IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 84345

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

Appellant

v.

180 LAND CO, LLC, a Nevada limited-liability company, FORE STARS LTD., a Nevada limited liability company,

Respondents

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

APPELLANT'S MOTION TO STAY

LAS VEGAS CITY ATTORNEY'S OFFICE Bryan K. Scott (#4381) Philip R. Byrnes (#166) Rebecca Wolfson (#14132) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 bscott@lasvegasnevada.gov pbyrnes@lasvegasnevada.gov rwolfson@lasvegasnevada.gov	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com
LEONARD LAW, PC Debbie Leonard (#8260) 955 S. Virginia St., Suite #220 Reno, NV 89502 775-964-4656 debbie@leonardlawpc.com	SHUTE, MIHALY & WEINBERGER, LLP Andrew W. Schwartz (CA Bar No. 87699) (Admitted pro hac vice) Lauren M. Tarpey (CA Bar No. 321775) (Admitted pro hac vice) 396 Hayes Street San Francisco, California 94102

Attorneys for Appellant

NRAP 26.1 DISCLOSURE STATEMENT

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.

1. The City of Las Vegas is a political subdivision of the State of Nevada and has no corporate affiliation.
2. The City of Las Vegas is represented by the following:
    a. Las Vegas City Attorney's Office
    b. McDonald Carano LLP
    c. Shute, Mihaly & Weinberger, LLP
    d. Leonard Law, PC

DATED this 9th day of March, 2022

LEONARD LAW, PC

BY: /s/ Debbie Leonard
Debbie Leonard (#8260)
955 S. Virginia St., Suite #220
Reno, NV 89502
775-964-4656
debbie@leonardlawpc.com

(additional counsel listed below)

Attorneys for Appellant

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INTRODUCTION

The City of Las Vegas ("City") seeks a stay pending appeal of a $34 million judgment and $14 million in post-judgment orders entered in favor of Respondents 180 Land Company, LLC and Fore Stars, Ltd. (collectively, "the Developer"). The judgment and interlocutory orders that led to it (collectively, "the Judgment") found the City liable for an alleged regulatory taking of a 35-acre portion of the former Badlands golf course ("the 35-Acre Property") based on the City Council's denial of the Developer's request to convert the 35-Acre Property from open space to houses ("the Application").

The Developer petitioned for judicial review ("the PJR"), which the district court denied. The district court held that: (a) at the time the Developer bought the property and filed the Application, the 35-Acre Property was designated open space in the City's General Plan, which does not permit housing; (b) the Council had discretion to retain or change the open space designation; (c) the zoning of the 35-Acre Property did not grant the Developer vested rights to have the Application approved because the General Plan designation controls, and zoning does not confer vested rights; (d) the Council properly exercised its discretion to deny the Application; and (e) substantial evidence supported its denial ("PJR Order").

Nevertheless, when subsequently deciding the takings claims in the Developer's favor, the district court contradicted itself, holding (among other

errors) that: (a) zoning confers a constitutionally protected property interest that allows any use for which the property is zoned, notwithstanding General Plan limitations, such as an open space designation; and (b) the City had no discretion to disapprove or condition the Developer's proposed use. The district court also incorrectly treated the 35-Acre Property as the parcel as a whole for purposes of its regulatory takings analysis, rather than the entire master planned area or the Badlands, from which the Developer and its predecessor derived substantial economic benefit.

These conclusions turn the City's discretionary land use planning process on its head by presenting the Council with an untenable Hobson's choice: Either approve every land use application if the existing zoning does not prohibit the proposed use or pay the applicant the property's fair market value, disregarding any General Plan designation of the property. Rather than consider applications based on its policy-driven General Plan, the City will be compelled to approve uses that are inconsistent with its planning goals, incompatible with surrounding land uses, destructive of open space, and deleterious to the environment.

The irreparable harm that could occur until the City's appeal can be decided is immeasurable and could not be undone. In contrast, the Developer will not be harmed by a stay because should it prevail, it will be made whole through the payment of interest, and it has already received substantial development approvals

for the Badlands. Because the Judgment is contrary to law on multiple fronts, the City is likely to prevail on appeal.

Pursuant to NRCP 62(d)-(e), the City is entitled to a stay as a matter of right without posting security. The City also satisfies the NRAP 8(c) factors. The district court denied the City's request for a stay based on the erroneous conclusion that NRS 37.140 – which applies to eminent domain actions in which physical occupation has occurred – deprives the City of its rights to a stay in this regulatory taking action. Erroneously relying on NRS 37.170, the district court conditioned the City's right to appeal on its payment of the Judgment. This is contrary to NRS 37.009(2), which provides that an eminent domain judgment is not final until no longer challengeable on appeal. The district court failed to address this statute.

Because the Judgment has profound consequences for the Council's discretionary authority over land use decisions, exceeds the district court's subject matter jurisdiction because the Developer's claims were unripe, could bear on the Developer's numerous other takings lawsuits, grossly misinterprets NRS Chapter 278 and NRS Chapter 37, ignores unanimous decisions of this Court holding that zoning does not confer vested rights, renders the statutorily mandated process of preparing and adopting master plans a pointless exercise, and misinterprets the law governing stays, a stay is warranted.

On February 11, 2022, the City filed an Emergency Petition for a Writ of Mandamus, or in the Alternative, Certiorari (NSC Case No. 84221, "the Writ Petition") to obtain a stay pending the district court's consideration of its Motion to Amend Judgment (Rules 59(e) and 60(b)) And Stay Of Execution. The district court denied the Motion to Amend on February 25, 2022 and, thereafter, the City filed this appeal. VI(1178-1188); VII(1189-1280). The Writ Petition and the instant Motion to Stay seek the same relief.

PERTINENT FACTS

A. The Developer Purchased The Badlands In 2015, Segmented It Into Four Development Areas, And Unsuccessfully Sought To Convert 35 Acres Of Open Space To Housing

In 1990, the City approved the amended Peccole Ranch Master Plan ("PRMP") submitted by the Developer's predecessors, "the Peccoles." I(0098); II(0384).[1] The City's approvals included provisionally rezoning approximately 614 acres of the 1,539-acre PRMP to "R-PD7" (Residential Planned Development – 7 units/acre). II(0361-0362, 0365-0366, 0369-0370, 390). The R-PD7 zoning category was specifically designed to encourage and facilitate extensive use of open space in planned residential developments. LVMC 19.10.050A. The approved PRMP set aside 211 acres of open space in the R-PD7-zoned area for a

[1] Because NRAP 8(c) requires the Court to consider the merits of the appeal, the City supports this motion with the documents contained in the concurrently filed Appellant's Appendix. Citations are to Volume Number(Page Number).

golf course and drainage to serve as an amenity for, and add economic value to, the remaining PRMP community. II(0349-0351, 0357).

By including the golf course in the PRMP, the Peccoles were also able to obtain approval of a resort/casino. II(0311-0321, 0381). The Peccoles later added an additional 9-hole course to create the 250-acre Badlands Golf Course and developed the remaining PRMP with residential, hotel/casino, and other commercial uses. I(0102, 0123); II(0399-0404). In an Ordinance adopted in 1992, the City designated the Badlands as parks, recreation and open space ("PR-OS") in the City's General Plan and reaffirmed that designation in ordinances adopted in 2000, 2005, 2009, 2011, and 2018. II(0394-0397, 0406-0426); III(0427-0474).

In March 2015, the Developer acquired the Badlands from the Peccoles for less than $4.5 million.[2] At the time, both the Peccoles and the Developer knew that the Badlands was designated PR-OS in the City's General Plan. III(0485); V(0765). Thereafter, the Developer closed the golf course and segmented the Badlands into four separate development areas and proceeded to file applications

[2] Under its written purchase contract with the Peccoles, the Developer purchased the 250-acre Badlands for $7,500,000. IV(0588). The City established from the Peccoles' deposition that $3,000,000 of the purchase price was consideration for other property interests not part of the Developer's takings claims, putting the price paid for the Badlands at less than $4,500,000, or $18,000 per acre. IV(0588); V(0772-0773). Therefore, the Developer paid less than $630,000 for the 35-Acre Property ($18,000 x 35). Although the Developer alleged that the purchase price was $45 million (V(0756)), it conceded that it had no documents to support that contention. IV(0688).

to convert the open space into residential uses. I(0114); III(0512-0532); IV(0549-0576, 0605-0621, 0745); V(0852-0857). The four areas included: (1) a 34.07-acre segment ("the 35-Acre Property"), which is at issue in this litigation; (2) a 17.49-acre segment, for which the City approved 435 luxury condominiums ("the 17-Acre Property"); (3) a 133-acre segment ("the 133-Acre Property"), for which the City invited the Developer to resubmit applications that were rejected on technical grounds,[3] which the Developer has declined to do; and (4) the remaining 65-acre segment ("the 65-Acre Property"), for which the Developer has filed no applications, notwithstanding the City's invitation to do so. III(0512-0532); IV(0549-0576, 0673, 0676-0677).

For its proposed project on the 35-Acre Property, the Developer sought, among other things, to amend the General Plan from PR-OS to low-density residential and obtain a site development review for 61 lots. IV(0549-0576). On June 21, 2017, the Council rejected the project as proposed and the Developer sued. IV(0578-0585, 0680). The Developer also brought separate takings actions

[3] The Honorable Jim Crockett struck down the City's approval of the 17-Acre development on the basis that a major modification of the PRMP must first be approved. IV(0534-0547). Based on that decision, the City rejected the 133-Acre application packet because it did not include a major modification application. IV(0612-0621). The Supreme Court then reversed Judge Crockett's decision (Case No. 75481) and reinstated the City's approval of the 17-Acre development (IV(0623-0628)), after which the City invited the Developer to resubmit the 133-Acre applications. IV(0676-0677).

for each of the other three Badlands segments, notwithstanding the City's approval of 435 condominiums. Eighth Jud. Dist. Ct. Cases A-18-773268-C, A-18-775804-J, and A-18-780184-C.

B. The District Court Denied The Developer's Petition For Judicial Review

The Developer filed the PJR and Alternative Verified Claims for Inverse Condemnation, which the district court bifurcated. I(0001-0085). After briefing and oral argument, the district court entered the PJR Order, which denied the PJR and dismissed the inverse condemnation claims. I(0128-0155). The district court concluded that the Council properly exercised its discretion to deny the Application and that substantial evidence supported its decision. I(0142-0147).

Relevant to this Motion, the PJR Order contained the following correct conclusions of law:

> 35. A zoning designation does not give the developer a vested right to have its development applications approved. "In order for rights in a proposed development project to vest, zoning or use approvals ***must not be subject to further governmental discretionary action affecting project commencement***, and the developer must prove considerable reliance on the approvals granted." *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (emphasis added); *see also Stratosphere Gaming*, 120 Nev. at 527–28, 96 P.3d at 759–60 (holding that because City's site development review process under Title 19.18.050 involved discretionary action by Council, the project proponent had no vested right to construct).
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> 36. "[C]ompatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest." *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *see Nevada Contractors v.*

Washoe Cty., 106 Nev. 310, 311, 792 P.2d 31, 31-32 (1990) (affirming county commission's denial of a special use permit even though property was zoned for the use).

37. The four Applications submitted to the Council for a general plan amendment, tentative map, site development review and waiver were all subject to the Council's discretionary decision making, no matter the zoning designation. *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112; *Cty. of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998), *superseded by statute on other grounds*; *Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nevada, Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983).

38. The Court rejects the Developer's attempt to distinguish the *Stratosphere* case, which concluded that the very same decision-making process at issue here was squarely within the Council's discretion, no matter that the property was zoned for the proposed use. *Id.* at 527; 96 P.3d at 759.

40. The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS) and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor.

43. The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course.

44. It is up to the Council – through its discretionary decision making – to decide whether a change in the area or conditions justify the development sought by the Developer and how any such development might look. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723.

47. The City's General Plan provides the benchmarks to ensure orderly development. A city's master plan is the "standard that commands deference and presumption of applicability." *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723; *see also City of Reno v.*

> *Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010) ("Master plans contain long-term comprehensive guides for the orderly development and growth for an area."). Substantial compliance with the master plan is required. *Nova*, 105 Nev. at 96-97, 769 P.2d at 723-24.
>
> 52. … NRS 278.349(e) does not confer any vested rights.

I(0147-0150).

The Developer filed two separate motions for reconsideration: one that challenged denial of the PJR (called a "motion for new trial") and one that challenged dismissal of the inverse condemnation claims. I(0156-0202). The district court granted the latter and entered an Order Nunc Pro Tunc that removed only those lines of the PJR Order that dismissed the inverse condemnation claims (23:4-20 and 24:4-5) but left intact everything else. I(0207-0212). In a separate order, the district court denied the "motion for new trial," finding no clear error in its PJR Order, as amended. II(0213-0228). Importantly, the district court reiterated its earlier conclusion "that the Developer does not have vested rights to have the 35-Acre Applications approved…." II(0223).

C. The District Court Contravened Its Earlier Conclusions To Hold That The City's Denial Of The Application Was A Taking And Entered A $34 Million Judgment In The Developer's Favor

Notwithstanding the PJR Order's correct conclusions of law, when considering the Developer's takings claims, the district court decided the exact opposite, concluding that:

(a) Zoning confers a constitutionally protected property interest to use property for any use permitted by zoning that can be "taken" if denied;

(b) Nevada cities have no discretion to disapprove or condition an owner's proposed use so long as the use is a permitted use in the zoning district;

(c) Housing is the only permitted use in the R-PD7 zoning district;

(d) The General Plan's open space designation cannot prevent the owner from using its property for any use permitted by zoning; and

(e) The parcel as a whole for purposes of regulatory takings analysis is the 35-Acre Property, rather than the PRMP or the Badlands.

II(294); V(0899-0906, 0912-0915); VI(0987-0990). These conclusions were contrary to Nevada law and the City's Unified Development Code and irreconcilable with the PJR Order. *See* I(0147-0150) and citations therein.

The district court found, for ripeness purposes, that the City had made a final decision that it will never allow any housing on the 35-Acre Property, despite the Developer having only filed one set of applications. V(0905-0906). The district court then concluded that the City is liable based on the theories that the City's denial of the Developer's Application effected a taking of: (1) the fee simple interest in the 35-Acre Property by preventing any economically viable use; and (2) the Developer's "property right" or "vested right" to develop housing on the 35-Acre Property. II(0295); VI(0987-0990). The district court ordered the City to

pay the Developer $34,135,000 as just compensation. VI(0987-0990). For the purpose of this Motion, the City collectively refers to these decisions, and all other previous interlocutory orders, as "the Judgment."

D. The District Court Awarded The Developer An Additional $4.7 Million In Fees, Costs And Property Tax Reimbursements And $9.4 Million In Pre-Judgment Interest

In addition to the $34 million Judgment, the district court granted the Developer's post-trial motions for reimbursement of property taxes, attorneys' fees and costs in the sum of $4,707,002.04 and approximately $9,416,116.37 in prejudgment interest (collectively, the "Additional Sums"), all of which derive from the legally unsupportable Judgment. VI(0968-0972, 0996-1042, 1140-1177).[4] The City requests that the Additional Sums also be stayed.

E. The District Court Denied The City's Motion To Stay And Conditioned The City's Right To Appeal On Payment Of The Judgment

The City filed the Motion to Amend to address the fact that the Judgment required the City to pay damages to the Developer without an associated requirement for the Developer to convey its fee simple interest in the 35-Acre Property to the City. VI(1043-1049). The City preserved all other challenges to the Judgment for appeal. VI(1043-1049). The City also moved the district court to stay

[4] At the time of this Motion, the district court had only entered a minute order setting the pre-judgment interest calculation at prime plus 2%. VI(1177). Although the district court has not yet entered an order, the City calculates the pre-judgment interest to be $9,416,116.37.

the Judgment pursuant to NRCP 62(b)(3) pending disposition of the Motion to Amend and NRCP 62(d)-(e) and NRAP 8(c) pending appeal. VI(1050-1126).

On February 9, 2022, the district court entered Findings of Fact and Conclusions of Law denying the City's requests for a stay ("the Stay Order"). VI(1128-1133). According to the district court, NRS 37.140 requires the City to pay the Judgment within 30 days, and NRS 37.170 makes that payment a precondition of the City's right to appeal. VI(1131-1133). The Stay Order stated:

> The City is hereby ordered to pay all sums assessed in this matter within 30 days of final judgment and as a condition to appeal.… [W]ith the 30-day delay in payment under NRS 37.140, the City will have sufficient time to seek a stay, if appropriate, from the Nevada Supreme Court.

VI(1132-1133).

ARGUMENT

A. As A Governmental Entity, The City Is Entitled To An Automatic Stay Without Posting A Bond

The City is entitled to a stay as a matter of right – without posting a supersedeas bond – simply by filing its motion below. "When an appeal is taken by the State or by any county, city or town within the State, or an officer or agency thereof and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant." NRCP 62(e). This provision must be read conjunctively with NRCP 62(d) to give a local government a right to a stay pending appeal without posting a bond. *See Clark Cty.*

Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J., 134 Nev. 174, 177, 415 P.3d 16, 19 (2018). The district court should have granted an automatic stay without a bond simply upon the City's filing of the motion that requested it. *See id.*

B. The City Is Entitled To A Stay Under NRAP 8(c)

Even if not automatic, the City is entitled to a stay pursuant to the NRAP 8(c) factors, which are: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether the appellant will suffer irreparable or serious injury if the stay is denied; (3) whether the respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether the appellant is likely to prevail on the appeal. NRAP 8(c)(1)-(4). "[I]f one or two factors are especially strong, they may counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

1. The Object Of The City's Appeal Would Be Defeated If A Stay Is Not Granted

a. Without A Stay, The City Could Irretrievably Lose More Than $48 Million Even If It Prevails

If the City is forced to pay the $34 million Judgment and the $14 million Additional Sums while an appeal is pending, there is no assurance that the Developer could reimburse that amount should the City prevail. If the Developer spends or allocates the money elsewhere, the City might never recover it. With an

irrevocable loss of such significant sums from the City's treasury, "any victory on appeal will be hollow." *Mikohn*, 120 Nev. at 252, 89 P.3d at 39.

b. Without A Stay, The Council Would Be Compelled To Grant Land Use Applications That Are Within Its Discretion To Deny, Irrevocably Altering The City's Environment

According to the Judgment, while the City's appeal is pending, property owners could claim a constitutional right to build virtually anything they choose simply because their property is zoned for the use. II(294); V(0899-0906, 0912-0915); VI(0987-0990). This would deprive the City of the discretion afforded by NRS Chapter 278 and nullify the City's General Plan. NRS 278.150, NRS 278.250 (2); II(0394-0397, 0422-0426); III(0427-0474). Every month, the City considers and decides as many as 100 discretionary land use applications. *See generally* https://lasvegas.primegov.com/portal/search. Because Nevada law provides that zoning **does not** confer a vested right and that any development must be consistent with the General Plan, until the Judgment, the City's discretionary decisions have been protected from takings claims that are premised on the specious argument that zoning confers a vested right that could be "taken" if a development application is denied. *See* NRS 278.150, NRS 278.250 (2); *Stratosphere Gaming v. City of Las Vegas*, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004); *Tighe*, 108 Nev. at 443, 833 P.2d at 1137; *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112.

By disregarding these authorities, the Judgment could effect a sea-change in State law regarding the scope of local police power to regulate land use. If, while the City's appeal is pending, local governments feel compelled to abandon their duty to exercise discretion over land use applications, the public interest would be seriously compromised. For example, under State law, cities and counties must "prepare and adopt a comprehensive, long-term plan" for their physical development and to "regulate and restrict" the construction, alteration and use of property to preserve air and water quality, promote the conservation of open space, provide for recreation, and generally promote health and welfare. NRS 278.250 (1)-(2). If cities and counties believe they must ministerially approve every application that is consistent with zoning, then the object of the City's appeal – to preserve its authority to regulate land use in the community's best interest and consistent with its General Plan – would be defeated. *See id.*

The media has already reported the district court's decision to the public, stating that Judge Williams ordered the City to pay $34.1 million for denying the Developer's application "even though the land was zoned for residential development." VI(1103). Likewise, at its October 6, 2021 meeting, the Council described the district court's ruling, alerting the public that the City is now faced with the untenable choice of either granting every land use application permitted within a zoning district or compensating property owners for the market value of

their property. V(0777). Because approvals and associated construction that occur while the appeal is pending could not be undone, the appeal should be decided on the merits before the Judgment is used to influence future land use decisions.

Moreover, the Developer has trumpeted the Judgment in the other pending lawsuits for the proposition that issue preclusion requires the City to be found liable for a taking of the other Badlands segments. V(0789-0844). The chaos created in these other cases cannot be unwound should the City prevail on appeal.

2. Absent A Stay, The City Would Suffer Irreparable Harm

The irrevocable loss of more than $48 million from the public treasury is irreparable harm because there is no adequate legal remedy. *AeroGrow Int'l, Inc. v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 76, 499 P.3d 1193, 1197 (2021). "[E]conomic harm can be considered irreparable." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) (internal quotations omitted). The irretrievable expenditure of substantial sums of money demonstrates irreparable harm. *See McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980).

Moreover, the irreversible damage to the City's discretionary planning process qualifies as irreparable. A "significant change in … programs and a concomitant loss of funding" as well as harms to an organization's mission or policies constitute irreparable harm. *E. Bay Sanctuary*, 993 F.3d at 677. So does irrevocable environmental damage. *See Nat'l Wildlife Fed'n v. Nat'l Marine*

Fisheries Serv., 886 F.3d 803, 820-21 (9th Cir. 2018). Mere threat of that harm occurring before a decision on the merits can be rendered warrants court intervention. *Cf. Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (in preliminary injunction context).

The State's planning and zoning laws set forth in NRS 278.010-278.828 are designed to protect the public against harmful development and to promote safe, healthy, efficient, and well-balanced land uses that provide adequate amenities and services for all while creating an attractive aesthetic for a thriving community. The Judgment will prompt the City to allow land uses it otherwise would have denied or conditionally approved in order to avoid paying compensation. V(0775-0779). Once those approvals are granted, and associated projects are constructed, permanent and lasting damage to the City's public welfare will have occurred.

3. The Developer Will Not Suffer Irreparable Harm If The Stay Is Granted

A stay in the payment of damages is not irreparable harm because the Developer is entitled to interest from the date of the taking, should it prevail. *City of North Las Vegas v. 5th & Centennial*, 130 Nev. 619, 624, 331 P.3d 896, 899 (2014). Moreover, the Developer will receive the statutory interest rate on any Judgment, if upheld. NRS 17.130. A delay in payment of money where interest accrues is not irreparable harm because it can be adequately remedied by

compensatory damages. *See Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987).

Moreover, the Developer's actions indicate it is only out for money. Nearly 18 months ago, this Court affirmed the City's approval of the Developer's luxury condominium project on the 17-Acre Property after that approval was reversed by the district court. Case No. 75481, IV(0622-0629). Thereafter, the City notified the Developer that the order reinstating its approvals was final, and the deadline for the Developer to start construction was extended by two years. IV(0631-0636). The City also invited the Developer to resubmit the 133-acre applications and file a first application for the 65-Acre Property and a second application for the 35-Acre Property, all of which the Developer declined to do. IV(0673-0681). Rather than build, the Developer elected solely to pursue the City for money damages in all four Badlands lawsuits.

4. The City Is Likely To Prevail On Appeal

"[A] movant [for a stay] does not always have to show a probability of success on the merits," but instead "must 'present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.'" *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). The City readily satisfies this standard because the district court

erred, as a matter of law, in finding categorical and *Penn Central* takings. First, those claims are not ripe. Second, even if deemed ripe, the City did not wipe out or nearly wipe out the value of the 35-Acre Property nor "take" a vested right to develop housing in designated open space because the Developer had no such right under well-established Nevada law. Third, even had the City wiped out the 35-Acre Property's value or taken a vested right to develop, the City allowed substantial development of the parcel as a whole, whether the entire PRMP or the Badlands. Finally, the Developer failed to submit any evidence or law to support its non-regulatory, physical, and temporary takings claims.

a. The District Court Acted Outside The Bounds Of Its Jurisdiction By Allowing the Developer's Unripe Claims To Proceed

If a party's claims are not ripe for review, they are not justiciable, and the Court lacks subject matter jurisdiction to review them. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010); *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988). A taking claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *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). "A final decision by the responsible

state agency informs the constitutional determination whether a regulation has deprived a landowner of all economically beneficial use of the property … or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (internal citations and quotations omitted).

To resolve a taking claim, a court must know "the extent of permitted development on the land in question." *Id.*, *quoting MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986)). The decisions of the U.S. Supreme Court regarding ripeness of takings claims "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer*, 477 U.S. at 351. *Williamson County* requires that a developer file and have denied at least two applications for development before a taking claim is ripe. *See* 473 U.S. at 191. Nevada follows *Williamson County* for its ripeness analysis. *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 419-20, 351 P.3d 736, 742 (2015).

Here, the Developer filed only one set of applications to develop the individual 35-Acre Property. IV(0549-0576). Under guiding ripeness authorities, that does not establish finality. *See Williamson County*, 477 U.S. at 351 (cited approvingly in *State*, 131 Nev. at 419-20, 351 P.3d at 742).

b. Declining To Remove The PR-OS Designation Did Not Change The 35-Acre Property's Value And Therefore Was Not A Regulatory Taking

Even if deemed ripe, the Developer cannot prevail because the City did not "completely deprive an owner of all economically beneficial use of her property." *State*, 131 Nev. at 419, 351 P.3d at 741 (internal quotes and citations omitted); *see also Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993) (regulation must deny "all economically viable use of [] property" to constitute a taking under either categorical or *Penn Central* tests); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-35 (1994) (taking requires agency action that "destroy[s] all viable economic value of the prospective development property").

Here, at the time the Developer bought the Badlands, the land could not legally be used for housing under the PR-OS designation, regardless of the zoning. III(0442-0458, 0485); V(0765); UDC 19.00.040; UDC 19.16.030. As the district court acknowledged, the Developer knew this at the time of purchase. I(0135). Nevada's land use regulatory framework requires cities to adopt General Plans (also called "master plans") governing the legal use of property. NRS 278.150 (1). In turn, "[t]he zoning regulations ***must*** be adopted in accordance with the master plan for land use and be designed: ... (b) To promote the conservation of open space ... (k) To promote health and the general welfare." NRS 278.250 (2)

(emphasis added); *see Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989). In implementing these mandates, the City's Unified Development Code provides:

> It is the intent of the City Council that all regulatory decisions made pursuant to this Title be consistent with the General Plan.... For purposes of this Section, "consistency with the General Plan" means not only consistency with the Plan's land use and density designations, but also consistency with all policies and programs of the General Plan, including those that promote compatibility of uses and densities, and orderly development consistent with available resources.

UDC 19.00.040. When exercising their powers, decisionmakers have broad discretion and "may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate...." NRS 278.250 (4).

Because the 35-Acre Property was designated PR-OS in the City's General Plan when the Developer bought the Badlands, and PR-OS does not permit residential use, the City did not devalue the property, or effect a taking, by simply maintaining the status quo.[5] *See Kelly*, 109 Nev. at 651, 855 P.2d at 1035 (rejecting takings claim where at time developer purchased property "he had adequate notice that his development plans might be frustrated"); *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 634-35 (9th Cir. 2020) (developer could not have reasonably expected agency to not enforce conditions in place when it purchased

[5] In Case No. 75481, this Court noted that a General Plan amendment was one of the required approvals to convert the Badlands into housing. IV(0627), *citing* LVMC 19.16.030(I).

the property); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120-21 (9th Cir. 2010) (takings claimants "bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had"). Similarly, the Developer could not have a reasonable investment-backed expectation that the City would lift the PR-OS designation to allow housing. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The Developer bought a golf course, and the City did nothing to interfere with the Developer's continued operation of that golf course. As a result, the City could not be liable for a regulatory taking.

c. The District Court's Conclusion Of Law That Zoning Confers A Right To Build Housing Is Contrary To All Authority

Ignoring well-established standards that limit regulatory takings to cases where regulation wipes out or nearly wipes out the property's economic value (*State*, 131 Nev. at 419, 351 P.3d at 741; *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35), the district court manufactured an unsupportable taking test. The district court concluded that the zoning designation gave the Developer a constitutionally protected property interest to build 61 housing units on the 35-Acre Property and that the City "took" that interest. II(0294-0295); V(0869-0870); VI(0978). The district court premised this unprecedented conclusion on the equally unprecedented conclusion that the PR-OS General Plan designation of the 35-Acre Property is a nullity, in

contravention of Nevada law that a General Plan designation governs the use of property, even if the zoning is inconsistent.[6] *See* NRS 278.250 (2).

The R-PD7 zoning district approved in the PRMP merely permits residential use but confers no "rights," constitutional or otherwise. *See Tighe*, 108 Nev. at 443, 833 P.2d at 1137 ("[C]ompatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest."). Nor does zoning invalidate or supersede the General Plan designation of the Property. *See* NRS 278.150 (cities shall adopt a General Plan that directs future uses of property); NRS 278.250(2) (zoning "must" be consistent with General Plan designation of property); *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112 ("municipal entities must adopt zoning regulations that are in substantial agreement with the master plan") (*quoting Nova Horizon*, 105 Nev. At 96, 769 P.2d at 723); *City of Reno*, 126 Nev. at 266, 236 P.3d at 12 (zoning decisions must defer to the city's master plan).

The R-PD zoning applicable to the 35-Acre Property provides:

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[6] The district court incorrectly ruled that a PR-OS General Plan designation is inconsistent with R-PD7 zoning based on the erroneous finding that single and multi-family housing are the only uses allowed in an R-PD7 district. II(0294-0295); VI(0987). To the contrary, R-PD7 not only allows, but encourages, the set-aside of open space as an amenity to serve the residential uses in the district. LVMC 19.10.50A. After the City Council provisionally zoned a 614-acre portion of the PRMP R-PD7, it designated in the General Plan the 403-acre residential portion for medium density residential and the 211-acre open space portion as PR-OS. This is common practice. V(0774B-0774O).

> … for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, ***efficient utilization of open space***, ... Single-family and multi-family residential and supporting uses are permitted in the R-PD District ***to the extent they are determined by the Director to be consistent with the density approved for the District and are compatible with surrounding uses***.... The approving body may attach to the amendment to an approved Site Development Plan Review whatever conditions are deemed necessary to ensure the proper amenities and to assure that the proposed development will be compatible with surrounding existing and proposed land uses.

UDC 19.10.050 (emphasis added). UDC 19.18.020 defines the term "Permitted Use" as, "Any use allowed in a zoning district as a matter of right ***if it is conducted in accordance with the restrictions applicable to that district***." (emphasis added). The Peccoles availed themselves of R-PD7 zoning's flexibility by setting aside the golf course as open space and an amenity for the PRMP. II(0343-0345, 0349). The City's broad discretion to approve or deny development generally and, in particular, in an R-PD7 zoning district, is not compatible with the district court's conclusion that the Developer has a constitutional right to build houses in that part of the R-PD7 zone set aside for open space. II(0294-0295, 0383); NRS 278.250 (4); UDC 19.10.050(D).

If the Judgment is upheld, a vast body of land use law that (a) requires cities to adopt General Plan designations that govern the use of property; (b) confers discretion to cities to keep or change those General Plan designations; and (c) confers discretion to deny or condition development applications in the public

interest, even where the proposed use is one of the permitted uses in the zone, would be nullified. *See Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60 (holding that because City's site development review process involved discretionary action by City Council, the project proponent had no vested right to construct); *Tighe*, 108 Nev. at 443, 833 P.2d at 1137 (holding that zoning does not confer rights to build zoned use); *City of Reno v. Harris*, 111 Nev. 672, 679, 895 P.2d 663, 667 (1995) ("Once it is established that an area permits several uses, it is within the discretion and good judgment of the municipality to determine what specific use should be permitted."); *Boulder City*, 110 Nev. at 246, 871 P.2d at 325 ("The grant of a building permit was discretionary. Therefore, under the applicable land use laws, [owner] did not have a vested entitlement to a constitutionally protected property interest."); *Nevada Contractors*, 106 Nev. at 314, 792 P.2d at 33 ("Because of the Board's particular expertise in zoning, the courts must defer to and not interfere with the Board's discretion if this discretion is not abused."); *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112 ("In order for rights in a proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting project commencement..."); *CMC of Nev.*, 99 Nev. at 747, 670 P.2d at 107 (There are no vested rights against changes in zoning laws "unless zoning or use approvals are not subject to further governmental discretionary actions affecting project commencement.").

The district court's disregard of these authorities on the grounds that they involved petitions for judicial review was erroneous. First, *Boulder City*, which squarely rejected the notion that owners have property rights in zoning, involved a constitutional challenge to denial of a permit, not a PJR. *See* 110 Nev. at 242, 871 P.2d at 322. Second, a PJR is merely a procedure for challenging government decisions that employs the same substantive law as an original claim; notwithstanding the district court's insistence, there is no separate substantive law of PJRs. *See*, *e.g.*, *Bombardier Transp. (Holdings) USA, Inc. v. Nevada Lab. Comm'r*, 135 Nev. 15, 18, 433 P.3d 248, 252 (2019) (reviewing de novo "statutory interpretation questions in the administrative context").

Legal rules do not vary depending on the type of suit that is asserted. If the Council had discretion to deny an application, as the district court correctly concluded in the PJR Order, it had the same discretion to deny the application in the context of the Developer's takings claims.

The Ninth Circuit agrees. IV(0666-0671). In *180 Land Co. LLC v. City of Las Vegas*, Ninth Circuit Case No. 19-16114, which involved the same parties and legal issue, the Developer alleged it had "vested zoning rights to develop residential units on the [Badlands]." IV(0648). The Ninth Circuit rejected that contention:

> To have a constitutionally protected property interest in a government benefit, such as a land use permit, an independent source, such as state

> law, must give rise to a "legitimate claim of entitlement," that imposes significant limitations on the discretion of the decision maker.... We reject as without merit plaintiffs' contentions that certain rulings in Nevada state court litigation establish that plaintiffs were deprived of a constitutionally protected property interest ....

IV(0669-0670). Like *Boulder City*, the *180 Land* case involved a constitutional challenge to a denial of a building permit, not a PJR. *See id.* These authorities are directly on point and required judgment for the City on the Developer's categorical and *Penn Central* claims.

d. The District Court Failed To Recognize The Substantial Development Permitted By The City In The Parcel As A Whole

Because the City approved substantial development in the PRMP and the Badlands, the taking claims failed as a matter of law because they were premised on the Developer's improper segmentation of the parcel as a whole. For takings liability to exist, there must be a wipeout or near wipeout of the parcel as a whole. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017). When assessing whether a developer has been deprived of all economic use, the property "must be viewed as a whole, not as … individual lots." *Kelly*, 109 Nev. at 651, 855 P2d at 1035 (finding that developer had improperly segmented the property to manufacture a takings claim).

> "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, 438 U.S. at 130-31; *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").

The district court failed to properly analyze the parcel as a whole, which is either the 1,596-acre PRMP or, at a minimum, the 250-acre Badlands, in which the City has permitted substantial development. II(0336-0392); IV(631-0636). The Developer's predecessor developed thousands of housing units, a hotel/casino, retail shopping mall, and golf course within the PRMP. I(0123); II(0319-0321, 0349, 0385). The Peccoles marketed the golf course and open space as an amenity to increase the value of adjacent parcels. II(0343, 0345, 0349). Even if the Badlands is deemed the parcel as a whole, the Developer segmented it into four development sites, and the City approved 435 condominiums on the 17-Acre segment, thereby conferring substantial value to the original 250-acre property. IV(0624, 0631-0633, 0726). The district court should have rejected the Developer's segmentation to manufacture a takings claim.

e. The Developer Failed To Present Evidence Of A Physical, Non-Regulatory, Or Temporary Taking

The Judgment erroneously concluded that the City was liable for a permanent physical taking on the faulty basis that Bill 2018-24 exacted an easement from the Developer. V(0892-0897). Bill 2018-24 did not apply to the Badlands on its face, and the City never applied the ordinance to the Developer. IV(0738-0741O). To the extent the Developer contended that a physical taking occurred because members of the public allegedly trespassed on the Badlands, the evidence showed that trespass occurred before Bill 2018-24 was enacted, during the 15 months the legislation was in effect, and after it was repealed. II(0308-0309). There is no evidence that any member of the public trespassed on the 35-Acre Property as a result of Bill 2018-24 or that any other City law authorized any trespasses. *See id.*

Even if there were such evidence, Bill 2018-24 did not permanently dispossess the Developer of the 35-Acre Property, as required to give rise to a physical taking. *Compare Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (noting that "permanent physical occupation of property forever denies the owner any power to control the use of the property"); *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 666, 137 P.3d 1110, 1124 (2006) (finding "per se" taking based on "permanent physical invasion"). The Developer submitted no evidence of damage to the 35-Acre Property from trespassers on the Badlands,

and the district court did not award any such damages. II(0308-0309). The district court's conclusion in the Stay Order that the Developer has been "dispossessed" of its property by Bill 2018-24 and trespassers is contrary to these authorities and constitutes clear error. VI(1134).

Moreover, the Developer did not present evidence or argument to show that the City interfered with the Developer's property, rendering it "unusable or valueless" as required for a non-regulatory taking. *State*, 131 Nev. at 421, 351 P.3d at 743. The Developer also failed to present any evidence that the City engaged in a temporary taking. The City is therefore likely to prevail on these claims as well.

C. NRS 37.140 Does Not Deprive The City Of Its Right To An Automatic Stay

1. Eminent Domain Statutes Regarding Payment Of Judgments Do Not Apply To This Regulatory Taking Case

The district court's conclusion that it should disregard the rules governing stays of judgments in civil actions and instead apply NRS 37.140 and NRS 37.170 because these statutes are "more specific" is misplaced. VI(1134). NRS 37.140 applies only where a public agency has exercised its power of eminent domain, not to regulatory taking judgments. NRS 37.0095; *see also Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 9, 106 P.3d 1198, 1199 (2005) ("NRS Chapter 37 ... contains the statutory scheme governing Nevada eminent domain proceedings"); *Gold Ridge Partners v. Sierra Pac. Power Co.*, 128 Nev. 495, 499, 285 P.3d 1059,

1062 (2012) ("NRS Chapter 37 governs the power of a public agency to take property through eminent domain proceedings.").

The eminent domain statutes regarding judgments and the law of regulatory takings are separate and distinct bodies of law in concept and practice. In eminent domain, the government's liability for a taking is established by the filing of the action, with the question of valuation of the condemned property to be determined in the court proceedings. *See* NRS 37.110. By contrast, in inverse condemnation, the government's liability is in dispute and must be decided by the court before the question of just compensation is addressed. *See generally Sisolak*, 122 Nev. at 650, 137 P.3d at 1114.

Under the law applicable to an inverse condemnation judgment, the City is entitled to an automatic stay of the money judgment without posting a bond. NRCP 62(d)-(e); *Clark Cty. Off. of Coroner/Med. Exam'r*, 134 Nev. at 177, 415 P.3d at 19. Eminent domain law does not alter that right. Because there is no conflict between NRCP 62 and NRS Chapter 37, the general/specific canon on which the district court relied does not apply. *Williams v. State Dep't of Corr.*, 133 Nev. 594, 601, 402 P.3d 1260, 1265 (2017).

Despite the clear differences between eminent domain and takings law, the district court conflated the two doctrines, relying primarily on *Clark County v. Alper*, 100 Nev. 382, 685 P.2d 94 (1984). VI(1134-1135). *Alper* applies to a small

set of cases where the government physically takes property but fails to initiate eminent domain proceedings, thereby forcing the property owner to file an inverse condemnation action. *See id.* at 385-86, 685 P.2d at 945-46. Moreover, *State ex rel. Dep't of Highways v. Second Jud. Dist. Ct.*, on which the district court relied to erroneously conclude that NRS 37.170 requires the City to pay the Judgment as a precondition of its right to appeal, involved a condemnation action in which an order of immediate occupancy had issued and there was no dispute that the state was in possession of the property. 75 Nev. 200, 201, 337 P.2d 274, 274 (1959).

No such circumstances exist in this regulatory taking case. The City has not exercised its eminent domain powers. I(083). The district court did not award damages for a physical invasion. VI(0984). Rather, the Developer's takings claims were based on the City's regulatory decisions, which the Developer claims prevented its desired development. I(0042-0047). Unlike eminent domain actions where the public agency requires title and possession to build a public project, the City does not need the 35-Acre Property for a public facility, has not taken possession, and should only obtain title and possession if and when it is required to pay the Judgment. I(0084). NRS 37.140 and NRS 37.170 have no application here.

On its face, NRS 37.170 does not make payment of the Judgment a precondition for the City to exercise its appeal rights. To the contrary, it contemplates that an appeal would already be "pending" following physical

occupation. NRS 37.170(1). Likewise, *State ex rel. Dep't of Highways* addressed "whether the State, ***as a condition to remaining in possession pending its appeal***, must deposit in court the amount of the award." *Id.* at 201, 337 at 274–75 (emphasis added). "The right of appeal is a substantial right which should not be taken away unless clearly intended by the statute… Any doubt about the construction of statutes regulating the right of appeal should be resolved in favor of allowing an appeal." *Thompson v. First Jud. Dist. Ct.*, 100 Nev. 352, 355, 683 P.2d 17, 19 (1984). The district court could not interfere with the City's appeal rights by construing NRS 37.170 as creating a pre-appeal requirement to pay the Developer more than $48 million that the City may never recover after a successful appeal.

2. Under The Plain Statutory Language, The Judgment Need Not Be Paid Until It Is Rendered Final On Appeal

Even assuming, *arguendo*, NRS 37.140 applies to this regulatory taking case, it only requires payment of just compensation after entry of a "final judgment." "'Final judgment' means a judgment which cannot be directly attacked by appeal." NRS 37.009(2). Until the appellate court decides the appeal and issues a remittitur, the Judgment is not yet "final." *See id.* The Stay Order did not even address NRS 37.009(2) and renders this language entirely meaningless, in contravention of fundamental principles of statutory construction. *See Williams*, 133 Nev. at 596, 402 P.3d at 1262.

CONCLUSION

Because the City is entitled to an automatic stay, the NRAP 8(c) factors warrant a stay, and NRS 37.140 and NRS 37.170 do not apply, a stay is justified and the district court cannot condition the City's appeal rights. The City asks for a stay of the Judgment and any Additional Sums while the City's appeal is pending.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 9th day of March, 2022

BY: /s/ Debbie Leonard

LAS VEGAS CITY ATTORNEY'S OFFICE Bryan K. Scott (#4381) Philip R. Byrnes (#166) Rebecca Wolfson (#14132) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 bscott@lasvegasnevada.gov pbyrnes@lasvegasnevada.gov rwolfson@lasvegasnevada.gov	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com
LEONARD LAW, PC Debbie Leonard (#8260) 955 S. Virginia St., Suite #220 Reno, NV 89502 775-964-4656 debbie@leonardlawpc.com	SHUTE, MIHALY & WEINBERGER, LLP Andrew W. Schwartz (CA Bar No. 87699) (Admitted pro hac vice) Lauren M. Tarpey (CA Bar No. 321775) (Admitted pro hac vice) 396 Hayes Street San Francisco, California 94102

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. The motion contains 35 pages, which exceeds the page limit in NRAP 27. Appellant has concurrently filed a motion to exceed the page limit.

Pursuant to NRAP 28.2, I hereby certify that I have read this motion, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of March, 2022. BY: /s/ Debbie Leonard

LAS VEGAS CITY ATTORNEY'S OFFICE Bryan K. Scott (#4381) Philip R. Byrnes (#166) Rebecca Wolfson (#14132) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 bscott@lasvegasnevada.gov pbyrnes@lasvegasnevada.gov rwolfson@lasvegasnevada.gov	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com

LEONARD LAW, PC Debbie Leonard (#8260) 955 S. Virginia St., Suite #220 Reno, NV 89502 775-964-4656 debbie@leonardlawpc.com	SHUTE, MIHALY & WEINBERGER, LLP Andrew W. Schwartz (CA Bar No. 87699) (Admitted pro hac vice) Lauren M. Tarpey (CA Bar No. 321775) (Admitted pro hac vice) 396 Hayes Street San Francisco, California 94102

Attorneys for Appellant

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). Participants in the case who are registered with E-Flex as users will be served by the E-Flex system and others not registered will be served via U.S. mail at the following addresses.

KAEMPFER CROWELL
Christopher L. Kaempfer
Stephanie H. Allen
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
ckaempfer@kcnvlaw.com
sallen@kcnvlaw.com
Attorneys for Respondents
180 Land Company, LLC and Fore Stars Ltd.

LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq.,
kermitt@kermittwaters.com
James J. Leavitt, Esq.
jim@kermittwaters.com
Michael A. Schneider, Esq.
michael@kermittwaters.com
Autumn L. Waters, Esq.
autumn@kermittwaters.com
Michael K. Wall, Esq.
mwall@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Respondents
180 Land Company, LLC and Fore Stars Ltd.

HUTCHISON & STEFFEN, PLLC
Mark A. Hutchison
Joseph S. Kistler
Matthew K. Schriever
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
mhutchison@hutchlegal.com
jkistler@hutchlegal.com
mschriever@hutchlegal.com
Attorneys for Respondents
180 Land Company, LLC and Fore Stars Ltd.

Elizabeth Ham, Esq.
EHB COMPANIES
1215 S. Fort Apache Road, Suite 120
Las Vegas, NV 89117
eham@ehbcompanies.com
Attorney for Respondents
180 Land Company, LLC and Fore Stars Ltd.

Dated: March 9, 2022

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