Case No. 84221

IN THE SUPREME COURT OF THE STATE OF NEVADA

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, FORE STARS LTD., a Nevada limited-liability company,

Real Parties in Interest.

Eighth Judicial District Court, Clark County, Nevada
Case No. A-17-758528-J
Honorable Timothy C. Williams, Department 16

ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF CERTIORARI

LAW OFFICES OF KERMITT L. WATERS
KERMITT L. WATERS, ESQ., NBN 2571
kermitt@kermittwaters.com
JAMES J. LEAVITT, ESQ., NBN 6032
jim@kermittwaters.com
MICHAEL SCHNEIDER, ESQ., NBN 8887
michael@kermittwaters.com
AUTUMN L. WATERS, ESQ., NBN 8917
autumn@kermittwaters.com
704 S. 9th Street, Las Vegas, Nevada 89101
Telephone: (702) 733-8877/ Facsimile: (702) 731-1964
Attorneys for 180 Land Co, LLC and Fore Stars Ltd.

NRAP 26.1 DISCLOSURE

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

Real Parties in Interest 180 LAND CO, LLC ("180 Land"), a Nevada limited liability company, and FORE STARS, Ltd. ("Fore Stars"), a Nevada limited liability company, (collectively "Landowners"), are not publicly traded companies, nor do Landowners have more than 10% of stock owned by a publicly traded company. These companies are effectively owned by two sets of principals, 50% by principals Paul and Vickie DeHart and 50% by principals Yohan and Merav Lowie, through various entities and family partnerships.

Landowners were represented in the District Court by the Law Offices of Kermitt L. Waters and are represented in this Court by the same.

DATED this 8th day of March, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ James J. Leavitt
Kermitt L. Waters, Esq. Bar No. 2571
James J. Leavitt, Esq., Bar No. 6032
Michael Schneider, Esq., Bar No. 8887
Autumn Waters, Esq., Bar No. 8917
Attorneys for 180 Land Co, LLC and Fore Stars Ltd.

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I. INTRODUCTION

The City of Las Vegas' (hereinafter "City") writ petition – which inappropriately seeks a stay of its constitutional and statutory obligation to pay the Landowners' just compensation award – is another delay tactic which should be summarily denied. Indeed, the Landowners were forced to initiate the underlying inverse condemnation action after the City took their private property without just compensation. Since then, the City has unduly delayed the case *for years* to avoid paying anything, and even worked with adjacent property owners to do so, all of which has had an oppressive effect on the Landowners, nearly destroying their livelihood. Now that the Landowners' have finally been awarded a $34 million judgment for the taking, the City is again trying to delay the matter to postpone indefinitely the payment of just compensation. For several important reasons the City is not entitled to a stay. As such, extraordinary relief is not warranted.

Specifically, the district court entertained extensive argument and concluded that mandatory statutes in NRS Chapter 37 compel prompt payment of the just compensation award. *See* NRS 37.140 (damages *must* be paid within 30 days after judgment); NRS 37.150 (award deposited in court); NRS 37.170 (plaintiff must pay award as a precondition to appeal while in possession of the taken property). Interpreting NRS 37.170, this Court held in *State v. Second Jud. Dist. Ct.,* 75 Nev. 200 (1959), that the government must pay a just compensation award as a

precondition to appeal. Otherwise, the government would have the power not only to take another's property, "but also to postpone indefinitely the payment of just compensation for it," a power which this Court has recognized as too much, because it "may well have an oppressive effect." *Id.* at 205. And, despite the City's erroneous contention otherwise, it is well established in Nevada that these mandatory Chapter 37 statutes apply to both direct condemnation and inverse condemnation cases – as both cases are governed by the same rules and principles. *See County Clark v. Alper,* 100 Nev. 382, 391 (1984) (applying NRS Chapter 37 in inverse condemnation proceedings); *see also Argier v. Nevada Power Co.,* 114 Nev. 137, 140 fn. 2 (1998) ("[T]his court has held that the same rules that govern direct condemnation actions apply in inverse condemnation actions as well.").

Additionally, specific statutes take precedence whenever any conflicts cannot be harmonized. *See Doe v. La Fuente, Inc.,* 2021 WL 772878, at *24-25 (Feb. 25, 2021) (unpublished disposition) (the general/specific canon instructs that when two statutes conflict, "the more specific statute will take precedence, and is construed as an exception to the more general statute") (citation omitted); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court,* 124 Nev. 193, 200-01 (2008) (noting that "a statute's provisions should be read as a whole . . . and, when possible, any conflict is harmonized"). The provisions of NRS Chapter 37 apply specifically to inverse condemnation cases and, therefore, take precedence over the more general NRCP

62. For the same reason, NRAP 8 is likewise inapplicable here. Indeed, the City concedes as much by filing a writ petition rather than a motion for stay. The district court therefore properly denied the City's request for a stay and this Court should do so as well.

Even if the general NRAP Rule 8 were applicable (which it is not), a stay is not warranted under the factors set forth in NRAP 8(c). The object of the appeal will not be defeated simply because the possibility exists that the City may have to seek to get back the just compensation award. Nor does such a possibility constitute irreparable harm to the City. *See State v. Second Jud. Dist. Ct.,* 75 Nev. at 205 (seeking to get back a just compensation award paid to a landowner is not an unjust burden on government entities). By contrast, to postpone indefinitely the payment of just compensation constitutes irreparable harm to the Landowners. *See id.* (recognizing oppressive effect of undue delay in payment of just compensation). Similarly, the City's doomsday assertion that it will be forced to approve every future development application in the absence of a stay is nothing more than unsubstantiated hyperbole. Finally, Nevada law and substantial evidence support the district court's decisions so the City is not likely to prevail on appeal. The City's writ petition should be denied accordingly.

II. FACTS SUPPORTING DENIAL OF WRIT PETITION

A. Prefatory Factual Statement.

The City's factual statements to this Court belie the record and uncontested evidence presented at trial. In regard to the Landowners' property rights in the 35 Acre Property, the City falsely asserts that the property had a binding PR-OS (parks, recreation, open space) master plan land use designation with no residential development rights. City Writ, 8-9, 25-27. In regard to the taking, the City falsely claims there could never have been a taking, because the City merely denied one application to change that binding PR-OS to a residential use. Id. The City also misrepresents that this is merely a "regulatory taking" case. Id.

On property rights, *all three* relevant City departments (City Attorney, City Planning, City Tax Assessor) rejected the arguments the City now makes. As set forth below, these three City departments uniformly agreed that: (1) the 35 Acre Property has at all times been zoned R-PD7; (2) the R-PD7 zoning gives the Landowners the property right to develop up to 7 residential units per acre; (3) there is no PR-OS master plan land use designation on the property; and, (4) even if there was a PR-OS master plan land use designation, the R-PD7 residential zoning takes precedence. This is consistent with Nevada law.[1]

[1] In fact, this Court has already weighed in on this issue having rejected the same PR-OS argument presented to it in case no. 75481. 4 PA 0623-0629.

On the taking, the record demonstrates that this is not just a "regulatory" takings case where the City merely denied one application. Instead, the City acted at the direction of surrounding property neighbors (who did not want the Landowners to use their property) to render the Landowners 35 Acre Property useless and valueless. The City denied ***four*** applications to use the 35 Acre Property (not just one application), refusing to allow the Landowners to fence or even obtain access to their own property. The City then went on the offensive. First, the City announced to the public and the surrounding neighbors that the Landowners' private property was theirs to use for recreation and open space. Second, the City adopted two City Bills that: (1) target only the Landowners' property; (2) made it impossible to develop or use the property; and (3) forced the Landowners to allow surrounding neighbors to enter onto their private property to use it for personal recreation and to further preserve it for public use. The City's actions were so egregious that, after four days of hearings, the district court ruled form the bench that it was "clear" a taking occurred and ordered payment of just compensation. These undisputed facts demonstrate that the City will not prevail on appeal.

B. Procedural Background.

This case has been litigated for over *four* years, largely due to the City's delay tactics. The district court properly followed Nevada's three-step mandatory procedure for resolving this inverse condemnation case, which is: (1) determine the

property interest; (2) determine if that property interest was taken; and (3) if so, determine just compensation for the taking. *ASAP Storage v. City of Sparks*, 123 Nev. 639, 642 (2007). First, the district court decided the Landowners' property interest based on the R-PD7 residential zoning, which includes the right to develop residential units. Second, the district court held a four-day evidentiary hearing on the takings issue and concluded it was "clear" the City has taken the Landowners' property. Third, the district court held a bench trial and post-trial hearings that resulted in an award of just compensation, which includes the value for the land taken, costs, attorney fees, and prejudgment interest. Nev. Const. art. 1, section 22(4) ("Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred."). The district court then followed the mandatory rules in NRS 37.140, NRS 37.170, and *State v. Second Jud. Dist. Ct.,* to order payment of the sums assessed within 30 days of the final judgment and as a precondition to appeal.

In particular, the following relevant district court orders were entered after exhaustive briefing and extensive oral argument and include all of the district court findings on the property interest, take, and just compensation issues:

> NOE FFCL Regarding Plaintiff Landowners' Motion to Determine Property Interest (FFCL Re: Property interest) 2 PA 0288-0295;
>
> FFCL Granting Landowners' Motion to Determine Take (FFCL Re: Take) 5 PA 0858-910

FFCL on Just Compensation ("FFCL Re: Just Compensation") 5 PA 0931-0950

Order Granting Landowners' Motion for Attorney Fees ("Order Re: Attorney Fees") 26 RA[2] 05582-05592; and

FFCL Denying City's Motion for Immediate Stay of Judgment (FFCL Re: Stay) 6-PA1128-1139

As is established below, these relevant orders provide detailed findings based on the evidence presented and the law in the state of Nevada.

C. Facts Relevant to The Property – Its Residential Zoning and Land Use Designation.

This case involves the taking of the Landowners' 35 Acre Property. The undisputed facts relevant to the property interest the Landowners had in this 35 Acre Property, and which the district court relied on, show the 35 Acre Property has always been zoned for residential development and resoundingly reject the City's invented PR-OS argument.

In 1996, Landowner representative, Yohan Lowie ("Lowie"), began working with the William Peccole family ("Peccole") to develop lots within the Queensridge Common Interest Community (Queensridge CIC). 4 RA 00714:25-26. Lowie, along with his current partners, ultimately built approximately 40% of the custom homes within the Queensridge CIC. 4 RA 00714:19-21. The 35 Acre Property at issue in this case is part of a larger 250 acre property ("250 Acres") and is located

[2] Real Parties in Interest Appendix ("RA"). The RA also includes the relevant exhibits the district court relies on and references in the FFCLs.

adjacent to the Queensridge CIC, within the boundaries of the City. The entire 250 Acres was originally owned by Peccole and has never been a part of the Queensridge CIC. 3 RA 00535:1-2, 4 RA 00744-00745, 4 RA 00880.

In or about 2001, Lowie was informed by Peccole that the 250 Acres (including the 35 Acre Property) was zoned RPD-7 and intended for residential development. 4 RA 00715:1-2, 4 RA 00894 . Lowie further learned that Peccole had never imposed any restrictions on the use of any part of the property and that it was intended for eventual development. Id. That same year, the Landowners confirmed through counsel and the City that the 250 Acres was residentially zoned thereby providing rights to develop. 4 RA 000715:11-16. According to the Covenants, Conditions and Restrictions (the "CC&Rs) of the Queensridge CIC, the surrounding neighbors could not interfere with the development of the 250 Acres as the 250 Acres was zoned for residential development and the CC&Rs clearly provide that the 250 Acres is "not a part" of the Queensridge community and was slated for "future development," which is consistent with what Peccole told Lowie. 4 RA 00745, 4 RA 00858, 4 RA 00880, 4 RA 00715:2-7, 5 PA 0865:11-21.

In or around 2005, Peccole and the Landowners principals entered into a series of complicated transactions wherein the Landowners principals obtained the right to purchase all five parcels that encompassed the 250 Acres. 5 PA 0955-0958, 4 RA 00722-00723. Both parties to these transactions confirmed in depositions that these

transactions resulted in the Landowners acquiring the right to purchase the 250 Acres, with the Landowners confirming over $100 million in consideration was given in the transactions for this right. *Id.* The district court excluded the 2005 purchase price from its valuation determination because it was too remote and the City offered no expert to testify to its relevance. *Id.*

Over the next 10 years, and prior to closing on the right to acquire the 250 Acres, the Landowners conducted further due diligence as follows:

2006 – City top planning official Robert Genzer confirmed the 250 Acres is zoned R-PD7 for residential development and there are no restrictions to development. 5 PA 0865:22-24

2014 – City top planning officials Tom Perrigo and Peter Lowenstein performed a three-week study and confirmed the 250 Acres is zoned R-PD7 for residential development, zoning trumps everything, and the owner of the property can develop under the R-PD7 zoning. 5 PA 0866:1-6.

2014 – Critically, the City, itself, issued an official Zoning Verification Letter to the Landowners, stating the 250 Acres is zoned R-PD7 for development of up to 7 units per acre. 5 PA 0866:7-14

Following years of extensive due diligence, primarily performed by the City itself, the Landowners exercised their right to purchase the 250 Acres and made the *final payment,* acquiring the 250 Acres in March of 2015 by purchasing the entity

Fore Stars Ltd which owned the five parcels that comprised the property. 4 RA 00722-00723.

After the acquisition, the City continued to confirm the residential use:

2016 – Veteran City Attorney Brad Jerbic - "Council gave hard zoning to this golf course [250 Acres], R-PD7, which allows somebody to come in and develop." 5 PA 0866:19-22

2016 – Head City planner Peter Lowenstein – "a zone district gives a property owner property rights." 5 PA 0866:23-24.

2017 – City Planning recommended approval to develop the 250 Acres because the proposed residential development "conforms to the existing zoning district requirements." 5 PA 0867:5-6.

2017 – City Planning recommended approval to develop the 35 Acre Property because the proposed residential development is "in conformance with [] Title 19 [City Zoning Code]." 5 PA 0867:7-12.

2016 – the City Tax Assessor[3] determined the "lawful" use of the 250 Acres pursuant to NRS 361.227(1) must be based on the "Zoning Designation … R-PD7" which is "residential" and *has taxed the Landowners over $1 million per year (for*

[3] City of Las Vegas Charter, Sec. 120 provides, "[t]he County Assessor of the County is, ex officio, the City Assessor of the City."

the 250 Acres) based on this residential zoning and "lawful use." 5 PA 0867:13-0868:2.

As a litigation defense, the City now claims the undisputed R-PD7 residential zoning is irrelevant. The City has invented a new argument that there was a "PR-OS" (parks, recreation, open space) master plan land use designation on the 250 Acres and this master plan land use designation takes precedence over the R-PD7 residential zoning. City Writ 8-11, 25-27. As explained above, all relevant City employees / departments (City Attorney, City Planning, City Tax Assessor) rejected this invented "PR-OS" argument, opining the R-PD7 residential zoning governs the use of the 250 Acres. The City's PR-OS argument is even rebutted by the City's own Land Use & Neighborhoods Preservation Element of the Las Vegas 2020 Master Plan and the newly adopted City of Las Vegas 2050 Master Plan, all of which establish that if zoning and a master plan land use designation are inconsistent, zoning supersedes and is "the law." 17 RA 03670, 16 RA 03396. And, this Court in an Order of Reversal also flatly rejected this PR-OS argument when it was presented by the abutting neighbors. 4 PA 0623-0629.

The following are a few more times the City's invented PR-OS argument was flatly rejected by the City itself.

Longtime City Attorney Brad Jerbic rebutted the PR-OS argument on the record at a City Council meeting:

"If I can jump in too and just say that everything Tom [Tom Perrigo – Director of City Planning] said is absolutely accurate. The R-PD7 preceded the change in the General Plan to PR-OS. *There is absolutely no document that we could find that really explains why anybody thought it should be changed to PR-OS*, except maybe somebody looked at a map one day and said, hey look, it's all golf course. It should be PR-OS. I don't know." 3 RA 00582, 2 RA 00407:16-20.

The City submitted a pleading under Rule 11, arguing to Judge Crockett in relation to a different parcel that makes up the 250 Acres:

"In the hierarchy, *the land use designation [master plan] is* ***subordinate*** *to the zoning designation. . ."* 5 RA 00942:4-12.

In an unrelated inverse condemnation case, the City Attorney's Office submitted a pleading under Rule 11 that the City Master Plan, "was a routine planning activity that had *no legal effect* on the use and development" of properties and "in the hierarchy, the land use designation [on the City Master Plan] is subordinate to the zoning designation." 5 PA 0868:8-12, 16 RA 03583-03589. (emphasis added). In the unrelated inverse condemnation case, two City attorneys submitted affidavits that, "the Office of the City Attorney has consistently advised the City Council and the City staff that the City's Master Plan *is a planning document only.*" 5 PA 0868:13-15, 16 RA 03589:10-13, 16 RA 03592:10-13

City Planner Tom Perrigo testified that, "if the land use [Master Plan] and the zoning aren't in conformance, then the zoning would be the higher order entitlement." 5 PA 0868:16-18. And, City Attorney Brad Jerbic stated, "the rule is the hard zoning, in my opinion, does trump the General Plan [Master Plan] designation." 5 PA 0868:5-7.

Finally, veteran land use attorney, Stephanie Allen, provided a declaration that, "During my 17 years of work in the area of land use, it has always been the practice that zoning governs the determination of how land may be used. The master plan land use designation has always been considered a general plan document. I do not recall any government agency or employee ever making the argument that a master plan land use designation trumps zoning." 5 PA 0868:19-24, 17 RA 30817-03823.

Accordingly, there can be no dispute that the 35 Acre Property carries a zoning designation of residential planned development (R-PD7), zoning determines the property rights, these property rights provide that the Landowners had the right to use their property for this residential use, and the City's PR-OS argument is baseless.

D. Facts Relevant to the City's Taking Actions.

1. Development Application Denials.

Once the Landowners closed on the R-PD7 zoned 250 Acres in 2015, they immediately went to work to develop. However, in or around December of 2015, a

representative of the surrounding property owners demanded that the Landowners relinquish 180 acres plus water rights in exchange for the ability to use their remaining 70 acres. 12 RA 02634, 5 PA 0871:11-0872:3. The representative threatened that if the Landowners refused to give up the 180 acres plus water rights, they would prevent all development of the 250 Acres through political connections with the City. *See id*. Within that same time frame a City Councilman repeated the demand to Mr. Lowie stating that he would allow him to build more units on the 70 acres if he handed over the other 180 acres and all the water rights for free. 4 RA 00723; Para 5-6. In 2018, another councilman informed Mr. Lowie that he should have negotiated with the surrounding owners' representative. 4 RA 00723; Para 7. These facts were undisputed as were the following subsequent actions by the City.

When the Landowners began the process to develop, the City advised the Landowners that, *unequivocally and without exception,* the City would accept *only* one application to develop the 35 Acre Property. 4 RA 00718:12-18, 5 RA 00979-980, para. 13, 5 PA 0872:21-0873:15. The one application the City would accept was a Master Development Agreement that provided one master development for the entire 250 Acres ("MDA"). Id. The Landowners objected but followed the City's mandate and worked tirelessly on the MDA for over two years (Spring 2015-Summer 2017). 4 RA 00718-00720, 5 RA 00979, para. 11, 5 PA 0879:1-3. The City primarily drafted the MDA, imposing outrageous conditions and costs on the

Landowners in excess of $1 million above those typically imposed for an MDA application. Id. 5 PA 0873:22-0876:6. The Landowners paid *all* costs and conceded *all* conditions. Id. 5 PA 0879:4-5.

Eventually, it became clear the City had created a never-ending MDA process; therefore, the Landowners worked with the City Planning Department to prepare stand-alone applications to develop 62 residential units on the 35 Acre Property, which is less than 2 units per acre (the R-PD7 zoning allows up to 7 units per acre). 4 RA 00719:13-28, 5 PA 0876:7-11. The 35 Acre Property applications were submitted to the City Council for approval on June 21, 2017, along with the City Planning Department's recommendation that the applications met all statutory and code requirements and were consistent with the City's zoning code. 5 PA 0876:12-0877:23. At the hearing, a councilmember acknowledged that the proposed development was "so far inside the existing lines." 5 PA 0877:20-24. The City Council, however, contrary to its own code and planning staff recommendation, *denied* the applications because: (1) there was not an MDA and the City would *only* accept one application, the MDA; and (2) the purported, detrimental impact to "surrounding residents" (those claiming to be "politically connected"). 5 PA 0878:1-19.

About 1.5 months later, on August 2, 2017, the MDA application was completed and submitted to the City Council. The City attorney's office and

planning department both confirmed that the City-prepared MDA application met all City requirements and the proposed development under the MDA was consistent with the zoning code and the City's master plan. 5 PA 0879:6-18. However, the City *denied* the MDA, without equivocation. 5 PA 0879:19-0880:10. Without asking for additional conditions or amendments to the MDA, the City simply denied it. *Id.* In other words, the City denied the stand-alone application to develop the 35 Acre Property because it was not the MDA and then denied the MDA.

2. Fence Denial.

The Landowners then applied for fencing around the permitter of the 250 Acres and the interior large ponds to exclude others and protect the health, safety, and welfare of the public. 5 PA 0880:11-0881:19, 12 RA02616-02626. The City code provides that a fence application is an over-the-counter application, subject to a "minor review" not a "major review." *Id.* In violation of its own code, the City *denied* the fence application due to "impact on the surrounding properties" and required a "major review" – the process for a hotel/casino submittal. *Id*. At the district court hearing on the takings issue, the City provided only one justification for the fence denial – "political pressure." 22 RA 04777:2-6.

3. Access Denial.

The City then issued a notice of violation to clean up the 250 Acres and the Landowners submitted an over-the-counter application to access the property to clear

the debris and other uses consistent with their ownership. 12 RA 2607-2615, 5 PA 0881:20-0882:17. Incredibly, the City *denied* the access applications due to impact to "surrounding properties." *Id.* In other words, the Landowners had lost possession and use of their property.

4. Adoption of City Bills to Stop All Development so the Surrounding Owners Could Use the Landowners' Property.

The City then went on the offensive. A councilmember announced to the surrounding owners that the Landowners' privately-owned 250 Acres was available for the surrounding owners "recreation" use. 15 RA 03338:23-03339:15, 03341:23-03342:3, 5 PA 0885:1-10. The City then drafted two bills to make this happen. 5 PA 0882:18-0886:6, 13 RA 02711-02737. Another councilmember described these bills as follows: "[f]or the past two years, the Las Vegas Council has been broiled in controversy over Badlands [250 acres], and this [Bill 2018-24] is the latest shot in a salvo against one developer" and "[t]his bill is for one development and one development only. This bill is only about the Badlands Golf Course [250 Acres]" and "I call it the Yohan Lowie Bill." 15 RA 03223:57-03224:60, 5 PA 0882:24-0883:5. An uncontested expert report confirmed these bills targeted only the Landowners' property. 13 RA 02768-15 RA 03220, 5 PA 0883:6-15. The bills made it impossible to develop or use any part of the 250 Acres and forced the Landowners to allow others to access their privately-owned 250 Acres for recreation and open space purposes. *See id, specifically 5 PA 0883:16-0885:20.* The City

adopted these bills over the Landowners' strenuous objection and the uncontested evidence shows that the surrounding homeowners are using the Landowners' 250 Acres, which includes the 35 Acre Property at issue in this appeal. 5 PA 0885:21-0886:3, 16 RA 03412-03573. It should be noted that the City attaches the affidavit of Donald Richards that addresses this use, but improperly leaves out the photos showing the public using the property, without noting such redaction in the record. See City Exhibit 2 PA 0308-0309 which redacts the photos and Landowners' 16 RA 03412-03573 which includes the photos.

5. Additional City Communications and Actions.

The Landowners obtained numerous documents through public records requests that revealed stunning facts. 5 PA 0887:16-0889:16. These documents show a City scheme to purchase the 250 Acres for just $15 million (after the City devalues the property) and rezone it for use by the surrounding homeowners. *Id*. They also reveal disturbing government conduct, such as retaining a private investigator to get "dirt" on the Landowners in case the City needs to "get rough" and a plan to speak in code through emails to avoid further public records requests. *Id*.

6. Expert Opinion.

The Landowners retained MAI appraiser, Tio DiFederico ("DiFederico"). who prepared a detailed expert analysis. 17 RA 03679-03814, 5 PA 0889:17-

0890:12, 5 PA 0935:1-0941:19. That report opined that the 35 Acre residentially zoned property, prior to any City interference, was worth $34,135,000, but as a result of the City's above described actions, the 35 Acre Property is valueless; that the City's actions resulted in "catastrophic damages to this property." 17 RA 03779, 5 PA 0941:10-12. This evidence of damages was undisputed as the City never produced an expert report, did not challenge the evidence presented by the Landowners, and in fact did not object to the appraisal report stating "the City has no evidence to admit in rebuttal to the evaluation report . . ." 24 RA 05257; 1-3, 24 RA 05258;13-14.

7. Take Facts Summary.

As detailed above, the City's claim that this is a "regulatory takings" case wherein the City merely denied one development application is patently false. The City: (1) denied two applications to use the 35 Acre Property, including the MDA it demanded; (2) denied the Landowners' application to fence their property to exclude others; (3) ousted the Landowners from their property by denying their access application; and (4) passed two bills that: (a) targeted only the 250 Acres; (b) made it impossible to use the property; and (c) preserved the 250 Acres for use by surrounding owners for "recreation" and open space. The City's actions rendered the Landowners' $34,135,000 property valueless.

Importantly, at no time during the denials did the City even mention there was a "PR-OS" master plan designation that prevents the use of the property. This proves the City's PR-OS argument is nothing more than an invented and baseless after-the-fact litigation argument.

8. The Landowners Tireless Efforts to Develop.

The City's false assertion that the Landowners are greedy and never intended any development is particularly offensive given all they did and spent at the City's behest in order to develop the 250 Acres including an *extra* $1 million in costs for the MDA – a City demand that was clearly improper and unnecessary. 5 PA 0872-0882. Ultimately, the City denied all attempts and even adopted bills that targeted the Landowners and prohibited all use of their property. 5 PA 0872-0886. As the district court concluded, this constitutes a taking and once a taking occurs, just compensation is automatically mandated. *See Knick v Township of Scott, Pennsylvania,* 139 S.Ct. 2162, 2172 (2019) ("a property owner acquires an irrevocable right to just compensation immediately upon a taking" . . . "[a] bank robber might give the loot back, but he still robbed the bank."). Thus, the City's self-serving, after-the-fact letters to the Landowners inviting them to re-submit applications to develop, *for a fifth time,* are nothing but litigation fodder since they were only sent *after* the City had already taken the property and *after* the City repeatedly lost at the district court level. *See* City Writ 22.

III. STATEMENT OF REASONS WHY A WRIT SHOULD *NOT* ISSUE

A. The District Court Properly Denied The City's Request For A Stay Because NRS Chapter 37 Applies And Compels Prompt Payment Of The Just Compensation Award.

Despite the City's erroneous contention otherwise, it is well established in Nevada that inverse condemnation proceedings are the constitutional equivalent of eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings. *See County Clark v. Alper,* 100 Nev. at 391 (applying NRS Chapter 37 to inverse condemnation action); *see also Argier v. Nevada Power Co.,* 114 Nev. at 140 n. 2, (1998) ("[T]his court has held that the same rules that govern direct condemnation actions apply in inverse condemnation actions as well."). Therefore, NRS 37.140 and NRS 37.170 payment requirements indisputably apply here.

The statutory language is mandatory. *See* NRS 37.140 (damages *must* be paid within 30 days after judgment); NRS 37.150 (award deposited in court); NRS 37.170 (plaintiff may continue in possession of property during pendency of litigation when full amount of judgment has been paid into court; defendant is entitled to demand and receive that money). Indeed, NRS 37.140 and NRS 37.170 expressly state that the City *must* promptly pay the just compensation award within 30 days after judgment and as a precondition to an appeal, without exceptions. *See id.* Because these statutes are mandatory, the district court was compelled to deny the City's

request to stay payment of the just compensation award in this case. To do otherwise here, this Court must ignore these statutory mandates and invade the province of the Nevada legislature by engaging in a law-making function. There is no legal or equitable basis for this drastic over-step of authority, as the City has been in possession of *both* the Landowners' property and their just compensation for over five years already.

B. The District Court Properly Denied The City's Request For A Stay Because *State v. Second Jud. Dist. Ct.* Makes Clear That The City Must Pay The Just Compensation Award As A Condition To Its Right To Appeal.

In 1911, the Nevada legislature adopted NRS 37.140 to require that all eminent domain verdicts be paid within 30 days of "final judgment." As "final judgment" was defined as a judgment that cannot be directly attacked by appeal, the government could easily avoid this 30-day payment requirement by filing a notice of appeal. Therefore, in 1959, the Nevada Legislature adopted NRS 37.170 which provides that an eminent domain award must be paid as a pre-condition to an appeal when the government is in possession. That same year, *State v. Second Jud. Dist. Ct.* was issued. *See id.,* 75 Nev. at 205, 337 P.2d at 276. There, the district court followed NRS 37.170 and ordered the State of Nevada to deposit in court a just compensation award as a precondition to appeal. *See id.* The State made the *exact same* arguments the City makes here, and this Court rejected them in their entirety. In doing so, this Court recognized that "[t]he power not only to take possession of

another's property, but also to postpone indefinitely the payment of just compensation for it, is a power which may well have an oppressive effect." *Id.*

The State argued in *State v. Second Jud. Dist. Ct.,* that NRS 37.170 places an undue burden on government entities: that of "seeking to get back from a condemnee that which it should never have had and may already have squandered." *Id.,* 75 Nev. at 206. The Court rejected the assertion, holding "[w]e do not regard such a burden as unjust when balanced against the condemnee's right to prompt compensation for property already taken." *Id.* The district court properly rejected the City's similar arguments in this case.

As will be explained further below, in addition to the regulatory taking it acknowledges in the writ petition, the City engaged in such egregious actions that it has taken the Landowners' 35 Acre Property under *three more* of Nevada's invariable taking standards. The City denied all economic use of the 35 Acre Property and adopted a bill authorizing public use of the 35 Acre Property. Under Nevada law, this is no different than if the City had directly condemned the Landowners' 35 Acre Property for a public park and placed an "open to the public" sign on their Land. In other words, the City's actions ousted the Landowners such that they no longer have possession or use of their Land. As such, the City has taken possession of the 35 Acre Property for purposes of NRS 37.170 because its actions constitute a taking as determined by the district court. 6 PA 1133:7-1134:7. The

City must therefore promptly pay the just compensation award as a condition to its right to maintain an appeal. *See* NRS 37.170; *see also State v. Second Jud. Dist. Ct.,* 75 Nev. at 205-06. On these bases, the district court properly denied the City's request for a stay, and this Court should do the same.

C. The District Court Properly Denied The City's Request For A Stay Because NRS Chapter 37 Takes Precedence Over NRCP 62 And/Or NRAP 8.

It is well settled that specific statutes take precedence whenever any conflicts cannot be harmonized. *See Doe v. La Fuente, Inc.,* 2021 WL 772878, at *24-25 (the general/specific canon instructs that when two statutes conflict, "the more specific statute will take precedence, and is construed as an exception to the more general statute") (citation omitted); *Int'l Game Tech., Inc.,* 124 Nev. at 200-01 (noting that "a statute's provisions should be read as a whole . . . and, when possible, any conflict is harmonized"). Thus, the provisions of NRS Chapter 37 take precedence over NRCP 62, and the City is not entitled to an automatic stay without paying anything in this inverse condemnation case. *See* NRS 37.170 (prompt payment of just compensation award); *cf.* NRCP 62(e) (stay without bond on appeal for government entity).

For the same reason, NRAP 8 is inapplicable. Again, the statutes applicable to inverse condemnation cases, such as this (NRS 37.140 and 37.170) take precedence over a rule that applies only generally to the issuance of a stay (NRAP

8). *See Doe v. La Fuente, Inc.,* 2021 WL 772878, at *24-25; *see also City of Sparks v. Reno Newspapers, Inc.,* 133 Nev. 398, 400-01 (2017) ("[I]t is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally."); 6 PA 1135:3-18. The district court therefore properly denied the City's request for a stay, and a writ should not issue.

D. The District Court Properly Denied The City's Request For A Stay Because, Even If NRAP 8 Applies, A Stay Is Not Warranted.

Generally, in determining whether to issue a stay pending disposition of an appeal, this court considers the following factors: (1) whether the object of the appeal will be defeated if the stay is denied, (2) whether appellant will suffer irreparable or serious injury if the stay is denied, (3) whether respondent will suffer irreparable or serious injury if the stay is granted, and (4) whether appellant is likely to prevail on the merits in the appeal. *See* NRAP 8(c); *see also Mikohn Gaming Corp. v. McCrea,* 120 Nev. 248, 251 (2004). None of these factors militate in favor of a stay here.

1. The Object Of The Appeal.

The object of the appeal will not be defeated simply because the possibility exists that the City may have to seek to get the just compensation award back. *See State v. Second Jud. Dist. Ct.,* 75 Nev. at 205 (compelling state to pay just compensation award pending appeal even though it may be difficult to recover in the event of reversal). Again, this Court considered and rejected the City's argument

long ago, holding "[s]uch is not our view of the law." *Id.* The Court reasoned that payment of the funds pending appeal is a condition to a government entity's right to maintain an appeal when it has taken possession of another's property. *Id.* "It is not an acceptance of the judgment rendered, but is the meeting of a condition by which that judgment may be disputed." *Id.*

2. No Irreparable Harm To The City.

The very unlikely possibility that the City may prevail on appeal and have to recover the just compensation award from the Landowners does not constitute irreparable harm either. *See State v. Second Jud. Dist. Ct.,* 75 Nev. at 205 (seeking to get back that which a landowner has been paid is not an unjust burden on government entities). Additionally, the City makes the unfounded argument that it will suffer irreparable harm because it will need to approve every single application that comes before it based on the district court orders. City Writ 18-19. This is nothing more than unsubstantiated hyperbole as the district court orders don't even remotely imply this result. Rather, the district court properly followed Nevada law that zoning is used to decide property rights in inverse condemnation cases, decided the Landowners' property rights based on the Landowners' R-PD7 residential zoning, and held that the City engaged in an aggregate of actions (including authorizing and preserving the Landowners Property for public use) that took the Landowners' 35 Acre Property. Nothing in those orders even suggests the City must

now approve all land use applications. In sum, the City will not be irreparably harmed in the absence of a stay.

3. Irreparable Harm To The Landowners.

Contrary to the City's contention, to postpone indefinitely the payment of just compensation constitutes irreparable harm to the Landowners. *See State v. Second Jud. Dist. Ct.,* 75 Nev. at 205 (recognizing oppressive effect of undue delay in payment of just compensation). That the Landowners will earn interest on the delayed funds does not remedy that harm as the City mistakenly asserts. Again, this Court in *State v. Second Jud. Dist. Ct.* considered and rejected this argument, holding "the assurance of ultimate payment plus interest may not be sufficient to meet the immediate needs of a condemnee either to his property or to its cash equivalent. The power not only to take possession of another's property, but also to postpone indefinitely the payment of just compensation for it, is a power which may well have an oppressive effect. It might well, through duress of circumstances, compel the acceptance by a condemnee of compensation felt not to be just." *Id.,* 75 Nev. at 205.

This oppressive effect on the Landowners is precisely why the district court denied the City's request for a stay. The City has been in possession of the Landowners' property, *without payment,* and at nearly every stage of these proceedings, the City has worked with the adjacent property owners to delay, resulting in an oppressive effect on the Landowners. For example, an email surfaced

in a public records request wherein a representative for the surrounding owners brags that *"we have done a pretty good job of prolonging the developer's agony from Sept 2015 to now."* 16 RA 03402. The City has worked with these surrounding owners to delay this matter – filing three motions to dismiss (losing all), delaying the hearing on the take issue, and improperly removing the case to federal court (prompting the federal court to enter a remand order because removal was improper). 24 RA 05280:8-05281:21, 1 RA 00015-00031. While the City delays the matter, not only is the City in possession of the Landowners' Property, but it is collecting money from the Landowners in real property taxes – causing further "agony." As explained, while the City tells this Court the Landowners' property rights are limited to PR-OS (parks, recreation, open space), it is collecting real property taxes from the Landowners in excess of $250,000 per year (just for the 35 Acre Property) based on a residential use. 5 PA 0867:13-08688:2. Additionally, the Landowners must pay all other carrying costs for their vacant, unfenced property to which they don't even have access. The City knows that the Landowners cannot continue to carry this oppressive burden and further delay may very well delay the Landowners out of the property. 5 PA 0876:4-6. The Landowners will indisputably suffer irreparable harm if a stay is granted and the City is not compelled to promptly pay the just compensation award.

4. The City Is Not Likely To Prevail On Appeal.

Finally, the City claims that the next NRAP Rule 8 element is met, because the City disagrees with the verdict and thinks it will prevail on appeal. *See* City Writ 22-34. Every government entity that appeals disagrees with the verdict. This is no reason to ignore the mandatory payment requirements of NRS 37.140, NRS37.170, and *State v. Second Jud. Dist. Ct.* And, the City had every opportunity to argue and re-argue the issues extensively. In fact, the district court added two additional days to the evidentiary hearing on the takings issue to allow the City a full day to reargue the property interest issue. 5 PA 0862:11-18. This Court would have to abandon all property and just compensation rights in Nevada to find the City can do to Nevada property owners what the City did to these Landowners and find no liability. It is very rare that a government entity engages in such egregious conduct that its actions meet *all three* of Nevada's invariable taking standards – yet, as explained below, that is exactly what the City did in this case. The Landowners' appraiser appropriately described the City's actions as resulting in "catastrophic damages" to the 35 Acre Property. 17 RA 03779; 5 PA 0892-0898. As set forth below, Nevada law and substantial evidence support the district court's decisions so the City is not likely to prevail on appeal.

a. The District Court Followed Nevada Law To Determine That The City's Actions Constituted A Taking.

Under Nevada law, there is a mandatory process to resolve inverse condemnation cases, which is to: (1) decide the Landowners' property rights; (2) decide if the City's actions constitute a taking of those property rights; and (3) if taken, determine just compensation. *See ASAP Storage v. City of Sparks*, 123 Nev. 639, 642 (2007) (the court must "undertake two distinct sub-inquiries: "the court must first determine" the property rights "before proceeding to determine whether the governmental action constituted a taking."); *McCarran International Airport v. Sisolak*, 122 Nev 645, 658 (2006). The district court followed this three-step process. 2 PA 0294; 5 PA 0862-0863.

(1) The Property Rights.

The district court followed this Court's three direct condemnation and three inverse condemnation cases, wherein this Court unanimously held that zoning must be used to determine the property rights in all Nevada eminent domain cases. *See* 2 PA 0288-0295; 5 PA 0869-0871 and *Sisolak*, 122 Nev. at 658; *Clark County v. Alper*, 100 Nev. at 390, 685; *City of Las Vegas v. C. Bustos*, 119 Nev. 360 (2003); *County of Clark v. Buckwalter*, 115 Nev. 58 (1999); *Alper v. State*, 95 Nev. 876 (1979), *on reh'g sub nom. Alper v. State*, 96 Nev. 925 (1980); *Andrews v. Kingsbury Gen. Imp. Dist. No. 2*, 84 Nev. 88 (1968). Most on point, this Court expressly rejected using the City's master plan designation to determine the property rights

issue in *Bustos* and, instead, held that the district court "properly considered the current zoning of the property." *Id.*, 119 Nev. at 363. This is consistent with NRS 278.349(3)(e), which states, "if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence." *See also* AGO 84-6 (holding it has been the law in Nevada since 1977 that zoning takes precedence over a master plan designation). 16 RA 03574-03581.

Based on this unanimous body of eminent domain law, the district court used the residential R-PD7 zoning to determine that, prior to the City's interference, the 35 Acre Property included the right to develop residential units. 2 PA 0288-0295; 5 PA 0864:18-0871:6. As explained above, this was entirely consistent with all three relevant City departments – City Attorney, City Planning, City Tax Assessor.

It is noteworthy that the district court rejected the City's improper attempt to interject land use / petition for judicial review law to decide the property rights issue in this inverse condemnation case – exactly as the City is attempting to do before this Court. *See* City Writ Petition, pp. 9-12, 29-31. The district court detailed why land use / petition for judicial review (PJR) law should not apply in several orders. 5 PA 0902-0904. First, the district court held the above *six* cases are eminent domain cases directly on point. 5 PA 0869:19-0870:2. Second, this Court very recently held that the City's cited PJR law has no application in other civil cases. *City of Henderson v. Eighth Judicial District Court*, 137 Nev. ___, 489 P.3d 908, 912

(2021) (PJR and other civil cases should not be mixed; they are "[l]ike water and oil, the two will not mix."). Finally, the City's argument would mean there are no property rights ever in a Nevada eminent domain case, because, according to the City, governments have the "discretion" under land use / petition for judicial review law to deny all land use applications, meaning no property owner ever has any right to use their property – which clearly is not Nevada eminent domain law. Instead, this Court held in *Sisolak* that Nevada Landowners have the right to "use" their property and the City can apply 'valid' zoning regulations to the property to regulate the use of the property, but *if those zoning regulations 'rise to a taking,' then the City is liable for the taking and must pay just compensation*. *See Sisolak,* 122 Nev. at 657, 660 and fn. 25. *See also ASAP Storage, supra* (property includes the "inalienable right to possess, use, and enjoy the property." *Id., at 646).* Simply stated, eminent domain law applies here, not land use / PJR law.

(2) The Take Issue.

After concluding that the Landowners had the right to use their property for residential development under the R-PD7 zoning, the district court considered whether the City's actions amounted to a taking. In doing so, the district court properly followed this Court's precedent to determine whether the aggregate of government actions in totality rise to the level of a taking. 5 PA 0891:10-0892:2. The district court also properly followed this Court's precedent that there are "nearly

infinite variety of ways in which government actions or regulations can effect property interests," but that there are a few "invariable rules" where this Court will *always* find a taking. 5 PA 0891:14-17; 0892:3-8. The district court then applied three of this Court's "invariable rules" where there will *always* be a taking. Importantly, meeting *any one* of these standards is a taking.

(a) Per Se Categorical Taking.

This Court held a per se categorical taking occurs where government action "completely deprives an owner of all economical beneficial use of her property," and, in these circumstances, just compensation is automatically warranted, meaning there is no defense to the taking. *Sisolak*, 122 Nev. at 662. The district court held this standard is met here, because the City denied any and all applications to use the 35 Acre Property and adopted bills that target only the Landowners' property, made it impossible to develop, and forced the Landowners to allow the public to use their property. 5 PA 0893:1-7. This clearly is a denial of all economic use of the property. The district court also found persuasive DiFederico's expert report that concluded the City's actions rendered the 35 Acre Property valueless. 5 PA 0893:8-13. As *all* these facts were uncontested (including that the City denied all applications to use the property), this was clearly the correct result.

(b) Per Se Regulatory Taking.

This Court holds that a per se regulatory taking occurs where government action "authorizes" the public to use private property or "preserves" private property for public use and, in these circumstances, just compensation is automatically warranted, meaning there is no defense to the taking. *Sisolak*, 122 Nev. at 662; *see also Tien Fu Hsu v. County of Clark,* 123 Nev. 625 (2007) (height restriction 1221 authorized the public to use Mr. Hsu's property). *See also Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) (a California statute that authorized labor unions to enter onto private farms 120 days a year for up to 3 hours at a time, upon proper notice, is a per se taking by inverse condemnation.). The district court held this standard is met based on the City's bills that specifically authorized the surrounding owners to enter onto the Landowners' property and preserved the property for the surrounding owners use. 5 PA 0894:17-0895:3. The district court also cited to the City's refusal to allow the Landowners to fence their own property and refusal to allow the Landowners access to their own property because both would impact the surrounding owners use as further evidence the City was acting to authorize the public to use the Landowners' 35 Acre Property. 5 PA 0895:4-0896:19.

The City's refusal to allow fencing was particularly relevant because "[t]he right to exclude is 'one of the most treasured' rights of property ownership" and "is 'one of the most essential sticks in the bundle of rights that are commonly

characterized as property.'" *Cedar Point Nursery v. Hassid*, 141 S.Ct. at 2072. The City's refusal to allow access was likewise relevant because a property owner "has a special right of easement in a public road for access purposes" and "[t]his is a property right of easement which cannot be damaged or taken from the owner without due compensation." *Schwartz v. State*, 111 Nev. 998, 1001 (1995). The public was clearly authorized to use and the Landowners clearly lost possession and use of the 35 Acre Property through the City's actions.

(c) Non-Regulatory / De Facto Taking.

This Court holds that a non-regulatory / de facto taking occurs where government action renders property unusable or valueless to the owner or substantially impairs or extinguishes some right directly connected to the property. *See State v. Eighth Judicial District Court*, 131 Nev. 411, 421 (2015) (citing *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977) ("To constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property rights.")); *see also Sloat v. Turner*, 93 Nev. 263 (1977); *Schwartz v. State*, 111 Nev. at 1001. The district court held that the aggregate of City actions "substantially interfered with the use and enjoyment of the Landowners' 35 Acre Property, rendering the 35

Acre Property unusable or valueless to the Landowners." 5 PA 00898:7-9. As stated above, the uncontested expert appraisal testimony was that the City's actions rendered the 35 Acre Property valueless.

Therefore, the City's actions were so egregious that all three "invariable rules" for a taking were met in this case.

(d) Ripeness.

Contrary to the City's assertion, the district court properly followed this Court's holdings in *Sisolak* and *Hsu* that a ripeness / futility analysis does not apply to the "per se" takings, because the government actions that meet this standard are a taking in and of themselves. *See* 5 PA 0898:12-0899:3, wherein the district court properly follows *Sisolak*, 122 Nev. at 664, 684 and *Hsu,* 123 Nev. at 635. The district court also properly followed this Court's standard that has never imposed the ripeness / futility analysis as a precondition to a non-regulatory / de facto taking. *See* 5 PA 0899:4-7, wherein the district court properly follows *State v. Eighth Judicial District, Sloat, and Schwartz*, *supra.*

The district court then held, even if a ripeness analysis applies, it is met, because the City denied all *four* of the Landowners applications to use the 35 Acre Property and went so far as to pass legislation to make use of the 35 Acre Property impossible and force the Landowners to allow others to use their private property. 5 PA 0905:21-0906:9.

b. The District Court Followed Nevada Law To Determine Just Compensation.

The parties thereafter appeared for a jury trial, but the City failed to produce an appraisal report so the parties conceded to a bench trial, and the Landowners' appraisal report was submitted to the district court for a determination of just compensation. 5 PA 0934:1-6. Without any competing evidence whatsoever, the district court properly adopted DiFederico's valuation of $34,135,000 as just compensation. 5 PA 0935-0945. As such, substantial evidence supports the award. See Clark County v. Alper, 100 Nev. at 391 (affirming just compensation award in inverse condemnation case). The district court subsequently awarded the Landowners their attorney fees, costs, and interest.

IV. CONCLUSION

The district court followed Nevada law to find a taking and award "just compensation," meaning the mandatory NRS Chapter 37 payment requirements apply. Therefore, extraordinary relief is unwarranted, and the City's writ petition should be denied in its entirety.

DATED this 8th day of March, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ James J. Leavitt
Kermitt L. Waters, Esq. Bar No. 2571
James J. Leavitt, Esq., Bar No. 6032
Michael Schneider, Esq., Bar No. 8887
Autumn Waters, Esq., Bar No. 8917
Attorneys for 180 Land Co, LLC and Fore Stars Ltd.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font.

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 either:

☒ proportionally spaced, has a typeface of 14 points or more, and contains 8,888 words; or

☐ does not exceed _____ pages.

Finally, I hereby certify that I have read this 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 8th day of March, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ James J. Leavitt
Kermitt L. Waters, Esq. Bar No. 2571
James J. Leavitt, Esq., Bar No. 6032
Michael Schneider, Esq., Bar No. 8887
Autumn Waters, Esq., Bar No. 8917
Attorneys for 180 Land Co, LLC and Fore Stars Ltd.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF CERTIORARI** was filed electronically with the Nevada Supreme Court on the 8th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

McDONALD CARANO LLP
George F. Ogilvie III, Esq.
Christopher Molina, Esq.
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz, Esq.
Lauren M. Tarpey, Esq.
396 Hayes Street
San Francisco, California 94102
schwartz@smwlaw.com
ltarpey@smwlaw.com

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan Scott, Esq., City Attorney
Philip R. Byrnes, Esq.
Rebecca Wolfson, Esq.
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

/s/ Sandy Guerra
An Employee of the Law Offices of Kermitt L. Water