal seeking to have this Court (1) affirm the District Court's order regarding the costs and fees which Designee assessed; but (2) overturn the District Court's Order to the extent it reduced penalties that Designee imposed and instead fully affirm the Designee's Decision.

V.

STATEMENT OF FACTS

Factual Overview

As an overview of events for context: City of Las Vegas Code Enforcement dealt with property owners' three (3) dilapidated buildings in downtown Las Vegas for years, none of which had been occupied or properly maintained by property owners for at least fifteen (15) years. (Volume III, 0199, lines 1038-1040; 0177, lines 73-75; 0206, lines 1361-1379; and Volume IV, 0317).

Over the course of decades, property owners allowed these structures to decay and become safety and fire hazards and abandoned urban blight attractive only to vagrants, criminals, drug users, and the homeless. (Volume III, 0209, line 1513 -

0210, line 1568; Volume IX, 0635, lines 2-9). Property owners had a history of lack of responsiveness to Code Enforcement. (Volume III, 0199, lines 1055-1056).

The buildings were across the street from Las Vegas High School where high school students attend school. (Volume III, 0177, lines 51 – 52).

Things reached a breaking point in December 2018 when two (2) separate fires broke out at two (2) of the properties (the El Cid Hotel and its annex). (Volume VIII, 0568-0570). Using its emergency powers granted to it by LVMC 9.04.080, NRS 268.4122, and NRS 332.112, City Respondents initiated a boarding up of these structures to protect the health, safety, and welfare of the community. (Volume VIII, 0571-0575). City Respondents then gave the property owners notice in January 2019 that they were operating these structures as a public nuisance that must be immediately remedied pursuant to LVMC 9.04.010. (Volume IV, 0302-0316). Property owners failed to fully do so under the public nuisance law resulting in thirty (30) days of civil penalties as well as the costs and fees incurred for the emergency nuisance abatement (boarding up) being assessed against the properties. (Volume III, 0211, line 1605 – 0212, line 1621).

City was then on the cusp of demolishing the buildings after declaring them imminent hazards per City Code. (Volume III, 0198, lines 1021-1035; and 0177, lines 57-60). Property owners then finally stepped-up and had the demolition work done to avoid the City from doing so. (Volume III, 0177, lines 78-79).

The City Council Designee held an Abatement and Lien Approval hearing on September 25, 2019. (Volume III, 0176). After receiving notice of the hearing, Property owners appeared with counsel, who admitted at the hearing that the buildings were an attractive nuisance. (Volume III, 0206, lines 1387-1388).

Designee heard and considered a mountain of evidence about the properties consisting of their tortured history of neglect and disrepair and the imminent hazards caused thereby, as well as by the fires in December 2018 and February 2019, the emergency boarding ups of buildings, the safety issues, lack of timely and full abatement by the deadlines set forth in City Respondents' Notice and Orders, and eventual demolition. (Volume I, 0089-0091). Designee then found that property owners received proper and sufficient notice of all nuisance abatement proceedings and that the fees, penalties, and costs were all proper and reasonable under the circumstances except for $150.00 in penalties that he denied. (Id.).

Designee further stated "This is the most cases I've ever heard on a single property since I've been here." (Volume III, 0209, lines 1521-1522).

Factual Details

233 South 6th Street (El Cid Hotel)

Property owner Good Earth Enterprises, a California corporation, purchased the El Cid Hotel and real property located at 233 South 6th Street on February 5, 1993. (Volume IV, 0294). Adjacent thereto was the separate hotel annex building

and real property located at 232 South 7th Street, which property owner Good Earth Enterprises also purchased on February 5, 1993. (Volume IV, 0297).

On November 17, 2008, property owner LIG Land Development LLC, a California limited liability company, purchased a residential hotel and real property immediately north of these properties at 615 East Carson Avenue known as the M.I. Residential Hotel. (Volume IX, 0613; Volume II, 0113).

Property owners Sophie and Jeffrey Lau own and/or control property owners Good Earth Enterprises and LIG Land Development, and for purposes of this action are the responsible parties for these properties. (Volume IV, 0294-0320).

Prior to the events at issue, Code Enforcement had seven (7) cases for an open and accessible building at the El Cid property since 2006. (Volume IV, 0317).

On November 17, 2018, a fire occurred. (Volume IV, 0318). On December 5, 2018, City Code Enforcement inspected and found numerous building and safety violations at the El Cid and El Cid Annex properties. (Volume IV, 0259). The refuse and upkeep issues were extreme and homeless persons were illegally using the properties for shelter. (Id.). On December 6, 2018, Code Enforcement brought these issues to the attention of Robert Mann, the on-premises representative/manager for property owners. (Id.).

On December 17, 2018, a fire occurred on the upper floor of the abandoned El Cid Hotel. (Volume IV, 0317-0318; Volume I, 0100). Approximately forty (40)

to fifty (50) homeless persons fled the building as a result of the fire. (Id.). As a result, to safeguard the public City Respondents caused an emergency boarding of the building to secure the first two (2) floors and the open elevator shafts. (Id.). In the process of doing so, even after the fires, it was discovered that approximately fifteen (15) homeless people were still living there. (Volume I, 0067). Even after the boarding up of the El Cid, homeless people continued to live there, a fact known to Mr. Mann. (Volume II, 0101).

The Las Vegas Metropolitan Police Department, Las Vegas Fire and Rescue, and the City declared the property an imminent hazard pursuant to LVMC 9.04.080 (Volume III, 0176, lines 34-40); 0205, lines 1318-1320; and 0220, lines 2012-2013).

As Vicki Ozuna, Code Enforcement Section Manager, testified at the Designee hearing on September 25, 2019, in describing the situation:

> We ended up declaring it - the City Council - or City Manager declared it February 20, two-thousand and nine, uh, 2019, but this process started in December. Um, at the concurrence of Fire and Metro and due to the activity, we - we declared - Code Enforcement declared that we needed to do the emergency boarding. And I had concurrence from two Departments which is more than what we're required to have. So, based off the fire activity and the, uh, number of - the number of homeless people. There were 40 to 50 homeless people were jumping out the windows. Somebody broke their ankle at - when, uh, the fire occurred on December 17th. This is not just a couple of people hangin' out. This is a very large number of people. When you would walk through the bottom floor of the building, there were mattresses in each and every room. It looked - it appeared like somebody may have been

> taking rental money or allowing the people to stay there. So, there was a lot of – there was a lot of issues and we were extremely concerned about what was occurring in this building.

(Volume III, 0205, lines 1318-1332).

On December 19, 2018, another fire occurred and also at the El Cid Annex building. (Volume IV, 0318).

On January 7, 2019, City sent a Revised Demolition Notice and Order to Comply to property owner Good Earth Enterprises at 785 Columbus Avenue, San Francisco, CA 94133-2732, and property owner Sophie Lau at 201 South 6th Street, Las Vegas, NV 89101. (Volume IV, 0309-0316). In that Order, property owners were given **ten (10) days** (until January 18, 2019) to:

(1) remove palm tree landscaping to prevent access to the building (homeless were scaling the trees to enter the building's broken out windows (Volume III, 0200, lines 1081-1082; and 0259);

(2) hire a licensed security firm to provide 24 hour security to prevent access into the substandard/dangerous building;

(3) fence the entire perimeter of the property with security fencing to prevent access into the building; and

(4) contact Code Enforcement with a proposed action plan and actually reach an agreement with Code Enforcement upon the action plan which would involve:

(i) hiring a licensed contractor to obtain all required demolition permits within sixty (60) days following the Order's issuance; plus

(ii) an agreed upon timeframe to demolish the building and remove all demolition debris, refuse, and waste. (Id., 0314).

The Notice and Order advised property owners that failure to fully and timely comply would result in daily civil penalties. (Volume IV, 0314).

On January 8, 2019, City Respondents posted a copy of the Notice and Order at the property. (Volume II, 0101). Property owners' representative Mr. Mann was fully aware of this Notice and Order as of that date. (Id.).

Between January 7 and January 16, 2019, property owner Sophie Lau and Vicki Ozuna, Code Enforcement Section Manager, traded multiple e-mails regarding the status of the Demolition Notice and Orders. (Volume I, 0053-0057).

On January 16, 2019, the fire department responded to the property with a ladder truck because a homeless person climbed on top of the building sign and could not get down. (Volume IV, 0318). Homeless people used the sign to gain access to the building. (Id.).

That same day property owner Sophie Lau emailed City Respondents that she had the palm trees removed. (Volume IV, 0318). City Respondents replied that they had not received the proposed action plan required by the Notice and Order. (Id.).

On January 24, 2019, City Respondents sent an e-mail message to property owner Sophie Lau to notify her that (1) property owners had not met the Notice and Order's January 18, 2019 deadline to submit a proposed demolition action plan, let alone reached an agreement with City Respondents regarding a demolition plan; and (2) City Respondents would proceed with demolition. (Volume IV, 0318).

As of January 28, 2019, hazards and nuisances at the El Cid Hotel and the other properties remained and the properties continued to remain a blight. (Volume II, 0102). So, City Respondents declared the property an imminent hazard on January 31, 2019, and authorized the demolition of all dangerous structures due to them being an attractive and public nuisance. (Volume I, 0065). The Las Vegas City Council later ratified said decision at a public meeting on February 20, 2019. (Volume III, 0201, line 1158 – 0202, line 1192; and Volume 1, 0090).

Property owners' failure to fully and timely comply with the Notice and Order concerning the El Cid property resulted in penalties of $32,000 ($1,000 per day per LVMC 9.04.040(A)) being assessed against the property by Designee following his hearing. (Volume III, 0178, lines 115-125; 0201, line 1156 – 0202, line 1194). The

penalties were for the period January 19, 2019, through February 20, 2019 (which was the date the City Council ratified the Declaration of Imminent Hazard). (Id.).

The civil penalties for noncompliance per LVMC 9.04.040 and 9.04.060 did not start to accrue until ten days after the posting date of the Notice and Order (January 19, 2019), and then continued until the Emergency Declaration was approved by the City Council on February 20, 2019, which was thirty (30) days, at $1,000.00 per day. (Volume III, 0201, line 1158 – 0202, line 1192; and Volume 1, 0090).

City Respondents had incurred hard costs of $18,698.00 for contractor CGI to board up the imminent hazard that was the El Cid Hotel. (Volume I, 0034; 0100; and Volume II, 0133). The inspection and other fees were $3,926.70, yielding total out of pocket costs of $22,624.70. (Volume I, 0092). Then, with daily civil penalties of $32,000.00 added, Designee assessed $54,624.70 as a lien against the subject property. (Volume 1, 0086, 0090). City did not seek any penalties thereafter despite having the right to do so per LVMC 9.04.040.

232 South 7th Street (El Cid Annex)

Since 2006, the Code Enforcement history for 232 South 7th Street included thirteen (13) cases for Open and Accessible Building. (Volume IV, 0317).

A fire occurred on December 8, 2018, resulting in police and Fire Department responses where they discovered homeless people who had barricaded themselves

with furniture in the rear of the building and who refused to leave despite the fire. (Volume IV, 0317-0318). The Fire Department hired a contractor to temporarily board up the structure to prevent entry. (Id.).

On January 10, 2019, City sent a Demolition Notice and Order to Comply to property owner Good Earth Enterprises at 785 Columbus Avenue, San Francisco, CA 94133-2732, and property owner Sophie Lau at 201 South 6th Street, Las Vegas, NV 89101. (Volume IV, 0302-0308). In that Order, property owners were given **ten (10) days** (until January 22, 2019) to complete the same requirements as for the El Cid property:

(1) remove palm tree landscaping to prevent access to the building;

(2) hire a licensed security firm to provide 24 hour security to prevent access into the substandard/dangerous building;

(3) fence the entire perimeter of the property with security fencing to prevent access into the building; and

(4) contact Code Enforcement with a proposed action plan and actually reach an agreement with Code Enforcement upon the action plan which would involve:

(i) hiring a licensed contractor to obtain all required demolition permits within **sixty (60) days** following the Order's issuance; plus

(ii) an agreed upon timeframe to demolish the building and remove all demolition debris, refuse, and waste. (Id., 0306).

The Notice and Order advised property owners that failure to fully and timely comply would result in daily civil penalties. (Volume IV, 0306).

Between January 7 and January 16, 2019, property owner Sophie Lau and Vicki Ozuna, Code Enforcement Section Manager, traded multiple e-mails regarding the status of the Demolition Notice and Orders. (Volume I, 0053-0057).

Property owners failed to fully comply by the January 22, 2019 deadline, so at the same Designee hearing as for 233 S. 6t^{h} Street (Ed Cid), City Respondents sought from Designee the assessment of $30,000 in daily civil penalties pursuant to LVMC 9.04.040 for the period commencing on January 20, 2019, and continuing through February 20, 2019, when the City Council ratified the City Manager's declaration of the property as an imminent hazard and public nuisance. (Volume I, 0053-0057). City did not seek any penalties thereafter despite having the right to do so per LVMC 9.04.040. City Respondents incurred out of pocket costs and fees of $924.00. Designee approved the daily civil penalties, costs, and fees for a total assessment of $30,924.00. (Volume I, 0087).

615 East Carson Street (M.I. Residential Hotel)

On January 16, 2019, City Respondents inspected the property at 615 East Carson Street and found the structure to be vacant and filled with trash and debris. (Volume II, 0113). On February 14, 2019, City Respondents noted that the building was open and accessible to transients. (Id.).

Another fire occurred on February 21, 2019. (Volume II, 0113). Five (5) homeless people were rescued from the building. (Id.). The Fire Department had the openings on the first floor of the buildings secured but some of the second floor windows were broken or partially boarded. (Id.).

Thereafter, City Respondents consulted with the Las Vegas Fire and Rescue Department and considered the homeless residing in the structure and starting fires inside, criminal activity, attractive nuisances, lack of property owners' oversight, and the continuing danger posed to both the homeless and the firefighters by the property. (Volume II, 0114, 0153; Volume I, 0074).

Between February 22 and February 25, 2019, Code Enforcement and property owner Sophie Lau exchanged multiple e-mails about the fire and the need to take emergency action to properly secure the premises. (Volume II, 0066-0071).

On February 25, 2019, Code Enforcement inspected the property and it failed the inspection due to continued signs of homeless activity, continuing imminent hazard conditions, and inadequate boarding/security of the premises. (Volume II,

0114-0115). City then invoked its emergency powers and declared the property an imminent hazard and had a contractor emergency board it, which was accomplished on February 26, 2019. (Id.; Volume I, 0074; Volume II, 0148).

City then issued its Dangerous Building Notice and Order to Comply on March 18, 2019, and mailed it to property owner LIG Land Development and separately to property owners Jeffrey and Sophie Lau. (Volume I, 0073-0080). City Respondents posted the Notice and Order at the property on March 21, 2019. (Id.). In that Order, property owners were given **ten (10) days** (until March 29, 2019) to:

(1) Maintain the property secure at all times;

(2) Remove all graffiti and maintain the property free of graffiti at all times;

(3) Remove all refuse and waste and fire hazards;

(4) Maintain onsite a licensed security firm to provide 24 hour security sufficient to prevent access into all vacant substandard/dangerous buildings; and

(5) contact Code Enforcement with a proposed action plan and actually reach an agreement with Code Enforcement upon the action plan to remove all demolition debris, refuse, and waste. (Id.).

City Respondents paid its contractor, Junkman, $20,000.00 for the emergency boarding services to secure the building and safeguard the public. (Volume I, 0072). Following Designee's hearing, Designee assessed $20,000 for the emergency

boarding along with $2,330.00 in fees and costs, for a total of $23,330. (Volume I, 0090). Designee denied City Respondents' request for $150.00 in daily civil penalties. (Id.).

Proof of Mailing Evidence at Designee's Hearing

To provide facts regarding property owners' proofs of mailing argument:

During Designee's hearing, City Respondent Vicki Ozuna gave testimony regarding proofs of service and mailing of Code Enforcement notices that City Respondents sent which amounted to three (3) pages. (Volume III, 0183, lines 324-335; Volume V, 0402-0404). But, she had not sent them to property owners' counsel before the hearing per policy because the case was ongoing and not closed. (Id., lines 354-360). Property owners' counsel rejected Designee's suggestion to continue the hearing so that counsel could review the documents.

> Q (City Council Designee): So, at this point, you know, I think that we need to perhaps stop these proceedings, because you're, you know, reading the record here and you don't have all the record. And so, some of your arguments may not be, uh, supported by what the City has. Uh, and so, you know, if - if you want those records, it may be more effective that you see the entire file, so that you know what happened.

Volume III, 0184, lines 384-389.

> A2 (Counsel Ben Lalazern): And so I said, "Send us everything you got and we won't continue the hearing." My clients came out here from San Francisco…And we want to press forward on the hearing.

Id., lines 397-402.

Later during the hearing, the issue was discussed again:

> Q (City Council Designee): So, if we can give you copies of these materials, then maybe you want to, uh, abandon those types of arguments and go onto something else. I think you're entitled to know, you know, when Notices were sent out, what expenses were incurred, and how the, uh, penalties were calculated.
>
> A2 (Counsel Ben Lalazern): I – I agree . . . we were entitled to this before showing up at the hearing today where they say, "Here you go now."
>
> Q (City Council Designee): Right, And I don't … want you to be … prejudiced by (unintelligible) … So, I – well, I'll give you another date . . . you're – obviously, you've not been given everything and – well, not obviously, um, you're saying you didn't get everything. Um, and so, we're gonna supply that to you. And we can give you another hearing date so that we don't do this piecemeal.

Id., 0190-0191, lines 655-708.

Again, property owners' counsel declined. (Volume III, 0191-0193).

Later in the hearing, property owners' counsel cut the hearing short and instead said they would rely upon what they presented at the hearing so far: "we're happy to go forward, but I – I think we covered our bases on everything that we wanted to present." (Volume III, 0234, lines 2616-2622).

Procedural History Following Designee's Hearing

Property owners filed a Petition for Judicial Review of Designee's Decision with the District Court on December 11, 2019, seeking an order directing City Respondents to vacate Designee's Decision. (Volume I, 0001-0025).

The parties filed their respective briefs (Volume I, 0026-33; Volume VI, 0406-0425; and Volume IX, 0609-0631) and it was not until property owner's Reply Brief to the District Court that they included a new request for relief that the District Court not vacate the Designee's Decision but instead "allow no more than 25% of the maximum allowable fines to be imposed." (Volume IX, 0644, lines 17-18).

The District Court conducted its hearing on the Petition for Judicial Review on February 2, 2021. (Volume IX, 0653).

On March 2, 2021, the District Court entered its Decision and Order Granting Partial Relief (hereinafter "**Order**"). (Volume IX, 0648-0650). Notice of Entry of the Order was field on March 3, 2021. (Id., 0646-0647).

The Order affirmed portions of the Designee's Decision including all of the abatement out of pocket costs for each of the three (3) separate properties ($22,624.70, $924.00, and $23,330.00). But, instead of remanding or affirming the Designee's Decision regarding penalties, the District Court reduced the penalty amounts in Designee's Decision on the El Cid property (233 South 6th Street) from $32,000.00 to $7,750.00 and on the Annex property (232 South 7th Street) from $30,000.00 to $7,000.00. (Volume IX, 0649, lines 15-26).

The District Court's stated rationale for reducing the penalties was that property owners "substantially complied with three of the four conditions imposed by the City of Las Vegas's Revised Demolition Notice and Order to Comply," so it

was an "abuse of discretion" to "impose the maximum daily civil penalty." (Volume IX, 0649, lines 15-26).

Standing

To provide facts regarding property owners' arguments regarding standing:

Designee included in his Decision a prospective statement regarding property owners' future participation in future possible proceedings:

> Documents were submitted in evidence by both sides and are incorporated herein by reference in a binder marked Binder A . . .
>
> Until such time as both entities prove their existence, and comply with the registration requirements, they and their putative representative, Sophie Lau will not be allowed to appear in these proceedings as a representative.
>
> Notwithstanding the above-cited determination, I find the opposition presented against the imposition of full amount sought by the City against all three properties to be insufficient.

(Volume I, 0089).

Notices to Property Owners

Property owners argued to the District Court that they somehow did not receive proper notice of the violations, emergency measures, fees, costs, and penalties invoked against the subject properties. While property owners did not make that argument to this Court, they did allude to it in the Facts section of their Second Amended Opening Brief. So, to clarify, the following is a list of certain

relevant notices City Respondents gave to property owners between December 2018 and August 2019, resulting in the assessments that property owners challenge:

- December 17, 2018: after a fire at 233 South 6th Street, Code Enforcement inspected the property and Robert Mann, property owners' representative on site, identified himself as the property manager and City posted a red tag on the building (Volume I, 0100).

- City Respondents sent a Revised Demolition Notice and Order to Comply dated January 7, 2019, regarding the 233 South 6th (the El Cid Hotel) property to property owner Good Earth Enterprises Inc. at 785 Columbus Avenue, San Francisco, CA 94133-2732, and to property owner Sophie Lau at 201 South 6th Street, Las Vegas, NV 89101. (Volume I, 0035-0042).

- City Respondents sent a Demolition Notice and Order to Comply January 10, 2019, regarding 232 South 7th Street (El Cid Annex) property to property owner Good Earth Enterprises Inc. at 785 Columbus Avenue, San Francisco, CA 94133-2732, and to Sophie Lau at 201 South Sixth Street, Las Vegas, NV 89101. (Volume I, 0043-0049).

- A Return Receipt Requested was received from the United States Postal Service, showing both notices above were delivered to property owner Good Earth Enterprises on January 16, 2019. (Volume V, 0404).

- January 16, 2019: Property owner Sophie Lau acknowledged receipt of the above notices in e-mails with City Respondent Vicki Ozuna. (Volume I, 0053-0057).

- Property owner Sophie Lau acknowledged notice of City's emergency action regarding the fire at the 615 East Carson property in e-mails with City Respondent Vicki Ozuna between February 22 and February 25, 2019. (Volume I, 0066-0070).

- Dangerous Building Notice and Order to Comply regarding the building fire at 615 East Carson mailed to property owner LIG Land Development LLC and to property owner Sophie Lau at 785 Columbus Avenue, San Francisco, CA 94133-2732 and 201 South Sixth Street, Las Vegas, NV 89101, respectively, on March 18, 2019. (Volume I, 0073-0080).

- A Return Receipt was received from the United States Postal Service showing the above notice was delivered to property owner LIG Land Development on March 25, 2019. (Volume V, 0402).

- City Respondents sent correspondence to property owner LIG Land Development dated August 8, 2019, via certified and regular mail, to give notice of the scheduled hearing before Designee to consider the Report

of Expenses and potential for lien assessment regarding the 615 E Carson Ave property. (Volume I, 0081).

- January 8, 2019: City Respondents posted the Notice and Order on the front building board of the 233 South 6th Street property. City inspectors spoke with Bob (Robert Mann) about boarding up and ongoing security problems. (Volume II, 0101).

- January 14, 2019: City Respondents posted a Revised Notice and Order at El Cid Hotel. (Volume II, 0102).

- February 25, 2019: Tim Elson – a lawyer for property owners at the time – spoke with City inspectors regarding the fire at 615 East Carson which had occurred days earlier. City informed him an emergency boarding up of the building was underway due to the fire. (Volume II, 0114).

- March 21, 2019: City Respondents posted the Dangerous Building Notice and Order to Comply at 615 East Carson. (Volume I, 0073-0080; and Volume II, 0114).

- Counsel for property owners at the time admitted during the Designee Hearing that they received notice of the violations posted on the El Cid and Annex properties. (Volume III, 0211, lines 1593-1594).

- August 8, 2019: City Respondents sent correspondence to property owner Good Earth Enterprises dated August 8, 2019, via certified and regular mail, to give notice of the scheduled hearing before Designee to consider the Report of Expenses and potential for lien assessment regarding the 232 S 7th St property. (Volume I, 0117-0118).

VI.

SUMMARY OF THE ARGUMENT

When considering a petition for judicial review of a local government's administrative hearing decision, this Court has traditionally deferred to the local government and presumed its decision is valid absent an abuse of discretion. To prove an abuse of discretion, per established case law the appellant must prove that a decision is not supported by substantial evidence, which is defined as merely any valid basis for the decision.

In this case, the City Council Designee's decision to assess out of pocket costs, fees, and daily civil penalties based upon property owners' failures to abate code enforcement issues, public nuisances, and imminent hazards at their properties was amply supported by substantial evidence. Therefore, no abuse of discretion exists.

Contrary to established case law, property owners spent a substantial portion of their briefing to the District Court and this Court rearguing the evidence and

improperly urging this Court to reweigh the evidence and substitute its judgment for that of the Designee. Case law is clear that such is not the Court's role on review.

Property owners then asserted that Designee was influenced in his decision by a belief that property owners lacked standing. But, the evidence indicates the contrary. Designee listened to and considered property owners' evidence, testimony, and argument, and he did not exclude any because of standing issues.

Designee properly considered three (3) pages of USPS proof of mailing documents that were not provided to property owners prior the hearing. Substantial evidence supports Designee's Decision because (1) the proofs were testified to at the hearing; and (2) property owners waived any objection by declining Designee's offers to continue the hearing to allow property owners' to review them.

Designee's assessments for emergency boarding contractor fees and administrative fees were proper and supported by substantial evidence. The supporting contractor invoices and testimony about them were sufficiently detailed for Designee to include the costs as assessments. And both contractor invoices were for emergency imminent hazard board ups incurred after City Respondents properly declared the respective properties imminent hazards.

The District Court's decision to:

- affirm Designee's assessment of the full amount of costs and fees should be affirmed by this Court; and

- reduce Designee's assessment of the daily civil penalties by seventy-five percent (75%) should be reversed and the full amount that Designee assessed should be affirmed by this Court.

Should this Court decline to so rule, City Respondents assert that this matter should be remanded to the Designee to re-open proceedings.

VII.

ARGUMENT

This Court has established standards for the review of government agencies' administrative decisions.

The Court's review of the City's decision "is **limited to the record** made before the City." City of Las Vegas v. Laughlin, 111 Nev. 557, 558, 893 P.2d 383, 384 (1995) (emphasis added). Therefore, no additional purported evidence should be considered by the Court and the Court should only consider the record before the Designee -- the Court may not conduct a de novo review of the administrative action. The Nevada Supreme Court so held in Clark County Bd. of Commissioners v. Taggart Constr. Co., Inc., 96 Nev. 732, 615 P.2d 965 (1980):

> The district court conducted the equivalent of a trial de novo. It made an independent determination that the breadth of the variance included an asphalt mixing plant and a maintenance building. The court erred in doing so. Its **province was confined to a review of the record of evidence** presented to the Clark County Board of

> Commissioners and the Planning Department, with its primary focus on the variance itself.

Taggart Constr Co, 96 Nev. at 734, 615 P.2d at 967 (emphasis added).

"[T]he **scope of review** is usually limited to a determination of whether the agency or municipality which made the decision appealed from committed an **abuse of discretion**." Stratosphere Gaming Corp. v. City of Las Vegas, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004) (emphasis added). If Designee's discretionary act is supported by **substantial evidence**, there is no abuse of discretion.

Substantial evidence is that which 'a reasonable mind might accept as **adequate to support a conclusion**.'" Laughlin, 111 Nev. at 558, 893 P.2d at 384 (emphasis added; internal citation omitted). **A valid basis** for Designee's decision leads to the conclusion that the decision was based upon substantial evidence and was not a manifest abuse of discretion. Id. at 560. "Additionally, 'substantial evidence need not be voluminous' and may even be 'inferentially shown by a lack of certain evidence.'" Wright v. State Dept. of Motor Vehicles, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005).

The Court **cannot substitute its judgment for that of the Designee** as to the weight of the evidence despite the existence of conflicting evidence. Stratosphere Gaming, 120 Nev. at 530. "Just because there was conflicting evidence does not compel interference with the Board's decision so long as the decision was supported

by substantial evidence." Clark Co. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc., 106 Nev. 96, 98, 787 P.2d 782, 783 (1990). The Court "will not substitute the Board's judgment with its own and will not reweigh the evidence when reviewing the decision." Eldorado Hills, LLC v. Clark County Bd. of Commissioners, 2016 WL 7439360 (Supreme Court of Nevada unpublished disposition filed December 22, 2016).

Similarly, in Brocas v. Mirage Hotel & Casino, 109 Nev. 579, 854 P.2d 862 (1993), this Court stated:

> This court's role in reviewing an administrative decision is identical to that of the district court: **to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion**. United Exposition Service Co. v. SIIS, 109 Nev. 421, 851 P.2d 423 (1993); Titanium Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355, 357 (1983). This standard of review is codified in NRS 233B.135. It is well recognized that this court, in reviewing an administrative agency decision, **will not substitute its judgment** of the evidence for that of the administrative agency. State. Dep't of Mtr. Vehicles v. Becksted, 107 Nev. 456, 458, 813 P.2d 995, 996 (1991). This court is limited to the record below and to a determination of whether the administrative body acted arbitrarily or capriciously. State Emp. Sec. Dep't v. Weber, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (1984). The central inquiry is whether substantial evidence in the record supports the agency decision. SIIS v. Christensen, 106 Nev. 85, 87-88, 787 P.2d 408, 409 (1990). Substantial evidence is that which a reasonable mind might accept as **adequate** to support a conclusion.

Brocas, 109 Nev. at 582-83, 854 P.2d at 864 (emphasis added).

The actions of an administrative agency are **presumed to be valid** and are not subject to judicial review unless they are an abuse of discretion. McKenzie v. Shelly, 77 Nev. 237, 242, 362 P.2d 268, 270 (1961). In City Council of City of Reno v. Irvine, 102 Nev. 277, 721 P.2d 371 (1986), the Court described **appellant's burden** to prove the type of abuse of discretion necessary to overturn the administrative acts of a municipality:

> A city board acts arbitrarily and capriciously when it denies a license without any reason for doing so. In previous cases, e.g. *Henderson*, we have spoken in terms of there being a 'lack of substantial evidence before the council'; but the essence of the abuse of discretion, of the **arbitrariness or capriciousness** of governmental action in denying a license application, is most often found in an **apparent absence of any grounds or reason for the decision. 'We did it just because we did it**.'

Irvine, 102 Nev. at 279-80, 721 P.2d at 372-73 (emphasis added; internal citation omitted).

> If one seeking such a privilege can show that the city board . . . acted in a manner that was arbitrary (baseless, despotic) or capricious (caprice: 'a sudden turn of mind without apparent motive; a freak, whim, mere fancy'), then the board is said to be abusing its discretion.

Id., at 278-79.

> These cases do not stand for the proposition that the board must 'explain' its decision or even that it must make formal findings or conclusions.

Id., at 280.

A. SUBSTANTIAL EVIDENCE EXISTS THAT DESIGNEE CONSIDERED AND DID NOT EXCLUDE PROPERTY OWNERS' TESTIMONY AND EVIDENCE PRESENTED AT THE HEARING DESPITE HIS CONCERN ABOUT STANDING.

Property owners erroneously assert that Designee was influenced by his purported determination in his written Decision that they lacked standing to participate. No compelling evidence of such an influence exists. Substantial evidence -- which is all that is required for Designee's Decision to be affirmed per Laughlin, 111 Nev. at 558, 893 P.2d at 384 -- actually indicates the contrary. Designee permitted property owners, through both Appellant Sophie Lau and property owner's counsel, to testify and submit evidence without limitation due to any standing issue. Therefore, substantial evidence exists that standing did not affect Designee's decision.

While Designee did not expressly state the prospective nature of his comment about standing in his written Decision, that is the only rational way to interpret it. Designee issued his Decision after the hearing and he was putting property owners on notice that until they prove their existence as foreign corporations in good standing in Nevada, he would not allow them to appear in future proceedings as a representative. Designee had already allowed property owners to testify via Appellant Sophie Lau and property owners' counsel, present exhibits and evidence, and make legal arguments via counsel at the hearing.

No evidence exists that Designee limited either property owners' testimony or evidence at the hearing. And, **property owners do not argue that they were so limited**. Also, no evidence exists that Designee considered or changed his Decision based upon property owners' entity status in Nevada. Designee stated in his Decision: "Notwithstanding the above-cited determination, I find the opposition presented … insufficient." (Volume I, 0089). Nowhere in his Decision did Designee state that he factored in the foreign corporation status or that he would not consider evidence because of it. In fact, Designee included numerous details and a thorough rationale in the Decision to support why he decided as he did, none of which included or even alluded to the foreign status issue. And Designee included in his Decision that "Documents were submitted in evidence by both sides and are incorporated herein by reference" (Volume I, 0089), so he clearly did not disregard property owners' evidence as he would have done had he decided that a standing issue affected his Decision.

Property owners' conjecture about standing is also based upon a misconception about Designee's statements concerning foreign status. Via the statement in the Decision that property owners' would not be allowed to appear in the proceedings, Designee was putting them on notice for any future proceedings

before him[1]. As set forth above, Designee had already allowed them to fully testify and present evidence. His statement would make no sense and have no relevance if interpreted retroactively the way property owners assert when the hearing had already occurred.

Substantial evidence supports the conclusion that Designee did not factor in standing in his Decision. Property owners have not met their burden to prove otherwise nor to overcome the presumption of validity as per McKenzie, 77 Nev. at 242. As a result, property owners' request to reverse the fines and fees based upon standing should be denied.

Should the Court disagree and decide that Designee factored standing into his Decision, City Respondents assert that the property remedy is to remand the matter to Designee so that he can reconsider his Decision and/or re-open the matter. Property owners provided no legal support or basis for reversing code enforcement fines and fees based upon a standing issue.

1 Whether Designee's position regarding standing was correct or not is irrelevant to the appeal because he did not limit property owners' testimony or evidence.

B. DESIGNEE DID NOT ABUSE HIS DISCRETION BY RECEIVING EVIDENCE AFTER THE HEARING BECAUSE THE EVIDENCE WAS TESTIFIED TO AT THE HEARING AND PROPERTY OWNERS WAIVED ANY OBJECTION BY DECLINING DESIGNEE'S OFFER TO CONTINUE THE HEARING.

Property owners waived the right to object to Designee's post-hearing receipt of three (3) pages of proof of mailing documents which were testified to at the hearing. Property owners did so by declining Designee's offers during the hearing to continue it so that property owners could review the evidence. Furthermore, property owners heard testimony about the evidence at the hearing. They simply did not receive copies of the documents before the hearing.

Designee properly added to the record three (3) pages constituting USPS proofs of mailing after the hearing because (1) they were testified to by City Respondent Vicki Ozuna at the hearing (Volume III, 0183, lines 324-335; 0189, lines 616-626), so there was no surprise or unknown information; and (2) because property owners waived any objection by not accepting Designee's offers to continue the hearing so they could review the documents at issue. Designee gave property owners the opportunity to have a continuance for the purpose of letting them review the documentation and they declined on multiple occasions. The exact exchange between counsel and Designee follows:

> Q (City Council Designee): So, at this point, you know, I think that we need to perhaps stop these proceedings, because you're, you

know, reading the record here and you don't have all the record. And so, some of your arguments may not be, uh, supported by what the City has. Uh, and so, you know, if - if you want those records, it may be more effective that you see the entire file, so that you know what happened.

Volume III, 0184, lines 384-389.

A2 (Counsel Ben Lalazern): And so I said, "Send us everything you got and we won't continue the hearing." My clients came out here from San Francisco…And we want to press forward on the hearing.

Id., 0184, lines 397-402.

Later during the hearing, the issue was discussed again:

Q (City Council Designee): So, if we can give you copies of these materials, then maybe you want to, uh, abandon those types of arguments and go onto something else. I think you're entitled to know, you know, when Notices were sent out, what expenses were incurred, and how the, uh, penalties were calculated.

A2 (Counsel Ben Lalazern): I – I agree . . . we were entitled to this before showing up at the hearing today where they say, "Here you go now."

Q (City Council Designee): Right, And I don't … want you to be … prejudiced by (unintelligible) … So, I – well, I'll give you another date . . . you're – obviously, you've not been given everything and – well, not obviously, um, you're saying you didn't get everything. Um, and so, we're gonna supply that to you. And we can give you another hearing date so that we don't do this piecemeal.

Id., 0190-0191, lines 655-708.

Again, property owners' counsel declined. (Volume III, 0191-0193; and See, Volume I, 0090, where Designee included in his Decision the following: "The owner was offered a continuance to review this record but was declined").

Property owners were aware there might be some evidence in the City's files they might have not seen (three (3) pages), but they decided not to contest this fact or accept Designee's offer to have more time to review the City's files. In fact, property owners cut the hearing short and stated they would rely upon information they had provided. (Volume III, 0234, lines 2616-2622).

The fact remains that City Respondents did mail the applicable notices to property owners and they had full notice of the violations being alleged by City Respondents. And property owners have not denied receiving the -- they actually admit to receiving them. Property owners simply want to nitpick over whether they were presented before the hearing even though they were fully aware of being notified by these mailings and knew Designee would be reviewing the City's entire file after the close of the hearing.

In addition, the proofs of mailing documents were not necessary for Designee to issue his Decision. They were additional information. City Respondent Vicki Ozuna testified at the hearing about service and mailing of code enforcement notices, so that information would have sufficed to support Designee's Decision. And it

satisfies the substantial evidence requirement as per Laughlin, 111 Nev. at 558, 893 P.2d at 384.

Finally, the hearing before the Designee was not a judicial court proceeding. Designee was the designee of the Las Vegas City Council, which was not part of the judicial branch. As a result, procedures at Designee hearings are much more relaxed than before a court, as the transcript of the hearing demonstrates. (See, Volume III, 0176). By attending and participating in the hearing and by hearing testimony from City Respondent Vicki Ozuna about the certified mail proofs of mailing, property owners knew what the documents would entail. The documents were simply incorporated into the record by Designee after the hearing.

Designee's decision and consideration of the proofs of mailing is presumed valid per McKenzie, 77 Nev. at 242, 362 P.2d at 270. Property owners have not overcome that presumption nor their self-described "arduous burden" to prove that Designee abused his discretion regarding the proofs of mailing. Substantial evidence exists to support his Decision, which is all that is required to affirm Decision's Decision per Laughlin, 111 Nev. at 558, 893 P.2d at 384.

C. DESIGNEE'S DETERMINATION OF PENALTIES WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Designee's Decision to assess daily civil penalties was not an abuse of discretion because it was supported by substantial evidence. As a result, on petition

for judicial review, the District Court should have affirmed it rather than substituting its judgment for Designee's as to the proper amount of penalties and reducing them seventy-five percent (75%).

The District Court's clear mandate on petition for judicial review, as set forth in Brocas, 109 Nev. at 582-83, 854 P.2d at 864, and other cited cases, was to either affirm the Designee's Decision or remand to the Designee. The District Court exceeded its authority on petition for judicial review and instead substituted its judgment for that of Designee.

On appeal, this Court should engage in the same type of review of Designee's penalties assessment as required of the District Court and use the same guiding principles. See, Brocas, 109 Nev. at 582-83, 854 P.2d at 864.

While set forth above, the detailed and instructive principles from Brocas are worth repeating:

> This court's role in reviewing an administrative decision is identical to that of the district court: **to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion**. United Exposition Service Co. v. SIIS, 109 Nev. 421, 851 P.2d 423 (1993); Titanium Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355, 357 (1983). This standard of review is codified in NRS 233B.135. It is well recognized that this court, in reviewing an administrative agency decision, **will not substitute its judgment** of the evidence for that of the administrative agency. State. Dep't of Mtr. Vehicles v. Becksted, 107 Nev. 456, 458, 813 P.2d 995, 996 (1991). This court is limited to the record below and to a determination of whether the administrative body acted

> arbitrarily or capriciously. State Emp. Sec. Dep't v. Weber, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (1984). The central inquiry is whether **substantial evidence** in the record supports the agency decision. SIIS v. Christensen, 106 Nev. 85, 87-88, 787 P.2d 408, 409 (1990). Substantial evidence is that which a reasonable mind might accept as **adequate** to support a conclusion.

Brocas, 109 Nev. at 582-83, 854 P.2d at 864 (emphasis added).

Based upon the Brocas principles, this Court should affirm the Designee's determination of penalties if there was **any valid basis** -- even just one -- for Designee's decision regarding penalties. In fact, several valid bases exist as adequately demonstrated by the evidence which Designee received and summarized in his written Decision. A brief summary of that evidence demonstrates the bases for Designee's Decision and assessment of penalties:

- The case concerned three (3) dilapidated buildings in downtown Las Vegas owned by property owners;
- The buildings were across the street from Las Vegas High School where high school students attended school and passed by;
- Two (2) of the above buildings property owners had owned since 1993;
- During property owners' ownership, City Code Enforcement had been involved in seven (7) abatement cases at the 233 South 6th Street property and thirteen (13) concerning the 232 South 7th property;

- None of the buildings had been occupied or maintained by property owners in over ten (10) years;
- All of the buildings were declared imminent hazards by City Respondents;
- Over the course of decades, property owners allowed these structures to decay and become safety and fire hazards and abandoned urban blight attractive only to vagrants, criminals, drug users, and the homeless;
- The repeat issues at the properties required intervention by both the City Fire Department and the Las Vegas Metropolitan Police Department on several occasions;
- In December 2018, two (2) separate fires broke out that endangered the lives of numerous homeless individuals that property owners allowed by their inaction to reside in an uninhabitable building;
- City Respondents then had to initiate a boarding up of these structures to protect the health, safety, and welfare of the community;
- City then gave property owners notice in January 2019 that they were operating these structures as a public nuisance that must be immediately remedied pursuant to LVMC 9.04.010. Property owners failed to fully and

timely do so, resulting in civil penalties, as well as the costs and fees, incurred for the emergency nuisance abatement / boarding up;

- The El Cid property was so dangerous that City required it to be demolished and so ordered property owners. Because property owners delayed and did not act, City Respondents were substantially along in the process of making arrangements to have the demolition done by its retained contractors before property owners finally took action to avoid City doing the demolition itself;

- Property owners did not have 24 hour security provided by a licensed security firm to prevent access into the substandard/dangerous building by the respective January 18 and January 22, 2021, deadlines for the two (2) parcels at issue; and

- Designee exercised discretion by not assessing additional daily penalties on the 615 E. Carson property.

The above evidence demonstrates the severity of the public nuisances and public dangers at the properties and the long history of public nuisance conditions that property owners permitted. The evidence also demonstrates that this case was not a garden variety, minor case. It justified Designee in assessing the penalties in the amount that he ordered.

As the Court considers the substantial evidence, it should also consider **property owners' burden of persuasion**. In the Irvine case, this Court described an appellant's burden to prove the extent of abuse of discretion necessary to overturn the administrative acts of a municipality:

> A city board acts arbitrarily and capriciously when it denies a license **without any reason for doing so**. In previous cases, e.g. *Henderson*, we have spoken in terms of there being a 'lack of substantial evidence before the council'; but the essence of the abuse of discretion, of the **arbitrariness or capriciousness** of governmental action in denying a license application, is most often found in an **apparent absence of any grounds or reason for the decision. 'We did it just because we did it**.'

Irvine, 102 Nev. at 279-80, 721 P.2d at 372-73 (emphasis added; internal citation omitted).

> If one seeking such a privilege can show that the city board . . . acted in a manner that was arbitrary **(baseless, despotic) or capricious (caprice: 'a sudden turn of mind without apparent motive; a freak, whim, mere fancy')**, then the board is said to be abusing its discretion.

Id., at 278-79 (emphasis added).

When Irvine is considered, it is evident that property owners did not meet their burden (which property owners admit on page 18 of their Second Amended Brief is **arduous)** to prove that Designee's decision to assess the penalties amount was done in "an apparent absence of any ground or reason" or done "just because." See, Irvine, 102 Nev. at 279-80, 721 P.2d at 372-73. Designee considered a compelling number and range of facts to justify the penalties assessed as set forth above.

The Irvine case demonstrates that for Designee's Decision to be arbitrary for purposes of judicial review, this Court would have to conclude that Designee's decision was baseless, despotic, a freak, mere fancy, or done "just because." See, Irvine, 102 Nev. at 279-80, 721 P.2d at 372-73. Designee set forth in his Decision a valid rationale for his assessment and it constituted, at the very least, one (1) valid basis for the penalties amount. Designee's rationale was something very far from a baseless, despotic, freak, or "just because" decision.

A finding that this Court may have reached a different determination on the amount of penalties to award if this Court was in Designee's position or was reviewing the record de novo would not suffice because that is not this Court's role on judicial review. See, Brocas, 109 Nev. at 582-83, 854 P.2d at 864. The record in this case is brimming with evidence that Designee decided in a fashion far from the indices of arbitrariness for purposes of judicial review.

The District Court must have decided that each Notice and Order requirement was equally important to addressing public nuisances -- which is not the case -- and that each required the same amount of effort and expense. No such evidence was in the record upon which the District Court could rely. So, the District Court's decision was flawed for being based upon information not in the record.

Tellingly, **property owners did not address or apply the applicable standard of review** and supporting case law in the argument section of their Second

Amended Opening Brief before this Court. (See, Appellants' Second Amended Opening Brief, pg. 23-26). They did recite the standard of review in their brief (Id., pg. 16-18), but conveniently they did not apply it at all in their argument. Application of the standard of review leads to the conclusion that Designee's decision was supported by substantial evidence and was not an abuse of discretion.

Property owner's argument is instead the argument that a party would make to the municipal administrative decision maker (i.e. Designee), which is not the appropriate argument on review to this Court. This Court's role on appeal is not to decide what result the facts mandate as a substitute for Designee. See, Brocas, 109 Nev. at 582-83, 854 P.2d at 864. And that is precisely what property owners argue for this Court to do. They argue that because they, in their opinion, timely completed three (3) of the four (4) requirements set forth in the Notice and Orders and then a fourth requirement late, that somehow they deserve to have zero penalties assessed. (As an aside, Property owners did not support that argument with any applicable law. Nothing in LVMC Chapter 9.04 (Nuisances) provides for such a result). But, that is not the appropriate issue for the Court to consider. Analyzing that argument and determining how this Court would rule given that scenario is not this Court's role on appeal of a petition for judicial review.

Instead, this Court's role is vastly different than Designee's. This Court's role is to decide if Designee's decision was supported by substantial evidence. As

detailed above, Designee's penalty assessments were supported by substantial evidence.

As a result, and based upon the presumption that Designee's decision was valid per McKenzie, 77 Nev. at 242, 362 P.2d at 270, property owners' argument to reverse the penalties fails and should be denied.

D. DESIGNEE'S ASSESSMENTS FOR EMERGENCY BOARDING CONTRACTOR FEES AND ADMINISTRATIVE FEES WERE PROPER AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. El Cid Property

Property owners argue that the $18,698 in boarding costs from contactor CGI that City Respondents incurred for the El Cid property imminent hazard boarding and related 15% administrative fee per LVMC 9.04.080(C) were improperly assessed by Designee because the El Cid property was not declared an imminent hazard before the emergency boarding abatement.

But, property owners are confusing the two (2) separate imminent hazard declarations as explained below. City Respondents did timely and properly declare the property an imminent hazard before boarding.

LVMC 9.04.080(D) provides in pertinent part:

> If, in the opinion of the City Manager, or a duly authorized representative, the condition of a property constitutes an imminent hazard, the City Manager or representative may order immediate abatement of the hazard without notice. . . . Before ordering abatement under this Section, the City Manager or representative

> shall first obtain the concurrence of at least one other City or public agency official. City and public agency officials that may concur with or request a designation of imminent hazard pursuant to this Section include, without limitation, the City Manager; the Las Vegas Metropolitan Police Department; the Southern Nevada Health District; and the Departments of Fire and Rescue, Public Works, Planning, Public Safety, and Parks and Recreation. . . . Any costs and expenses incurred, and any fees imposed, in connection with the removal of an imminent hazard may be assessed against the property or the owner in accordance with the procedure described in Section 9.04.100.

In this case, City Respondents deemed the property an imminent hazard on **December 17, 2018** due to "imminent hazard to people and property," the Department of Fire and Rescue and Las Vegas Metropolitan Police Department concurred, so City Respondents hired a contractor to perform emergency action to **board the property** pursuant to LVMC 9.04.080(D). (Volume I, 0098-0100; Volume IV, 0309).

Property owners argue that the record does not indicate that City Respondents declared the El Cid an imminent hazard before the emergency boarding abatement and that the City Manager did not declare it an imminent hazard until January 31, 2019. (Appellants' Second Amended Brief, pgs. 26-29). First, the preceding paragraph demonstrates that City Respondents (who are duly authorized representatives of the City Manager) did declare the property an imminent hazard before boarding. And, property owners admit in their Second Opening Brief that the

"Code Enforcement Reports states that 'Fire and Metro'" have deemed the property is (sic) an imminent hazard,' on December 17, 2018." (Id., pg. 27).

Second, property owners appear to confuse the first imminent hazard that was declared on December 17, 2018, because of the fire on that date with the second imminent hazard declaration that the City Manager issued on **January 31, 2019**, to require the building to be **demolished**. (Volume I, 0065). The two (2) separate imminent hazard declarations concern two (2) separate situations, both of which City Respondents handled properly and in accordance with LVMC 9.04.080(D). As a result, property owners' arguments fail.

Based upon the above and the presumption that Designee's decision was valid per McKenzie, 77 Nev. at 242, 362 P.2d at 270, the record provides ample support for this Court to determine that substantial evidence supports Designee's Decision to impose the boarding expenses and fifteen percent (15%) assessment pursuant to LVMC 9.04.080.

2. MI Property

Property owners argue that for the 615 E Carson property (MI property), City Respondents' $20,000.00 in hard costs paid to contractor Junkman to emergency board the property following a fire should not have been approved by Designee because the record does reflect an imminent hazard declaration.

But, property owners waived the right to so argue because they cut short the Designee hearing. (Volume III, 0234, line 2615 – 0235, line 2669). They did so before City Respondents could provide full information about the 615 E Carson property, including the on-site concurrence by the Las Vegas Fire & Rescue Department and Las Vegas Metropolitan Police that the property was in imminent hazard which required emergency boarding. (Id.). Because of the imminent hazard, City Respondents were justified per LVMC 9.04.080(D) in having a contractor emergency board the structure. (Id.).

The primary topics of discussion during the hearing before property owners ended it early were the other two (2) properties, 233 South 6th Street and 232 South 7th Street. Little was discussed about 615 E. Carson prior to property owners unexpectedly announcing after a break in the hearing that they were satisfied with what they had presented and would have the same arguments for "the other property." (Id., 0234, lines 2615-2616).

In addition, the record does indicate that the Fire Department considered the building an imminent hazard because right after the fire, they caused their contractor to board all first floor openings to keep squatters out, leaving the second floor openings open. (Volume II, 0154). The Fire Department's decision to board could only have been based upon a determination of imminent hazard. Therefore, substantial evidence -- which is all that is required per Laughlin, 111 Nev. at 558,

893 P.2d at 384 -- exists to support Designee's decision to assess the hard costs for the emergency abatement per LVMC 9.04.080(D).

3. Property Owners Waived any Argument regarding the "Back up" for Boarding Expenses Assessments by Failing to Raise it Below. In the Alternative, Substantial Evidence Supports the Designee's Imminent Hazard Boarding Assessments.

Property owners erroneously assert that both the El Cid imminent hazard boarding expense assessment based upon the CGI invoice and the MI property imminent hazard boarding expense assessment based upon the Junkman invoice are unsubstantiated.

But, property owners' claims were not argued to the District Court, so they should not be considered by this Court.

> A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.

Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

"Arguments raised for the first time on appeal need not be considered." Montesano v. Donrey Media Grp, 99 Nev. 644, 650 n.5, 668 P.2d 1081, 1085 (1983).

Because property owners did not raise their argument about unsubstantiated assessments below, this Court should not consider said claims.

Should this Court not so rule, the proper issue for this Court to consider is whether substantial evidence supports Designee's Decision to assess the boarding

expenses -- not whether this Court's review of the evidence differs from that of Designee. See, Laughlin, 111 Nev. at 558, 893 P.2d at 384.

a. El Cid

Regarding the El Cid assessment, Designee considered a thorough and detailed contractor invoice (CGI) which was dated, included the job site and scope of work, and which listed the following items separately with the applicable unit price for each: number of sheets of plywood, screws/bolts, 2 days use of a boom lift, emergency call out fee, the number of hours of labor, and the number of hours of supervision labor, with a tally showing the total invoice amount of $18,698. (Volume VII, 0498).

While such thoroughness is not required to support Designee's Decision, City Respondents can hardly imagine a more thorough and detailed invoice and certainly not one that should be considered unsubstantiated as property owners allege. Instead, it demonstrates that Designee's Decision to assess for the imminent hazard boarding was supported by substantial evidence as required by Laughlin, 111 Nev. at 558, 893 P.2d at 384.

Property owners' claim that the plywood cost was substantially higher than market rate (Appellants' Second Amended Opening Brief, pg. 28) is unsupported by evidence with foundation in the record. The Court's review of Designee's decision "is limited to the record made before the City." Laughlin, 111 Nev. at 558, 893 P.2d

at 384. Therefore, property owners' plywood cost assertion should not be considered.

One of property owners' legal counsel, without foundation testimony that he was a contractor or person otherwise knowledgeable about the costs of lumber on the date of the emergency boarding, did state his belief about the cost of plywood at the Designee Hearing. (Volume III, 0196, lines 930-931). But, that certainly does not render Designee's Decision as unsupported by substantial evidence. Property could have brought in actual evidence of plywood cost to the Designee hearing, but they failed to do so. It was entirely reasonable for Designee to approve the CGI invoice – which was thorough, detailed, and from one of City's approved contractors for work provided on an emergency basis — and not disregard it based upon the unsupported claim from one of property owner's attorneys.

And even if property owners' claim about the cost of plywood was considered and even if it was accurate (which City Respondents vigorously oppose for the lack of foundation as set forth above), that alone does not justify determining that Designee's Decision was unsupported by substantial evidence. For an emergency situation, City Respondents did not have the luxury of obtaining competing bids and vetting them. Instead, as City Respondent Vicki Ozuna testified at the Designee Hearing, City Respondents chose one of their approved contractors randomly, were provided a cost, and had the contractor proceed without the opportunity to negotiate

price. (Volume III, 0198, line 1033 – 0199, lines 1040). So, property owners have not met what they described as their arduous burden to prove that Designee acted arbitrarily and capriciously by approving the imminent hazard boarding expenses.

Property owners' argument that lack of proof of payment of both invoices by City Respondents somehow renders Designee's assessments for those invalid also fails as once again property owners attempt to reargue their case to this Court instead of properly addressing the substantial evidence standard of review per Laughlin, 111 Nev. at 558, 893 P.2d at 384. Property owners produced no evidence at the Designee Hearing nor even alluded to the notion that City did not pay the invoices. Instead, they argue that proof of payment was not provided. Evidence exists that City Respondents did pay the invoices — each has a handwritten notation "reciept (sic) #" added on the bottom, which City Respondents assert must have been added by City Respondents when paying the invoices. (Volume VII, 0498; and Volume I, 0072).

But, it is irrelevant whether the invoices were paid or not, and it is not a LVMC 9.04.100 requirement that City Respondents so prove. It is uncontroverted that City Respondents still incurred the boarding expense as a result of property owners allowing their properties to become imminent hazards. Therefore, substantial evidence -- which is all that is required for Designee's Decision to be

affirmed per Laughlin, 111 Nev. at 558, 893 P.2d at 384 -- supports Designee's Decision to assess the out of pocket expenses that City Respondents incurred.

b. MI Property

Regarding the MI assessment, Designee's assessment for imminent hazard boarding fees was also supported by substantial evidence as required by Laughlin, 111 Nev. at 558, 893 P.2d at 384.

Designee considered the contractor's (Junkman) invoice which was dated, included the job site, and a total invoice amount of $20,000. (Volume I, 0072). It includes a handwritten notation "receipt (sic) #502970" which is likely City Respondents' notation that the invoice was paid. (Id.).

Unfortunately, the Junkman invoice in the record is a poor copy and appears to have content that is almost completely faded out, which actual content Designee was likely to have considered on a clearer copy. (Volume I, 0072).

Designee also heard testimony from City Respondent Vicki Ozuna at the Designee Hearing that the boarding was extensive (Volume I, 0178, lines 93-96), which supports the amount of the invoice especially when Designee had the CGI invoice for similar work at property owners' neighboring property, El Cid, for a similar amount: $18,698.

And, property owners have not challenged that City Respondents had Junkman perform extensive boarding services at the property as alleged.

Based upon the above factors together with the presumption that Designee's decision is valid per McKenzie, 77 Nev. at 242, 362 P.2d at 270, property owners failed to meet their arduous burden to prove that Designee's Decision to assess for the imminent hazard boarding expenses was not supported by substantial evidence as required by Laughlin, 111 Nev. at 558, 893 P.2d at 384.

E. SHOULD THIS COURT DISAGREE WITH CITY RESPONDENTS AND DECIDE THAT DESIGNEE ABUSED HIS DISCRETION, THE APPROPRIATE REMEDY IS TO REMAND TO THE DESIGNEE TO RE-OPEN THE MATTER.

Because this Court's jurisdiction on appeal of a Petition for Judicial Review is to remand, set aside, or affirm, if this Court decides that Designee abused his discretion so that his Decision should not be affirmed in whole, this Court should remand the matter to the Designee rather than determine the amount of out of pocket expenses and/or penalties.

This Court's role on judicial review is a limited one. It is not to rule as an appellate court might do in other types of cases and substitute its judgment or determination of the proper amount of penalties. Instead, as NRS 233B.135[2] provides:

2 While Nevada's Administrative Procedure Act NRS 233B is not applicable to this case, Nevada courts that have analyzed Petition for Judicial Review cases nevertheless used and applied it provisions, such as the scope of review. See Brocas, 109 Nev. 579; and Las Vegas Metropolitan Police Dept. v. Jenkins, 131 Nev. 1310 (2015) (unpublished opinion).

> The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. **The court may remand or affirm the final decision or set it aside in whole or in part** if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
> …
> (f) arbitrary or capricious or characterized by abuse of discretion.

NRS 233B.135(3) (emphasis added).

As the Nevada Supreme Court held in a Petition for Review case involving a district court's review of Board of Medical Examiners' disciplinary proceedings:

> NRS 630.352(2) empowers the Board, and not a reviewing court, to impose specific sanctions . . . . Pursuant to NRS 233B.140(5) [Nevada's Administrative Procedure Act], **remand to the Board is necessary here in order for the Board to determine what sanction, if any, should be imposed** . . . .

Board of Medical Examiners v. Potter, 99 Nev. 162, 166, 659 P.2d 868, 871 (1983) (emphasis added).

The Nevada Supreme Court added that the "district court erred in substituting its judgment for that of the Board." Board of Medical Examiners, 99 Nev. at 165, 659 P.2d at 870. The court instead ordered that the matter be remanded to the agency to determine the sanction.

Based upon the above, if this Court determines that Designee abused his discretion, this Court should remand this case to the Designee to re-open the hearing for testimony and/or argument and then issue a revised decision.

VIII.

CONCLUSION

Property owners have not met their self-described "arduous burden" to overturn Designee's Decision by demonstrating a lack of substantial evidence to support the Decision. Rather, as City Respondents have set forth above, substantial evidence supports each of the challenged aspects of Designee's Decision — the standing, proofs of mailing issue, penalties amount, and costs and assessments.

As a result, City Respondents respectfully request that this Court deny each of property owners' claims and not overturn Designee's Decision.

For purposes of property owners' appeal, City Respondents respectfully request that this Court affirm the District Court's order to the extent it affirmed Designee's assessment of the full amount of out of pocket expenses. City Respondents also respectfully request via their Cross-Appeal (see below) that this Court overturn the District Court's order to the extent it reduced Designee's assessment of penalties and instead affirm Designee's penalty assessment in full.

Should this Court not agree with City Respondents' requests, City Respondents respectfully request that this Court remand this matter to Designee to re-open the hearing for testimony and/or argument and to issue a revised decision.

OPENING BRIEF ON CROSS-APPEAL

To avoid duplication and because City Respondents' argument is substantially related to its arguments above, City Respondents hereby incorporate by reference below several sections from their Answering Brief on Appeal above.

IX.

JURISDICTIONAL STATEMENT

City Respondents hereby incorporate by reference their Jurisdictional Statement set forth above in § I above.

X.

ROUTING STATEMENT

City Respondents hereby incorporate by reference their Routing Statement set forth in § II above.

XI.

ISSUES PRESENTED FOR REVIEW

City Respondents hereby incorporate by reference their Issues Presented for Review set forth in § III above.

XII.

STATEMENT OF THE CASE

City Respondents hereby incorporate by reference their Statement of the Case set forth in § IV above.

XIII.

STATEMENT OF FACTS

City Respondents hereby incorporate by reference their Statement of Facts set forth in § V above.

XIV.

SUMMARY OF THE ARGUMENT

As set forth above in City Respondents' Answering Brief, the City Council Designee's decision to assess daily civil penalties based upon property owners' failure to abate code enforcement, public nuisance, and imminent hazards at their properties was amply supported by evidence. Such evidence amounted to much more than the rather minimal "substantial evidence" standard. Therefore, Designee's penalties assessment was not an abuse of discretion.

Nevertheless, the District Court disregarded well established judicial review case law that a reviewing court is not to reweigh the evidence and substitute its judgment for that of the Designee. The District Court reweighed and considered the evidence and then substituted its judgment that the penalties should be reduced by a certain percent. This Court should overturn the District Court and affirm Designee's Decision without reduction in the penalties because the Decision is supported by substantial evidence.

XV.

ARGUMENT

City Respondents agree with the District Court's ruling to affirm Designee's assessment of out of pocket expenses in full. But, City Respondents disagree with the District Court's ruling to reduce Designee's assessment of daily civil penalties by seventy-five percent (75%). The District Court improperly reweighed the evidence and substituted its judgment for that of Designee's and determined that property owners' alleged compliance with three (3) of the four (4) requirements from the Notice and Order should result in a penalties reduction.

A. THE DISTRICT COURT SHOULD HAVE AFFIRMED THE DESIGNEE'S PENALTIES ASSESSMENT BECAUSE IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Because City Respondents' arguments on cross-appeal regarding the penalties assessment are nearly identical to, and rely upon the same legal authority as, their arguments above in their Answering Brief, City Respondents incorporate by reference their arguments in § VII. (C) above concerning Designee's penalties assessment.

As a brief summary of City Respondents' argument, the detailed and instructive principles from Brocas are worth repeating:

> This court's role in reviewing an administrative decision is identical to that of the district court: **to review the evidence presented to the agency in order to determine whether the agency's decision was**

> **arbitrary or capricious and was thus an abuse of the agency's discretion**. United Exposition Service Co. v. SIIS, 109 Nev. 421, 851 P.2d 423 (1993); Titanium Metals Corp. v. Clark County, 99 Nev. 397, 399, 663 P.2d 355, 357 (1983). . . . It is well recognized that this court, in reviewing an administrative agency decision, **will not substitute its judgment** of the evidence for that of the administrative agency. State. Dep't of Mtr. Vehicles v. Becksted, 107 Nev. 456, 458, 813 P.2d 995, 996 (1991). This court is limited to the record below and to a determination of whether the administrative body acted arbitrarily or capriciously. State Emp. Sec. Dep't v. Weber, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (1984). The central inquiry is whether **substantial evidence** in the record supports the agency decision. SIIS v. Christensen, 106 Nev. 85, 87-88, 787 P.2d 408, 409 (1990). Substantial evidence is that which a reasonable mind might accept as **adequate** to support a conclusion.

Brocas, 109 Nev. at 582-83, 854 P.2d at 864 (emphasis added).

Applying the above from Brocas, for Designee's penalties assessment to be affirmed by this Court on judicial review, his Decision must be supported by substantial evidence. In making that determination, this Court is not to reweigh the evidence nor substitute its judgment for that of Designee. Instead, this Court is to determine if there was a valid basis (even just one) for Designee's assessment of penalties. In this case, as set forth above in the Statement of Facts and as summarized in § VII. (C), ample evidence supported Designee's decision to assess penalties as he did. Such evidence was much more than the relatively low threshold that was required, which was just substantial evidence. Therefore, Designee's

penalties assessment should be affirmed and the District Court's decision to the contrary overturned.

The District Court's decision to reduce penalties was error given the applicable standard of review. The District Court determined that the penalties should be reduced by seventy-five percent (75%) because property owners purportedly completed three (3) of the four (4) requirements set forth in the Notice and Orders. The District Court must have decided that each requirement was equally important to addressing public nuisances, which is not the case as coming with a demolition plan and getting it approved by City Respondents is obviously much more entailed than removing a couple trees, and that each required the same amount of effort and expense. No such evidence was in the record upon which the District Court could rely. So, the District Court's decision was flawed for being based upon information not in the record.

But, first and foremost, it was not the District Court's role on judicial review to substitute its decision making for that of Designee. The District Court should have determined -- and limited its review to deciding -- if the Designee's decision was supported by substantial evidence. Because the District Court did not so limit its decision, it committed error. City Respondents urge this Court to overturn the District Court and confirm the Designee's Decision regarding penalties because it was supported by substantial evidence.

XVI.

CONCLUSION

Designee's penalties assessments were supported by substantial evidence. On petition for judicial review, the District Court should not have reweighed the evidence and substituted its judgment for the Designee's as to the proper amount of penalties. Therefore, the District Court erred by reducing the penalties by seventy-five percent (75%).

City Respondents respectfully request that this Court overturn the District Court's order to the extent it decreased Designee's assessment of penalties and instead affirm Designee's Decision in full.

Should this Court not agree with City Respondents' request, City Respondents respectfully request that this Court remand this matter to Designee to re-open the hearing for testimony and/or argument and to issue a revised decision.

DATED this 16th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font size.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 14,608 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2021, I served a true and correct copy of the foregoing RESPONDENTS/CROSS-APPELLANTS' COMBINED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL through the electronic filing system of the Nevada Supreme Court, (or, if necessary, by United States Mail at Las Vegas, Nevada, postage fully prepaid) upon the following:

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