IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 84221

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

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

CITY'S OPPOSITION TO MOTION FOR DISQUALIFICATION

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INTRODUCTION

Petitioner City of Las Vegas ("City") opposes the motion to disqualify the Honorable Justice Douglas Herndon brought by Respondents 180 Land Co., LLC and Fore Stars Ltd. (collectively, the "Developer"). Contrary to the Developer's implication, Justice Herndon did not preside over any part of the instant case while sitting on the district court. Rather, he presided over a separate lawsuit that involved different property and facts. The Developer has failed to show even the appearance of impropriety. Accordingly, no basis exists for Justice Herndon's disqualification, and the Developer's motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Developer's Predecessor Set Aside The Badlands Golf Course As An Open Space and Recreation Amenity For the Peccole Ranch Master Plan Area

In 1990, the City Council approved a request by the Developer's predecessor to build the 1,539-acre Peccole Ranch Master Plan ("PRMP"), which set aside 211 acres of the PRMP for a golf course to provide an open space and recreational amenity for the residential and commercial uses developed in the master planned area. I(0098); II(0384); II(0349-0351, 0357).[1] Reservation of the Badlands as a golf course was also an express condition of the City's approval of a casino.

[1] Citations to Petitioner's Appendix ("PA") are the Volume Number(Page Number). The City has concurrently filed a Petitioner's Supplemental Appendix to include additional documents referenced herein.

II(0311-0321, 0381). An additional nine-hole golf course was later added to create the 250-acre Badlands Golf Course. I(0102, 0123); II(0399-0404). In 1992, the City Council designated the Badlands as Parks, Recreation, and Open Space ("PR-OS") in the City's General Plan, a designation that does not permit housing or commercial development. II(0394-0397, 0406-0426); III(0427-0474).

In the next 20 years, the PRMP was fully built out with thousands of houses, a casino resort, offices, and retail. VII(1141-1145). The Developer was responsible for a substantial portion of this build-out, claiming to have built over three million square feet of residential and commercial property. III(0477-0479). The golf course served as an amenity for, and add economic value to, the remaining PRMP community. II(0349-0351, 0357).

B. The Developer Purchased The Badlands In 2015 And Segmented It Into Four Development Areas

In March 2015, the parent company of the Developer's principals acquired Respondent Fore Stars Ltd., which at that time, owned the entire Badlands Golf Course. IV(0588, 0640). Less than 4.5 million of the $7.5 million purchase price was allocated to the 250-acre golf course property. V(0772-0773). The Developer divided the Badlands into four development sites of 17, 35, 65, and 133 acres, transferred title to each segment to Respondent 180 Land Co LLC and another related entity, and proceeded to file applications to develop the individual 17, 35, and 133-acre segments. I(0114); III(0512-0532); IV(0549-0576, 0605-0621);

V(0852-0857). The City approved 435 luxury housing units for the 17-Acre segment, denied the application to develop the 35-Acre segment, and struck the application to develop the 133-Acre segment. The Developer never filed any application to develop the 65-Acre segment. III(0512-0532); IV(0549-0576).

C. The Developer Filed Four Separate Takings Lawsuits, One For Each Segment

Although the Badlands was essentially one development site, the Developer then filed four separate regulatory takings lawsuits against the City, one for each segment. In addition to this case, the Developer filed Eighth Judicial District Court Cases A-19-773268-C (17-Acre), A-18-775804-J (133-Acre), and A-18-780184-C (65-Acre).

1. District Judge Herndon Determined The 65-Acre Case Was Not Ripe For Review Because The Developer Had Failed To File Any Development Applications For The 65-Acre Segment

In the 65-Acre case (A-18-780184-C), then-Judge Herndon granted the City summary judgment on ripeness grounds because the Developer failed to file any application to develop the 65-Acre segment with houses. IV(0722-0733). Judge Herndon's decision did not reach beyond the ripeness of the Developer's claims in the 65-Acre case. IV(0695-0733). Following Justice Herndon's elevation to this Court, District Judge Monica Trujillo granted the Developer's motion for reconsideration and has taken the matter under submission. VII(1161). Accordingly, there has been no final judgment entered in the 65-Acre case.

2. In This 35-Acre Case, Judge Timothy Williams Decided The Merits Of The Developer's Takings Claims And Entered Final Judgment Against The City On Grounds Not Addressed In Justice Herndon's Decision

In contrast to the 65-Acre case, the Developer filed an application to develop houses on the 35-Acre segment that the City denied. V(0878). District Judge Timothy Williams found the case was ripe for adjudication and the City is liable for a regulatory taking of the 35-Acre segment. V(0892-0894, 0905-0906). Judge Williams also concluded that the City effected a physical and non-regulatory taking of the 35-Acre segment. V(0894-0898). V(0944).

Contrary to long-standing decisions of this Court, Judge Williams ignored the General Plan's PR-OS designation of the Badlands and concluded the zoning of the 35-Acre segment conferred on the Developer a constitutionally protected property right to build whatever housing project the Developer desires up to seven units per acre. V(0868-0871). Judge Williams awarded the Developer $34,135,000 for the City's alleged taking of the 35-Acre segment.

ARGUMENT

A. Justice Herndon Is Not Disqualified From Sitting In This Case By Having Presided Over A Different Case In The District Court

Code of Judicial Conduct Rule 2.11(A) requires a judge to disqualify himself "in any proceeding in which the judge's impartiality might reasonably be questioned," including where he "previously presided as a judge over *the matter* in

another court." Rule 2.11(A)(6)(d)) (emphasis added). The rule does not apply here because Justice Herndon did not preside over the matter now before this Court. Rather, Justice Herndon presided over a different matter, the 65-Acre case, which involves different material facts and legal issues.

In the instant case, the Developer filed an application to build 61 housing units on the 35-Acre Property. By contrast, the Developer filed no application to develop the 65-Acre Property, which Judge Herndon deemed determinative: "Because the court finds that the failure to have made an application to the City in regard to the development of the individual 65-Acre Property renders the Developer's claims in the instant case unripe, that decision is fatal to Developer's case ...." IV(0733). Judge Herndon then held that because the case was unripe, "further court inquiry [was] unnecessary," and he would not adjudicate the Developer's taking claims on the merits:

> Moreover, the court believes that addressing the merits of any of the remaining issues would be unwise as there are three companion cases still pending with similar issues and any ruling by this court on the remaining issues could be construed as having preclusive effect in the other pending court actions, much like the then controlling Crockett Order was previously perceived to have had in both the 35-Acre Property case and the 133-Acre Property case.

IV(0733).

Before a taking claim alleging denial of the owner's economic use of property is ripe, the owner must file, and the regulatory agency must deny, at least

two applications to develop the property. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *overruled on other grounds by Knick v. T'ship of Scott, Pa.*, 139 S.Ct. 2162 (2019); *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 419-20, 351 P.3d 736, 742 (2015). Because the Developer filed only one application to develop the individual 35-Acre Property, the City will argue on appeal that the Developer's categorical and *Penn Central* taking claims are not ripe, and Judge Williams lacked jurisdiction to hear them. Although ripeness is at issue in the instant case, the relevant facts (one application here versus no applications in the 65-Acre case) are different.

By deciding the case on ripeness grounds, Justice Herndon did not decide any other legal issue that might be common to the two cases, including:

- whether the Developer had a constitutional right to approval of its application under zoning;
- whether the City has discretion to disapprove or condition approval of the Developer's application to build housing;
- the validity and effect of the PR-OS designation of the Badlands;
- whether the Developer improperly segmented the Badlands (the parcel as a whole issue);
- the relevance of statements of individual City Councilmembers and staff;

- the tests for a regulatory taking, a non-regulatory taking, categorical, and a physical taking;
- the merits of the Developer's physical, non-regulatory, categorical and *Penn Central* taking claims;
- the relevance of the Developer's claim that the City denied access and the right to fence the Badlands;
- the amount of just compensation;
- entitlement to and the amount of prejudgment interest; and
- the right to reimbursement of property taxes.

Because the facts and legal issues in this case are distinct from those in the 65-Acre case, Judge Herndon's ruling in the 65-Acre case does not raise any question as to his impartiality in this 35-Acre appeal. There is no reason for Justice Herndon to recuse himself or to be disqualified from hearing this appeal.

B. Justice Herndon's Decision To Not Recuse Himself Is Entitled To Deference

The Court's February 22, 2022 Order Directing Answer states that the three Justices signing the Order, including Justice Herndon, had "reviewed the petition and supporting documents." *Id.* at 1. Before signing the Order, therefore, Justice Herndon presumably considered whether to recuse himself under the standards of Rule 2.11(A) and determined that recusal was not warranted.

"A judge shall hear and decide matters assigned to the judge except those in which disqualification is *required*." NCJC Rule 2.7 (emphasis added); *see also City of Las Vegas Downtown Redevelopment Agency v. Eighth Jud. Dist. Ct.*, 116 Nev. 640, 643, 5 P.3d 1059, 1061 (2000). Judges are "presumed to be impartial, and the party asserting a challenge carries the burden of establishing sufficient factual and legal grounds warranting disqualification." *City of Las Vegas*, 116 Nev. at 643, 5 P.3d at 1061. Where a judge declines to voluntarily recuse himself, "his decision should be given 'substantial weight,' and should not be overturned in the absence of a clear abuse of discretion." *Matter of Dunleavy*, 104 Nev. 784, 788, 769 P.2d 1271, 1274 (1988); *see also Kirksey v. State*, 112 Nev. 980, 1006, 923 P.2d 1102, 1118 (1996).

Having reviewed the City's Petition, Justice Herndon is in the best position to determine whether the 35-Acre case is "the same matter" as the 65-Acre case. Based on the facts and legal issues presented, Justice Herndon's decision not to recuse was a reasonable exercise of discretion and is entitled to deference.

Contrary to the Developer's contention, at the hearing on the City's Motion for Summary Judgment in the 65-Acre case, then-Judge Herndon did not indicate he would be required to recuse himself from any appeal of the Developer's other takings actions. Rather, he described the 65-Acre case:

> . . . I have some sense of propriety and responsibility to say should I move forward with this and therefore not be available to involve

> myself in *the case* and be another Justice that has to recuse if and when any of *this litigation* goes back to the Supreme Court, or should I move it now and not make any decisions on anything so that I could be involved in *it*?

Exhibit A to the Developer's Motion to Disqualify at 5:7-15 (emphasis added). While Judge Herndon signaled that he might not be able to sit on the Supreme Court panel that hears *the 65-Acre case*, he did not indicate any concern with hearing an appeal in any of the Developer's other three Badlands cases.

C. After Improperly Segmenting The Badlands And Filing Four Separate Lawsuits, The Developer Cannot Now Claim That A District Judge Who Addressed One Issue In One Case Is Disqualified From Hearing An Appeal In Another

Prior to the Developer's purchase, all 250-acres of the Badlands had been in a single golf course for 23 years. Although the Developer intended to develop the entire Badlands with housing, the Developer engaged in a tactic known as "segmentation" commonly used by real estate developers seeking to maximize the density, and hence profit, of their development project. Segmentation of property for purposes of enhancing regulatory taking claims has been rejected by the Supreme Courts of the United States and Nevada. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 651, 855 P.2d 1027, 1035 (1993).

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court

> focuses rather ... on the nature and extent of the interference with rights in the parcel as a whole ....

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327, 331 (2002) (holding that defining the relevant parcel required consideration of the "aggregate ... in its entirety").

Having pursued a classic segmentation strategy, the Developer cannot now seek to disqualify a judge on the basis that the four segmented cases are "related." If the facts and legal issues are as similar as the Developer argues, then the Developer should have filed a single lawsuit. The Court should bar the Developer from using its segmentation tactic to determine which justices preside over this appeal. In sum, the Developer has not demonstrated any basis for disqualification.

CONCLUSION

For the foregoing reasons, the Developer's Motion for Disqualification should be denied.

DATED this 15th day of March, 2022. BY: /s/ Debbie Leonard

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. The opposition meets the 10-page limit in NRAP 27(d)(2).

Pursuant to NRAP 28.2, I hereby certify that I have read this opposition, 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 opposition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this opposition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of March, 2022. BY: /s/ Debbie Leonard

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court on today's date by using the Nevada Supreme Court's E-Filing system (E-Flex). Upon e-filing of the foregoing document, participants in the case who are registered with E-Flex as users will be served by the E-Flex system. Others not registered will be served via U.S. mail at the following addresses on March 16, 2022.

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