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

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

APPELLANT'S REPLY IN SUPPORT OF MOTION TO STAY

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INTRODUCTION

Although *Clark Cty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 134 Nev. 174, 177, 415 P.3d 16, 19 (2018), holds that Appellant City of Las Vegas ("the City") is entitled to a stay without bond as a matter of right simply by having filed its motion, Respondents 180 Land Co, LLC and Fore Stars Ltd. (collectively, "the Developer") do not even address that decision. The Developer's omission is a concession that *Clark Cty. Coroner* is dispositive here and that a stay is required.

Rather than counteract the governing legal authority, the Developer fabricates a narrative that it acquired the Badlands golf course with a legitimate expectation that it had a constitutional right to develop the entire 250-acre property with housing and distorts takings law to fit that tale. According to the Developer's narrative, the City Council conspired with surrounding homeowners to impose new and unfair regulatory restrictions that prevented the Developer from developing housing, thereby wiping out the property's value. The narrative also contends the City Council physically seized, and currently occupies, the Badlands. Contrary to the Developer's narrative, the City denied the Developer's application to build 61 homes in an area that had been designated open space for 25 years. The City's regulatory decisions neither sought nor obtained "possession" of the property.

State and local land use statutes strongly encourage open space reservation in planned developments involving large acreage. In 1990, the original developer

of the 1,569-acre Peccole Ranch Master Plan ("PRMP") set aside the Badlands as open space to compliment future development in the PRMP. The City also required the developer to set aside the Badlands for recreation as a condition of a casino approval in the PRMP. Because the purpose of the Badlands was to provide an open space and recreational amenity to the surrounding community, in 1992, the City designated the Badlands Parks, Recreation, and Open Space ("PR-OS") in the City's General Plan. The City repeatedly reaffirmed the PR-OS designation by legislative act, most recently in 2018. Consistent with the purpose of the PR-OS designation – to ensure that communities are adequately served by open space – residential and commercial uses are not allowed.

The Developer acquired the Badlands in 2015, after thousands of homes had been built and sold in the PRMP (many by the Developer), all in reliance on the reservation of the Badlands as an open space amenity. The Developer then segmented the Badlands into four development sites of 17, 35, 65, and 133 acres, and applied to develop houses on three of the four segments. Under state and local law statute and unanimous decisions of this Court, the City had discretion to reject each application and retain the PR-OS designation to preserve open space for the homeowners who bought property in the PRMP in reliance on that amenity.

A regulatory taking requires a wipeout or virtual wipeout of property value. As the district court found, the Developer was aware that the PR-OS designation

prohibited housing development when it bought the property. The Developer paid a price for the Badlands that accounted for the restrictions on the property's use. Whatever the property's value at the time of purchase, the City Council's retention of the PR-OS designation—the legal status quo—did not change that value and thus did not effect a regulatory taking.

Nonetheless, the City Council approved the Developer's application to build 435 luxury housing units on the 17-Acre segment of the Badlands, in the process lifting the PR-OS designation and rezoning the property to allow greater density. By the Developer's own evidence, this approval multiplied the Developer's investment in the Badlands by a factor of six, rendering false the Developer's narrative that the City has prevented housing development in the Badlands and wiped out its value. Although the City Council rejected the application for the 35-acre segment at issue in this appeal, the City Council was merely doing its job as directed by state law to preserve long-standing open space for the benefit of the community. There was nothing illegal or unreasonable in the Council's decision.

The Developer's contention that the City physically appropriated the Badlands for public use is another part of its false narrative. There is no evidence that the City has invaded or occupied any part of the Badlands. Nor is there any evidence that the City authorized the public to physically occupy the Badlands. This is a contested regulatory taking case where liability for regulatory restrictions

on the owner's use of the property is in dispute. It is not an eminent domain case in which the condemnor requires the property for a public project and has obtained an order of occupancy to allow construction to begin. Because the City has not taken permanent physical possession of the property, NRS 37.170 does not apply, and the primary authority on which the Developer relies, *State ex rel. Dep't of Highways v. Second Jud. Dist. Ct.*, 75 Nev. 200, 205, 337 P.2d 274, 277 (1959), is inapplicable. NRCP 62 entitles the City to a stay without posting a bond, and NRAP 8(c) militates in favor of a stay. Nothing presented in the Developer's Opposition alters this conclusion.

ARGUMENT

A. The Developer's Argument That NRS Chapter 37 Prohibits A Stay Is Premised On Two Conditions That Do Not Exist: A Final Judgment Within The Meaning Of NRS 37.009(2) And Physical Possession

1. The Developer Does Not Dispute That A "Final Judgment," As Defined By NRS 37.009, Does Not Yet Exist

The Developer's Opposition fails to address that, although NRS 37.140 states that payment must be made within 30 days after final judgment, an eminent domain judgment does not become "final" until it can no longer be challenged on appeal. NRS 37.009(2). Because the Judgment is not final within the meaning of NRS 37.009(2), it did not trigger the 30-day deadline for payment specified in NRS 37.140. The Developer concedes this point. *See Ozawa v. Vision Airlines,*

Inc., 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating party's failure to respond to an argument as a concession that the argument is meritorious).

2. NRS 37.170 Does Not Apply Because The City Has Not Taken Possession Of The 35-Acre Property

To evade the plain language of NRS 37.009(2), the Developer tries to shoehorn this case into NRS 37.170 by mischaracterizing the City's regulatory decisions regarding the Developer's *use* of the property as having taken "*possession*." According to the Developer, by denying certain applications and passing a short-lived bill to increase opportunities for public participation in land use changes, the City has "possession" of the 35-Acre Property and therefore, pursuant to NRS 37.170, must pay the Judgment as a pre-condition to appeal. Opp at 5. This argument fails on all fronts.

a. On Its Face, NRS 37.170 Does Not Make Payment Of A Judgment A Precondition Of Appeal

Contrary to the Developer's assertion, nothing in the language of NRS 37.170 can be construed to precondition appeal rights on the payment of a judgment. *See id.* NRS 37.170 applies to situations in which a government entity has exercised its rights to eminent domain and obtained occupancy, which does not exist here: "[T]he plaintiff, ***if already in possession***, may continue therein, and if not, the court shall, upon motion of the plaintiff, authorize the plaintiff ***to take***

possession of and use the property during the pendency of and until the final conclusion of the litigation." *Id.* (emphases added).

The primary authority on which the Developer relies – and convinced the district court to erroneously embrace – provides only that a condemnor in an eminent domain action that has been granted immediate occupancy can be required to pay a just compensation award as "a condition to the condemnor's right to maintain an appeal ***while remaining in possession***." *State*, 75 Nev. at 205, 337 P.2d at 277 (emphasis added). It does not pre-condition appeal rights. *See id.* By its terms, *State*, an eminent domain action, does not apply in an inverse condemnation action such as this, where the City has merely regulated the owner's use of the property, is not in possession of the property, and has no need for the property.

In addition to being inapplicable, *State* pre-dates the seminal regulatory takings decision, which holds that courts must conduct "ad hoc, factual inquiries" into the circumstances of each particular case. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Because, unlike a direct condemnation case, the City very much disputes liability here, a de novo case-by-case factual inquiry under NRAP 8(c) is warranted, rather than blanket application of NRS 37.170.

While the Court has stated that eminent domain "rules and principles" govern inverse condemnation actions (*Clark County v. Alper*, 100 Nev. 382, 391, 685 P.2d 943, 949 (1984)), there is no language in NRS Chapter 37 to support the

notion that every provision of the chapter is applicable to inverse condemnation. "[A] statute's meaning is not necessarily limited to those cases in which it has already been applied." *Echeverria v. State*, 137 Nev. Adv. Op. 49, 495 P.3d 471, 477 (2021). *Alper* addressed only one statutory provision not at issue here regarding the date of valuation, NRS 37.120(1)(b), which is an issue in common between inverse and direct condemnation. 100 Nev. at 391, 685 P.2d at 949.

Because liability for the taking is conceded by the filing of an eminent domain action, and the only issue remaining is the amount of just compensation, eminent domain rules cannot possibly provide standards for liability for a regulatory taking, where liability is contested. *See Echeverria*, 137 Nev. at _, 495 P.3d at 477 (rejecting party's "overread[ing]" out of "context" of Court's previous interpretations of a statute). Had the Legislature intended for NRS 37.170 to apply to inverse condemnation cases it would have so stated. *See State, Dep't of Motor Vehicles & Pub. Safety v. Brown*, 104 Nev. 524, 526, 762 P.2d 882, 883 (1988). Where it did not, the Court should not favor the Developer's proffered "policy considerations" to write a provision into the statute that does not exist. *See id.*

Rather than construe *Alper* in its context, the district court stretched *Alper* beyond reason when concluding that NRS 37.170 deprives the government of its right to a stay in any inverse condemnation case where the government has not taken possession of the property and has no desire to take possession. "[S]tatutory

interpretation should avoid absurd or unreasonable results." *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1065, 864 P.2d 285, 286 (1993). Because the Developer's construction requires the Court to create a new statutory obligation that the Legislature did not impose and undermines the City's substantive appeal rights by presuming liability that is fiercely contested, it should be rejected.

b. The City Has Not Occupied The 35-Acre Property

State also does not apply here because the City is not in possession. Nevada law treats the term "possession" as synonymous with "occupancy." *See State*, 75 Nev. at 201, 337 P.2d at 274 (concluding that possession occurred upon condemnor receiving order of immediate occupancy); *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 119 Nev. 429, 438, 76 P.3d 1, 8 (2003) (same); *Argier v. Nevada Power Co.*, 114 Nev. 137, 141, 952 P.2d 1390, 1393 (1998) (same); *see also McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662–63, 137 P.3d 1110, 1122 (2006) (defining a per se taking as "physical possession of the property" and forced "acquiesce[nce] to a permanent physical occupation"). The City has not physically occupied the 35-Acre Property, and the Developer provides no evidence to prove otherwise.

In the absence of such evidence, the Developer grasps at three baseless assertions of an alleged "physical occupation" to invoke NRS 37.170: denial of a fence application; denial of an application to add new access points; and passage of

a short-lived bill that provided for greater public participation in proposals to repurpose golf courses. Opp at 22-24. A regulation does not effect a physical taking unless it permits the government or the public to physically occupy the owner's property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 436 (1982); *see also Tahoe-Sierra Pres. Council, Inc. v Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002) (noting "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other").

None of the three regulatory decisions referenced by the Developer triggers the application NRS 37.170 because they: (1) did not give the City "possession" of the property or authorize public use; (2) did not deprive the Developer of its possession; and (3) were not permanent. *See Sisolak*, 122 Nev. at 662-663, 137 P.3d at 1122 (requiring "permanent physical invasion" for "per se taking" to exist).

i. The City's Denial Of The Developer's Fence Application Was Neither A Permanent Physical Occupation Nor An Exercise Of Possession

Contrary to the Developer's misleading assertions, the City did not physically occupy the 35-Acre Property (permanently or otherwise) or prevent the Developer from excluding others by denying its fence application. For nearly 20 years, the Developer and its predecessor used, possessed, enjoyed, and otherwise exercised their rights to the Badlands without the new fencing the Developer

sought in 2017. II(0349-03553). When the Developer filed an application to construct additional fences, the Acting Planning Director simply informed the Developer that a different application would be required:

> I have determined that the proximity to adjacent properties has the potential to have significant impact on the surrounding properties. As such, the Minor Development Review (Building Permit Level Review) is denied and an application for a Major Review will be required pursuant to LVMC 19.16.100(G)(l)(b).

12RA02621.

On its face, nothing in this denial was a physical occupation (permanent or otherwise) or a decision to prevent the Developer from excluding others (permanent or otherwise). 12RA02621. Rather, the City simply required the Developer to complete a different application and invited the Developer to "coordinate with the Department of Planning the submittal of a Major Site Review," which the Developer failed to do. 12RA02621. The district court erred as a matter of law by deeming the City's requirement that the Developer apply for fencing to constitute "possession" of the 35-Acre Property that amounted to a "per se" taking. VI(1133); *see Sisolak*, 122 Nev. at 662-663, 137 P.3d at 1122.

ii. The City's Denial Of The Developer's Application For New Access Points Was Neither A Permanent Physical Occupation Nor An Exercise Of Possession

Similarly, the City did not physically occupy (permanently or otherwise) or deprive the Developer of its possession and use of the 35-Acre Property by

denying its application for new access points. For nearly 20 years, the Developer and its predecessor used, possessed, enjoyed, and otherwise exercised their rights to the Badlands with the existing access points, which included vehicular access from public streets at multiple locations. IV(0737). After the Developer closed the golf course in 2016, the Badlands retained the same vehicular access. *Id*. The Judgment's assertion that the City denied the Developer access to the 35-Acre Property is therefore incorrect.

When the Developer filed an application in 2017 to construct new access points that did not previously exist, the Acting Planning Director simply informed the Developer that a different application would be required:

> After reviewing the permit submitted (L17-00198) for perimeter wall modifications and controlled access gates on the subject site, I have determined that the proximity to adjacent properties has the potential to have significant impact on the surrounding properties. As such, the Minor Development Review (Building Permit Level Review) is denied and an application for a Major Review will be required pursuant to LVMC 19.16.100(G)(1)(b).

12RA02615.

On its face, nothing in this denial constituted an occupation of the property by the City (permanent or otherwise) or a decision that prevented the Developer from possessing and using the property (permanent or otherwise). 12RA02615. Nor did it "oust" the Developer or authorize public use, as the Developer disingenuously contends. Opp at 26, 32. To the contrary, the City simply invited

the Developer to file a different application. 12RA02615 ("Please coordinate with the Department of Planning for the submittal of a Major Site Review.").

The Developer's reliance on *Schwartz v. State* is misplaced because that case involved the state highway department cutting off the owner's existing access to the highway abutting its property. 111 Nev. 998, 1001, 900 P.2d 939, 941 (1995). In contrast, here, the City did not impair the Developer's existing access rights. IV(0737). And the Developer does not have a "right" to construct new access points wherever and however it wants that can be "taken" simply because the City requires compliance with its Code. LVMC 19.16.100(G)(1)(b).

The City has discretion to implement its Code provisions to ensure that modifications to existing land uses are compatible with their surroundings. *See generally* UDC 19.00.030. To the extent the Developer contends the City's application process was too burdensome or that the City's requirements were a pretext to prevent development of the 35-Acre Property, the 25-day statute of limitations to challenge the City's denial expired in 2017 without the Developer filing a petition for judicial review. *See* NRS 278.0235. As a result, the district court erred as a matter of law by deeming the City's denial of the application for new access points to have put the City in "possession" and amounted to a "per se taking." VI(1133-34).

iii. The City's Passage Of Two Bills Related To Golf Course Repurposing Did Not Effect A Physical Occupation Of The 35-Acre Property

Likewise, passage of two bills related to golf course repurposing did not constitute "possession" of the 35-Acre Property within the meaning of NRS 37.170. Bill 2018-24, passed in November 2018 and repealed in January 2020, did not apply to the 35-Acre Property because it applied only to "any proposal by or on behalf of a property owner to repurpose a golf course or open space." 13RA02722-02723. While the bill was in effect, the Developer filed no "proposals" to repurpose the 35-Acre Property. VII(1146-1160). The City denied the Developer's Application for the 35-Acre Property on June 21, 2017, and the Developer filed suit, including claims for a physical taking, on September 24, 2017, 18 months and 15 months, respectively, **before** Bill 2018-24's passage. I(0009-0027). Accordingly, Bill 2018-24 did not apply to the 35-Acre Property.

Even assuming *arguendo* Bill 2018-24 applied, it did not constitute "occupation" of private property. The Judgment erroneously concluded that Bill 2018-24 required the Developer to allow the public to physically occupy the 35-Acre Property and thus effected a physical taking, similar to the statutes at issue in *Sisolak* and *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). V(0894-0896). In *Sisolak*, the ordinance exacted an easement that required private property owners to submit to permanent occupation of their airspace by commercial

airplanes. 122 Nev. at 667, 137 P.3d at 1125. In *Cedar Point*, a statute compelled the owners of certain private industrial facilities to grant a permanent easement to labor union organizers to physically enter their property. 141 S.Ct. at 2072.

In contrast, Bill 2018-24 did not authorize public access but rather required a developer to discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City. 13RA02731-02732. Only if a developer planned to ***maintain*** ongoing public access did it have to document such plans and ***only*** if requested by the City. 13RA02731-02732. The City never notified the Developer that it should submit a plan under Bill 2018-24, and the Developer did not do so. IV(0738-0739). Accordingly, Bill 2018-24's requirement to document ongoing public access did not apply to the 35-Acre Property. IV(0739); 13RA02731-02732. Nor was Bill 2018-24 permanent. The City Council enacted the Bill in November 2018 and repealed the Bill in January 2020. 13RA02722-02723.

Finally, there is no evidence that the public physically occupied the Badlands as a consequence of any City regulation. The Developer's evidence shows that members of the public trespassed on the Badlands before Bill 2018-24 was enacted, while it was in effect, and after it was repealed. 16RA03411-03573.

Bill 2018-5, adopted on May 16, 2018, also did not authorize public access. 13RA02712-02717. Rather, the bill created a process for public engagement, did

not impose substantive requirements for a development project or authorize public use, and cannot be construed as having taken physical possession of private property. 13RA02712-02717. The Developer's Opposition provides no analysis of how this bill supposedly effectuated a physical taking of the 35-Acre Property. As a result, the Developer's contention that these bills amounted to "possession" as that term is used in NRS 37.170 is misplaced.

iv. The Developer Did Not Recover Any Damages For A Physical Taking

Importantly, the Developer does not dispute that it neither asked for, nor was awarded, damages for an alleged physical invasion of the 35-Acre Property. The Judgment awards damages to the Developer for its categorical and *Penn Central* claims based on an appraisal submitted by the Developer. V(0935-0945). That appraisal concluded that the City' regulation of the Developer's use wiped out the value of the Property, not any physical "possession" by the City. V(0935-0945). The Developer's failure to present evidence of damage from a physical occupation underscores that the City did not dispossess the Developer from its property.

B. The Developer Fails To Overcome The Law That Entitles The City To An Automatic Stay

1. There Is No Conflict Between NRS Chapter 37 And NRCP 62 In This Case

Because the City does not have "possession," the Developer's contention that NRS 37.170 conflicts with NRCP 62 fails. Absent any conflicting provision in

NRS Chapter 37, the Developer is compelled to agree that NRCP 62 authorizes the City to obtain a stay without bond pending appeal. Opp 7. The Developer does not even address, much less dispute, the applicability of *Clark Cty. Off. of Coroner*, 134 Nev. at 177, 415 P.3d at 19 (NRCP 62(e) must be read conjunctively with NRCP 62(d) to grant government right to stay without posting bond).

2. NRCP 62 And NRAP 8(c) Supersede Any Conflicting Procedural Provisions In NRS Chapter 37

To the extent any conflict can be construed to exist, an automatic stay without bond is still warranted because the Court's procedural rules take precedence over a conflicting statute:

> [T]he legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. Furthermore, where ... a rule of procedure is promulgated in conflict with a preexisting procedural statute, the rule supersedes the statute and controls.

State v. Second Jud. Dist. Ct. ex rel. Cty. of Washoe, 116 Nev. 953, 959–60, 11 P.3d 1209, 1213 (2000), *quoting State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) (alterations in the original).

> Pursuant to the doctrine of separation of powers, it is clear that the judiciary, as a coequal branch of government, has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice. Any infringement by the legislature upon such power is in degradation of our tripartite system of government and strictly prohibited….

> [T]he inherent power of the judicial department to make rules is not only reasonable and necessary, but absolutely essential to the effective and efficient administration of our judicial system, and it is our obligation to insure that such power is in no manner diminished or compromised by the legislature.

Goldberg v. Eighth Jud. Dist. Ct., 93 Nev. 614, 615-17, 572 P.2d 521, 522-23 (1977). Under this authority, NRCP 62 and NRAP 8 prevail over NRS 37.170, and the Developer's general vs. specific argument adopted by the district court is inapplicable.

The Developer tries to circumvent this law by describing NRS 37.170 as a "substantive statute." Opp at 8. The Ninth Circuit has soundly rejected that exact position. *See Vacation Vill., Inc. v. Clark Cty.*, Nev, 497 F.3d 902, 913 (9th Cir. 2007). While the right to just compensation arguably is a substantive right, the timing of payment and the government's right to a stay are procedural issues to which procedural rules apply. *See id.* (applying FRCP 62 rather than NRS 37.170 to reject landowner's contention that full judgment amount needed to be deposited before the government could pursue its appeal). Indeed, in the air space invasion case that the Developer repeatedly invokes, the Court rejected the landowner's citation to NRS 37.170 and issued a stay pending appeal. *See* Order Granting Motion For Stay, Dec. 12, 2001, Case No. 38853, *County of Clark v. Hsu*.

C. The Developer's Analysis Confirms That The NRAP 8(c) Factors Warrant A Stay

1. The Developer Does Not Dispute That The City Council's Discretionary Decision-Making Authority Under Chapter 278 Will Be Defeated Absent A Stay

The Developer's Opposition does not address the grave impacts the Judgment imposes on the City Council's obligation to adopt General Plans governing physical development and to "regulate and restrict" development according to zoning ordinances. NRS 278.150; NRS 278.250(1)-(2). It also completely ignores the Court's long line of cases holding that zoning does not confer a vested right because the City has discretionary authority to restrict land uses to protect the public interest. *See, e.g., Stratosphere Gaming v. City of Las Vegas*, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995).

The object of the City's appeal is not just to overturn a grossly erroneous and excessive monetary judgment. It is also to ensure that the Council continues to exercise its duties and discretion under NRS Chapter 278 to regulate land use for the common good. By holding that the City must pay compensation for denying any application simply because the proposed use happens to be permitted within the zoning district, the Judgment chills the Council from doing its job as mandated by NRS Chapter 278.

2. The Developer Mischaracterizes The Nature Of The Irreparable Harm The City Claims

In disputing the Judgment's irreparable harm, the Developer misleadingly characterizes the City as arguing it will "need to approve every single application that comes before it based on the district court orders." Opp 33. That is not what the City's Petition states. Rather, according to the Judgment, the Council will need to approve every application so long as it does not seek a zoning change. II(294); V(0899-0906, 0912-0915); VI(0987-0990).

In other words, no matter if a proposed project that proposes a use permitted by the applicable zoning violates every other provision of the City's General Plan or zoning Code, or will be harmful to the City's environment, the Judgment says failure to approve it constitutes a taking. II(294); V(0899-0906, 0912-0915); VI(0987-0990). Moreover, under the Judgment, whenever an agency downzones property or amends a zoning ordinance to impose new restrictions, the agency must compensate every property owner in the zone for a "taking" of their "property rights" in the prior zoning. These scenarios, which jeopardize the State's entire system of land use regulation, are a very real probability, not "unsubstantiated hyperbole" as the Developer contends. V(0777).

3. The Developer Fails To Identify Any Irreparable Harm To Itself

In arguing that it will purportedly suffer irreparable harm from a stay, the Developer rehashes the inapplicable *State* decision, incorrectly attributes statements by a former Councilmember to the City as a whole, and identifies only alleged monetary damages. It is well established that compensatory damages do not constitute irreparable harm unless they will be irretrievable at the end of the litigation. *See McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980); *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987). Delayed payment of the Judgment, a property tax reimbursement, and "carrying costs" are all compensatory damages. The fact that the Developer thinks they are an "oppressive burden" does not alter that conclusion. In the unlikely event that the Developer prevails on appeal, it will be compensated for the delay through the payment of interest. As a result, it will suffer no irreparable harm from a stay.

4. The Developer's Analysis Confirms The City Will Prevail On Appeal

a. The Developer Fails To Identify Any Vested Property Rights That Were Taken By The City

The lynchpin of the Developer's takings argument falls flat because zoning does not confer a vested right that was "taken" by the City. Ignoring *Tighe*, *Am. Dev. W.*, *Stratosphere*, *Nova Horizon*, and *Cold Springs*, the Developer points to NRS 278.349(3)(e) to prop up the erroneous Judgment. That subsection provides

that, for tentative map applications, if the zoning of the property conflicts with the General Plan, the zoning ordinance takes precedence. *Id*. The district court established in the PJR Order that "NRS 278.349(e) does not confer any vested rights." I(0150). On its face, NRS 278.349(3)(e) does not apply to a waiver of the City's development standards, a General Plan Amendment to change the PR-OS designation, or a Site Development Plan review required to develop the 35-Acre Property.[1] IV(0549-0576). The PR-OS designation, which does not permit housing, had existed since 1992 and, as the Developer knew when it bought the Badlands and filed the Application, remains the applicable law. II(0394-0397, 0406-0426); III(0427-0474).

Additionally, state law and the City's Code are clear that the General Plan takes precedence over zoning. *See* NRS 278.250(2).

> Except as otherwise authorized by this Title, approval of all Maps, Vacations, Rezonings, Site Development Plan Reviews, Special Use Permits, Variances, Waivers, Exceptions, Deviations and

[1] Although the Developer's application packet for the 35-Acre Property sought a General Plan Amendment, Site Development Review, a Waiver and a Tentative Map, those were not successive applications needed to establish ripeness for a regulatory takings claim. *See 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). Each of these applications was necessary for the Developer's proposed 61-home project. The Developer filed no other applications to develop the individual 35-Acre Property. Accordingly, the Master Development Application covering the entire Badlands and the fence and access applications do not count as applications to develop the 35-Acre Property standing alone for purposes of final decision ripeness.

> Development Agreements shall be consistent with the spirit and intent of the General Plan.

UDC 19.16.010(A) (emphasis added).

> 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. Consistency with the General Plan has long been acknowledged by this Court's jurisprudence. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010); *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989). The Attorney General Opinion on which the Developer relies supports the City's interpretation of NRS 278.349(3)(e), not the Developer's: "[T]he correct procedure is to amend the master plan rather than to erode the master plan by simply refusing to adhere to its guidelines." 1984 Nev. Op. Att'y Gen. 19 (1984).

Finally, NRS 278.349(3)(e) is inapplicable because the zoning of the 35-Acre Property does not conflict with the General Plan. R-PD7 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. V(0774B-0774O). This is common practice. V(0774B-0774O). Because open space is an authorized use in an R-PD7 district, the zoning designation did not create a constitutionally protected property interest to build houses that was "taken" when the City declined to change the PR-OS designation. *See id.* Accordingly, there is no conflict between the R-PD7 zoning and the PR-OS designation of the 35-Acre Property and NRS 278.349(3)(e) is irrelevant.

b. The "Eminent Domain Law" Invoked By The Developer Does Not Affect The Primacy Of The General Plan

None of the cases the Developer cites stand for the proposition that zoning creates a property interest that can be "taken" by the denial of a discretionary land use application. Opp at 11-12. Indeed, the language the Developer quotes from *City of Las Vegas v. C. Bustos* addressed valuation in a direct condemnation case, not the agency's liability for a regulatory taking, and did not remotely hold that zoning confers a constitutional right to build. 119 Nev. 360, 362, 75 P.3d 351, 362 (2003). Nor could it, because liability for the taking is not at issue in an eminent domain action. Likewise, *Andrews v. Kingsbury Gen. Imp. Dist. No. 2*, 84 Nev. 88, 89, 436 P.2d 813, 813 (1968), was a direct condemnation case where the dispute was over damages.

In *Clark Cty. v. Alper*, 100 Nev. 382, 385, 685 P.2d 943, 945 (1984), the parties stipulated that the County had already taken physical possession of the property for a road-widening project, so the only issue in dispute was valuation, not liability. The issue in *Alper v. State, Dep't of Highways* involved interpretation of the federal Highway Beautification Act, 23 U.S.C. §131, not whether zoning creates a vested property interest. 95 Nev. 876, 878, 603 P.2d 1085, 1086 (1979), on reh'g sub nom. *Alper v. State*, 96 Nev. 925, 621 P.2d 492 (1980). *Sisolak* involved a regulation that authorized the physical invasion of private property. 122 Nev. at 672, 137 P.3d at 1128. The Court considered property's zoning for the purpose of valuation. *See id.* None of these cases supports the misguided notion that zoning establishes a vested property interest that is "taken" if a discretionary application for a use allowed within the zoning district is denied.

c. The Developer Cannot Make A Belated Collateral Attack On The PR-OS Designation That Its Predecessor Sought And That The City Lawfully Adopted In 1992

The Developer's predecessor – in whose shoes the Developer stepped into – requested that the Badlands be set aside as a golf course and open space in order that it could obtain approval for the hotel/casino it sought to build in the PRMP. II(0311-0321, 0349-0351, 0357, 0381). In presenting its proposed PRMP, the Developer's predecessor acknowledged that it conformed to the City's General Plan in part because it "[p]rovide[d] for the continuing development of a diverse

system of open space." II(0356). Once the Developer's predecessor established the location of the open space in the PRMP, by ordinance duly adopted in 1992, the City designated the Badlands as 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 other words, the Developer's predecessor not only knew of the PR-OS designation but specifically sought it out to reap the economic benefits of the open space to the PRMP as a whole. II(0311-0321, 0349-0351, 0357, 0381). The Developer is bound by the legislation adopted in response to its predecessor's open space commitments and offered no evidence to call into question the lawfulness of the 25-year-old PR-OS designation. Moreover, the Developer's collateral attack on the 1992 PR-OS designation and the subsequent legislation reaffirming that designation is too late. *See* NRS 278.0235 (25-day statute of limitations to challenge final action of City Council).

d. Substantive Land Use Law Applies Equally To Original Claims And Petitions For Judicial Review

The Developer's attempt to discard decades of binding land use decisions from this Court on the basis that they arose in a petition for judicial review posture is a false premise. In a constitutional challenge to denial of a building permit (i.e., not a PJR case), this Court squarely rejected the notion that owners have vested rights in a discretionary land use approval. *Boulder City v. Cinnamon Hills*

Assocs., 110 Nev. 238, 246, 871 P.2d 322, 325 (1994). The Developer's Opposition ignores this binding authority.

Additionally, the Developer mischaracterizes the holding in *City of Henderson v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 26, 489 P.3d 908, 912 (2021). Recognizing that "civil actions and judicial review proceedings are fundamentally different," and focusing on the different procedures, scope of review and allowable evidence that are used in each, the Court in *Henderson* concluded that the two types of proceedings should not be combined. *Id.* The Court said nothing about the substantive law that should be applied. *See id.* It has long been established that the same land use law applies to original claims and PJRs. *Compare Boulder City*, 110 Nev. at 242, 871 P.2d at 322 *to Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60.

e. The Evidence Cited By The Developer Does Not Establish Any Type Of Taking

Although the Developer fills its Opposition with a host of inflammatory material, it only identifies three City actions in its takings analysis: (1) denial of the Application (which sought a General Plan Amendment and Site Development Review) and a Master Development Agreement application; (2) denial of the applications for new fencing and access points; and (3) adoption of bills related to golf course repurposing. Opposition 25-26. These actions are described in more

detail *supra* and did not authorize public use, obstruct the Developer's access, or dispossess the Developer.

They also did not deny "all economic use" of the Badlands or render it valueless because the City approved 435 luxury condominiums in the Badlands parcel as a whole. Indeed, in its Opposition, the Developer does not even address the authoritative case that lays down the test for the parcel-as-a-whole doctrine. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017). Nor does it address *Kelly v. Tahoe Reg'l Planning Agency*, which clearly rejects the notion that a landowner's creation of individual parcels can overcome the parcel as a whole. 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993). Ignoring these binding authorities, the Developer doubles down on the district court's erroneous legal conclusion, which cited to an unpublished disposition and a treatise that predated *Murr*. Opp at 31, citing V(0899-0901). Those are not the law. The Developer also cites NRS 37.039, which does nothing to change the rules set out in *Murr* or *Kelly*.

The City permitted substantial development in the PRMP and the Badlands, which conferred a multi-million-dollar benefit to the Developer. After the district court struck down that approval, this Court reinstated it in Case No. 75481 (IV(0623-0628)). The City then notified the Developer that the approval would remain valid for an extra two years from remittitur. IV(0631). The Developer's mischaracterization of this procedural history as the City having purportedly

"clawed back" the approval is plainly wrong and does not authorize the Developer to improperly segment the Badlands for its lawsuits in violation of *Murr* and *Kelly*.

The Opposition also does not address that, under *Penn Central* and the long-standing PR-OS designation, the Developer could not have a reasonable expectation that it could convert the designated open space into houses. The Developer's own appraiser concluded that if the 35-Acre Property could not be developed with housing, it had a zero value.[2] 17RA3682. Accepting *arguendo* the appraiser's conclusion, the Badlands was worth zero when the Developer bought the property because the PR-OS designation was in effect at that time, and as Judge Williams found, the Developer was aware of it. I(0135). By simply declining to lift the PR-OS designation (*i.e.*, maintaining the status quo), the City could not have changed the value of the 35-Acre Property. As a result, the Developer cannot establish a categorical or *Penn Central* taking.

5. Statements Of Individual Council Members Or City Officials Do Not Have The Force Of Law To Give Rise To A Taking

The Developer improperly references statements by individual City Councilmembers and employees, which do not constitute official City action, to support its takings claims. "A city can act by and through its governing body; statements of individual council members are not binding on the city." *City of*

[2] The Developer's expert testimony was "uncontested" only because the district court improperly precluded the City from offering its competing evidence as to valuation. V(0951-0967).

Corpus Christi v. Bayfront Assocs., Ltd., 814 S.W.2d 98, 105 (Tex. Ct. App. 1991). A "city can speak only through its council." *Pac. Tel. & Tel. Co. v. City of Seattle*, 14 F.2d 877, 880 (W.D. Wash. 1926).

This principle is consistent with Nevada's Open Meeting Law, pursuant to which the City can adopt laws only through the City Council at a properly noticed public meeting that meets all statutory requirements. *See* NRS 241.015; NRS 241.020; NRS 241.035; NRS 241.036; *see also Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. 304, 307, 419 P.3d 140, 142 (2018) (discussing when action by board is required). A public body composed of elected officials, such as the Las Vegas City Council, may not act except by vote of a majority of those elected officials. NRS 241.0355(1). Statements of individual Councilmembers that do not comply with these statutory requirements are not laws, have no legal force, and do not bind the City government. And because individual City employees cannot establish law or City policy or make land use decisions that Chapter 278

obligates the City Council to make, none of the statements referenced by the Developer is relevant to the Court's analysis of whether a taking occurred here.[3]

Likewise, statements by the Developer's attorneys and neighboring property owners (cited at Opp 20-21) are not actions of the City.

CONCLUSION

NRS 37.170 does not apply to this case or deprive the City of its right to an immediate stay without bond. NRAP 8(c) militates in favor of a stay. As a result, the City respectfully requests that the Court stay the Judgment and Additional Sums pending appeal.

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[3] Notably, the Developer falsely attributes actions to the "City Tax Assessor." Opp at 15. The tax assessor to which the Developer refers is an employee of Clark County, not the City, who reassessed the Badlands from open space to residential after the Developer chose to close the golf course. *Id.*, citing V(0867). The Assessor is authorized to value property for the purposes of tax assessments. The Assessor's opinions of value and assumptions on which those opinions are based do not constitute regulation and do not bind the City Council, which has exclusive authority to regulate land use in the City.

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 24th day of March, 2022

BY: /s/ Debbie Leonard

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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 reply contains 30 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 24th 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). 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.

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