Case No. 84345

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

and

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

Respondents.

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

REQUEST FOR LEAVE TO FILE A REPLY TO JUSTICE HERNDON'S RESPONSE OF IMPARTIALITY

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Attorney for 180 Land Co, LLC and Fore Stars Ltd.

Respondents 180 Land Co., LLC and Fore Stars Ltd. ("Landowners") hereby respectfully request leave pursuant to NRAP 35(c) to file the attached Reply to Judge Herndon's Response of Impartiality and in support of their Notice of Justice Participation In Lower Tribunal and Motion for Disqualification ("Reply').

The Landowners respectfully submit this request for leave to address the impartiality concerns regarding Justice Herndon before a decision is made on the Motion to Disqualify.

For the reasons stated herein and within the attached Reply, the Landowners respectfully request leave to file their Reply. A true and correct copy of the Reply is attached hereto.

DATED this 4th day of April, 2022.

ELIZABETH GHANEM HAM
/s/ Elizabeth Ghanem Ham
Elizabeth Ghanem Ham, Esq. Bar No. 6987
Attorney for 180 Land Co, LLC and Fore Stars Ltd.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REQUEST FOR LEAVE TO FILE A REPLY TO JUSTICE HERNDON'S RESPONSE OF IMPARTIALITY** was filed electronically with the Nevada Supreme Court on the 4th day of April, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Attorney for 180 Land Co, LLC and Fore Stars Ltd.

INTRODUCTION

Justice Herndon's Response of Impartiality (Justice Herndon's Response) addresses only his belief that he can be impartial in the pending appeal. Respectfully, that is not the issue. The issue for disqualification considers the "appearance of impropriety," which is based on: 1) whether Justice Herndon decided issues that will be before him on appeal; and, 2) whether a reasonable person knowing all the circumstances would "harbor doubts" concerning Justice Herndon's impartiality. The following shows both factors require disqualification.

1. Justice Herndon Considered and Decided Issues in the 65 Acre Case that Will be Before This Court in this 35 Acre Case and This is Always a Disqualifying Factor

The standard for disqualification here is whether there is the "appearance of impropriety." Nev. Code of Jud. Conduct Rule 1.2. The United States Congress has adopted a definitive rule for when there is **always** the "appearance of impropriety" in 28 U.S.C.A. section 47 – "No judge shall hear or determine an appeal from the decision of a case ***or issue*** tried by him." Emphasis supplied. The United States Supreme Court has stated the purpose of this rule is to "promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

Here, the City admits that Justice Herndon decided or considered issues in a detailed 35-page order (EXHIBIT 2) entered in the 65 Acre Case, while a district

court judge, that are directly before this Court in this 35 Acre Case, where he now sits as a justice of the Supreme Court. To support its arguments in the 17, 35, and 133 acre cases, the City repeatedly cited to Justice Herndon's 65 Acre Case Order. Just by way of example: a) in its summary judgment papers in this 35 Acre Case, the City referenced Justice Herndon's 65 Acre Case order **73 times**; b) in its summary judgment reply in the 17 Acre Case, the City referenced Justice Herndon's 65 Acre Case Order **32 times**; and, c) in its remand papers in the 133 Acre Case, the City referenced Justice Herndon's 65 Acre Case order **40** times. *EXHIBITS 3,4, 5, 6, 7.* This is **145 times** the City claimed Justice Herndon's order in the 65 Acre Case applied to the 35, 17, and 133 acre cases. Moreover, the City represented to every tribunal in these four cases that all cases involve "common plaintiffs, a common defendant, a common property, common causes of action and common questions of fact and law. EXHIBIT 1. Therefore, Justice Herndon, in the 65 Acre Case, considered, addressed and made findings and conclusions on at least some of the common causes of action and issues that are before this Court in this 35 Acre Case. This, alone, is grounds for disqualification.

2. A Reasonable Person Would "Harbor Doubts" About Justice Herndon's Participation in this Appeal

The "appearance of impropriety" test is what a reasonable person in the public would think about Justice Herndon siting on this case. "[W]hat matters is not the reality of bias of prejudice **but its appearance**." *Liteky v. United States*, 510 U.S.

540, 548 (1994). Emphasis added. Put another way, disqualification is required if "a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality." *United States v. Dalfonso,* 707 F.2d 757, 760 (3d. Cir. 1983). Comment 5 of Nev. Code of Jud. Conduct Rule 1.2 is in accord, stating the test is based on the perception the judge's participation would "create[] in reasonable minds." Therefore, the standard is not whether Justice Herndon thinks he can be impartial, but rather whether a reasonable person on the streets of Las Vegas would harbor doubts about his participation.

The public policy for focusing on the public' perception, rather than what Justice Herndon may think is clear – "the public's confidence in the judiciary … may be irreparably harmed if a case is allowed to proceed before a judge who *appears* to be tainted." *Clemmons v. Wolfe*, 377 F.3d 322, 325 (2004). Italics in original.

Justice Herndon's Response does not address this reasonable person standard; it merely states Justice Herndon's belief that he can be impartial.

Applying the correct reasonable person standard, the question is simply – whether a reasonable person knowing the facts of this case "would harbor doubts" concerning Justice Herndon's participation in this 35 Acre Case appeal where he entered a 35-page summary judgment order while sitting as a district court judge in the 65 Acre Case that directly and indirectly addressed at least 11 of the issues that

are pending in this 35 Acre Case. And, this reasonable person would also need to know that the Appellant City of Las Vegas repeatedly represented, at least **145 times** that Justice Herndon's order in the 65 Acre Case should apply in this 35 Acre Case and the City has always maintained that the two cases involve "common plaintiffs, a common defendant, a common property, common causes of action and common questions of fact and law. EXHIBITS 1, 3, 4, 5, 6, 7. Furthermore, Justice Herndon's Response seemingly justifying his Order dismissing the 65 Acre Case reveals how he will rule in this 35 Acre Case.

No reasonable person, based on these facts, would think that it is okay for Justice Herndon to sit on this case; he or she "would harbor doubts" concerning Justice Herndon's participation in this appeal.

3. Conclusion

What Justice Herndon believes about his impartiality is not relevant to whether this reasonable person would harbor doubts about his participation. Given Justice Herndon's detailed 35-page Order in the 65 Acre Case that, as admitted by the City, addresses at least 11 of the issues pending in this 35 Acre Case, and his defense of the 65 Acre Order in his filed Response, a reasonable person would certainly harbor doubts about his impartiality.

Therefore, it is undisputable that Justice Herndon's participation in this appeal **will not** "promote public confidence in the integrity of the judicial process."

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988). And, to allow Justice Herndon to sit on this case would undermine the principle to "uphold and promote the independence, integrity, and impartiality of the judiciary." *Id.*, Canon 1. The City's arguments to its taking and reasons why it believes it will succeed on appeal are *exactly the same defenses and arguments presented in the 35 Acre Case (the instant case), the 17 Acre Case, the 133 Acre Case and the 65 Acre Case* (collectively "related cases") thereby demonstrating the impossibility of avoiding "***impropriety and the appearance of impropriety***." Nev. Code of Jud. Conduct, Rule 1.2; 2.11(A)(6)(d). Accordingly, it is respectfully requested that Justice Herndon be disqualified from this case.

DATED this 4th day of April, 2022.

ELIZABETH GHANEM HAM

/s/ Elizabeth Ghanem Ham
Elizabeth Ghanem Ham, Esq. Bar No. 6987
Attorney for 180 Land Co, LLC and Fore Stars Ltd.

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Exhibit 1

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X,

Defendants.

CASE NO. 2:19-cv-01467-KJD−DJA

NOTICE OF RELATED CASES

Pursuant to LR 42-1, Defendant City of Las Vegas, by and through its undersigned counsel, hereby provides notice to the Court that this case is related to the following three cases pending in the United States District Court for the District of Nevada:[1]

> *Fore Stars, Ltd. and Seventy Acres LLC v. City of Las Vegas and The Eighth Judicial District Court, Dept. 24 (Hon. Jim Crockett, District Court Judge, in His Official Capacity)*; Case No. 2:19-cv-01469-JAD-NJK
>
> *180 Land Co LLC v. City of Las Vegas*; Case No. 2:19-cv-01470-RFB-BNW
>
> *180 Land Co LLC, Fore Stars, Ltd., and Seventy Acres, LLC v. City of Las Vegas*; Case No. 2:19-cv-01471-JCM-EJY

As set forth below, the instant action and the three above-referenced related cases involve common plaintiffs, a common defendant, a common property, common causes of action, and common questions of fact and law. Therefore, assignment to a single district judge is likely to effect a substantial savings of judicial effort.

Common Plaintiffs

Each of the four cases involves one or more of three affiliated entities as plaintiffs: Fore Stars, Ltd.; Seventy Acres LLC; and 180 Land Co LLC. All three of these entities (collectively, the "Developer") are managed by EHB Companies, LLC, which, in turn, is managed by Yohan Lowie, Paul Dehart, Vicki Dehart, and Frank Pankratz.

Common Defendant

The City of Las Vegas is a named defendant in all four cases. In three of these cases, the City of Las Vegas is the only named defendant; in the fourth case (Case No. 2:19-cv-01469-JAD-NJK), the Developer also named the Eighth Judicial District Court, County of Clark, State of Nevada (the Honorable Jim Crockett, District Court Judge, in his official capacity) as a defendant.

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[1] LR 42-1 requires parties to provide notice of related cases "whether active or terminated". Accordingly, the City of Las Vegas provides notice to the Court that this case is also related to the terminated case styled, *180 Land Co LLC; Fore Stars, Ltd.; Seventy Acres LLC; and Yohan Lowie v. City of Las Vegas; James Coffin; and Steven Seroka*; Case No. 2:18-CV-547 JCM (CWH). That case shared commonality of plaintiffs, defendant City of Las Vegas, facts, and the same 250-acre property as the instant action, but involved different causes of action. On December 21, 2018, the Honorable James C. Mahan entered an order granting defendants' second motion to dismiss (ECF No. 72), resulting in the termination of that case.

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Common Property

Each of the four cases involves portions of approximately 250 acres in the Queensridge community formerly known as the Badlands Golf Course, and commonly described as Clark County APNs 138-32-301-005, 138-31-201-005, 138-31-601-008, 138-31-702-003, 138-31-702-004, 138-31-801-002, 138-31-801-003, and 138-32-301-007 (the "Badlands Property"). The four cases involve four different portions of the Badlands Property that the Developer split into separate parcels for redevelopment of the golf course.

Common Causes of Action

In each of the four cases, the Developer asserts takings claims against the City of Las Vegas under the United States Constitution and the Constitution of the State of Nevada relative to the Developer's attempt to redevelop the Badlands Property. In the case in which the Developer named the Honorable Jim Crockett, Eighth Judicial District Court Judge as a defendant, the Developer also asserts a judicial takings claim.

Common/Similar Questions of Fact and Law

The City of Las Vegas removed each of the four cases on August 22, 2019 pursuant to *Knick v. Township of Scott, Pennsylvania*, et al., 139 S.Ct. 2162 (2019). Thus, common issues of jurisdiction are present in each case. Additionally, common/similar issues of fact exist in the cases as the Developer has alleged eleven actions taken by the City of Las Vegas that constitute a common basis for the takings claims asserted in the cases, including the allegation, "The City has Shown an Unprecedented Level of Aggression to Deny All Use of the 250 Acre Residential Zoned Land." Further, common issues of law exist relative to whether the City of Las Vegas' actions constitute a categorical taking, a *Penn Central* regulatory taking, a regulatory *per se* taking, a nonregulatory taking, or a temporary taking.

Each of the four cases involves redevelopment of the Badlands Property, common parties, common claims, and common questions of fact and law. As such, adjudication of these four actions would entail substantial duplication of labor if the actions were heard by different district judges. Additionally, as opposed to considering the individual parcels subdivided by the Developer in the respective four cases, the Court must consider the property as a whole for purposes of determining

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whether a regulatory taking has occurred. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1948, 198 L. Ed. 2d 497 (2017).

Therefore, the City of Las Vegas respectfully submits that consolidation of the above-referenced actions is appropriate.

DATED this 28th day of August, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 28th day of August, 2019, I caused a true and correct copy of the foregoing **NOTICE OF RELATED CASES** to be electronically filed with the Clerk of the Court by using CM/ECF service and serving on all parties of record via U.S. Mail as follows:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, LTD., SEVENTY ACRES, LLC, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, vs. CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entitles I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entitles I through X, Defendants.	CASE NO. 2:19-cv-01471-JCM-EJY **NOTICE OF RELATED CASES**

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DATED this 28th day of August, 2019.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X,

Defendants.

CASE NO. 2:19-cv-01470-RFB-BNW

NOTICE OF RELATED CASES

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Pursuant to LR 42-1, Defendant City of Las Vegas, by and through its undersigned counsel, hereby provides notice to the Court that this case is related to the following three cases pending in the United States District Court for the District of Nevada:[1]

180 Land Co LLC, et al. v. City of Las Vegas; Case No. 2:19-cv-01467-KJD-DJA

Fore Stars, Ltd. and Seventy Acres LLC v. City of Las Vegas and The Eighth Judicial District Court, Dept. 24 (Hon. Jim Crockett, District Court Judge, in His Official Capacity); Case No. 2:19-cv-01469-JAD-NJK

180 Land Co LLC, Fore Stars, Ltd., and Seventy Acres, LLC v. City of Las Vegas; Case No. 2:19-cv-01471-JCM-EJY

As set forth below, the instant action and the three above-referenced related cases involve common plaintiffs, a common defendant, a common property, common causes of action, and common questions of fact and law. Therefore, assignment to a single district judge is likely to effect a substantial savings of judicial effort.

Common Plaintiffs

Each of the four cases involves one or more of three affiliated entities as plaintiffs: Fore Stars, Ltd.; Seventy Acres LLC; and 180 Land Co LLC. All three of these entities (collectively, the "Developer") are managed by EHB Companies, LLC, which, in turn, is managed by Yohan Lowie, Paul Dehart, Vicki Dehart, and Frank Pankratz.

Common Defendant

The City of Las Vegas is a named defendant in all four cases. In three of these cases, the City of Las Vegas is the only named defendant; in the fourth case (Case No. 2:19-cv-01469-JAD-NJK), the Developer also named the Eighth Judicial District Court, County of Clark, State of Nevada (the Honorable Jim Crockett, District Court Judge, in his official capacity) as a defendant.

---

[1] LR 42-1 requires parties to provide notice of related cases "whether active or terminated". Accordingly, the City of Las Vegas provides notice to the Court that this case is also related to the terminated case styled, *180 Land Co LLC; Fore Stars, Ltd.; Seventy Acres LLC; and Yohan Lowie v. City of Las Vegas; James Coffin; and Steven Seroka*; Case No. 2:18-CV-547 JCM (CWH). That case shared commonality of plaintiffs, defendant City of Las Vegas, facts, and the same 250-acre property as the instant action, but involved different causes of action. On December 21, 2018, the Honorable James C. Mahan entered an order granting defendants' second motion to dismiss (ECF No. 72), resulting in the termination of that case.

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Common Property

Each of the four cases involves portions of approximately 250 acres in the Queensridge community formerly known as the Badlands Golf Course, and commonly described as Clark County APNs 138-32-301-005, 138-31-201-005, 138-31-601-008, 138-31-702-003, 138-31-702-004, 138-31-801-002, 138-31-801-003, and 138-32-301-007 (the "Badlands Property"). The four cases involve four different portions of the Badlands Property that the Developer split into separate parcels for redevelopment of the golf course.

Common Causes of Action

In each of the four cases, the Developer asserts takings claims against the City of Las Vegas under the United States Constitution and the Constitution of the State of Nevada relative to the Developer's attempt to redevelop the Badlands Property. In the case in which the Developer named the Honorable Jim Crockett, Eighth Judicial District Court Judge as a defendant, the Developer also asserts a judicial takings claim.

Common/Similar Questions of Fact and Law

The City of Las Vegas removed each of the four cases on August 22, 2019 pursuant to *Knick v. Township of Scott, Pennsylvania*, et al., 139 S.Ct. 2162 (2019). Thus, common issues of jurisdiction are present in each case. Additionally, common/similar issues of fact exist in the cases as the Developer has alleged eleven actions taken by the City of Las Vegas that constitute a common basis for the takings claims asserted in the cases, including the allegation, "The City has Shown an Unprecedented Level of Aggression to Deny All Use of the 250 Acre Residential Zoned Land." Further, common issues of law exist relative to whether the City of Las Vegas' actions constitute a categorical taking, a *Penn Central* regulatory taking, a regulatory *per se* taking, a nonregulatory taking, or a temporary taking.

Each of the four cases involves redevelopment of the Badlands Property, common parties, common claims, and common questions of fact and law. As such, adjudication of these four actions would entail substantial duplication of labor if the actions were heard by different district judges. Additionally, as opposed to considering the individual parcels subdivided by the Developer in the respective four cases, the Court must consider the property as a whole for

purposes of determining whether a regulatory taking has occurred. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1948, 198 L. Ed. 2d 497 (2017).

Therefore, the City of Las Vegas respectfully submits that consolidation of the above-referenced actions is appropriate.

DATED this 28th day of August, 2019.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FORE STARS, LTD, SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiff, vs. CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT 24 (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entitles I through X, ROE Corporations I through X,	CASE NO. 2:19-cv-01469-JAD-NJK **NOTICE OF RELATED CASES**

ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entitles I through X,

Defendants.

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/s/ Jelena Jovanovic
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Exhibit 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, Ltd., SEVENTY ACRES, LLC, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, vs. CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entitles I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entitles I through X, Defendants.	Case No.: A-18-780184-C Dept. No. III **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING CITY OF LAS VEGAS' MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that the Findings of Fact and Conclusions of Law Granting City of Las Vegas' Motion for Summary Judgment was entered in the above-referenced case on the 30th day of December, a copy of which is attached hereto.

. . .

. . .

. . .

. . .

DATED this 30th day of December 2020.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 30th day of December, 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING CITY OF LAS VEGAS' MOTION FOR SUMMARY JUDGMENT** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, LTD, SEVENTY ACRES, LLC, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, v. CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entitles I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entitles I through X, Defendants.	Case No. A-18-780184-C Dept. No. III **FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING CITY OF LAS VEGAS' MOTION FOR SUMMARY JUDGMENT**

Departmental History

The instant matter was filed in the Eighth Judicial District Court (hereinafter referred to by "Department" designations) by Plaintiff's 180 Land Company, LLC et al. (hereinafter "Developer") on August 28, 2018, and assigned to Judge Israel in Department 28. Based on a peremptory challenge filed by the Defendant City of Las Vegas (hereinafter "City"), the matter was reassigned on February 5, 2019, to Judge Silva in Department 9. The peremptory challenge was subsequently reversed and the matter was reassigned back to Department 28 on February 22, 2019.

Thereafter, on March 12, 2019, Department 28 recused itself from hearing the matter and it was again reassigned to Department 9. Based on a new peremptory challenge filed by

the Developer, the matter was reassigned on April 26, 2019, to Department 8, which was at that time vacant pending the appointment of a new judge.

Prior to the appointment of the new Department 8 judge, the matter was removed to Federal Court on August 22, 2019. In September, 2019, Judge Atkin was appointed to Department 8. On October 24, 2019, the matter was remanded back to State Court by the Federal Court.

On November 6, 2019, Department 8 recused itself and the matter was then reassigned to Judge T. Jones in Department 10. Department 10 presided over the case until September, 2020. At that time, a caseload reassignment occurred and the matter was reassigned to this court, Department 3.

Procedural History

The instant case centers on disputes between the Developer and the City over property formerly known as the Badlands Golf Course. Based on those disputes, Developer filed a series of inverse condemnation actions in the Eighth Judicial District Court. The actions are each specific to separate parcels of land and are commonly identified by the acreage at issue.

The instant matter is commonly referred to as the "65-Acre Property case" and was filed, as stated above, on August 28, 2018. Pending before Judge Williams in Department 16 is Case A758528, the "35-Acre Property case," which was filed on July 18, 2017. Pending before Senior Judge Bixler is Case A773228, the "17-Acre Property case," which was filed on April 20, 2018. Lastly, pending before Judge Sturman in Department 26 is Case A775804, the "133-Acre Property case," which was filed on June 7, 2018.

Also relevant and of note is the fact that the above four inverse condemnation actions were preceded by Case A752344, the "Crockett case" which was filed on March 10, 2017, and assigned to Judge Crockett in Department 24. That matter also dealt with the "17-Acre Property" and was a Petition for Judicial Review filed by a group of citizens challenging the

decision of the City to grant Developer's application to develop that particular property. Judge Crockett granted the Petition for Judicial Review over the objection of both the Developer and the City. Developer then appealed and the City filed an amicus brief in support of the Developer. The Nevada Supreme Court reversed Judge Crockett's decision by way of an order filed March 5, 2020. By then, however, Developer had filed the "17-Acre Property case" now pending before Senior Judge Bixler.

On November 9, 2020, City filed the instant Motion for Summary Judgment (hereinafter "Motion"). On November 23, 2020, Developer filed their Opposition and a Countermotion to Determine the Two Inverse Condemnation Sub-Inquiries in the Proper Order (hereinafter "Countermotion"). On December 9, 2020, City filed a Motion to Strike Developer's Countermotion (hereinafter "Motion to Strike"). The pending motions have been fully briefed.

The court held a lengthy hearing on the pending motions on December 16, 2020. Appearing remotely were James J. Leavitt, Elizabeth Ghanem Ham, Autumn Waters and Michael Schneider on behalf of the Developer, and George F. Ogilvie III, Andrew Schwartz and Philip R. Byrnes on behalf of the City. The court made an initial ruling denying the City's Motion to Strike, finding that the relief requested was proper for a countermotion as it simply asked this court to engage in a certain legal analysis format if and when it addressed the merits of the City's summary judgement request, and to make certain findings, if necessary, in favor of Developer based on that legal analysis.

Regarding the Summary Judgment Motion and the Countermotion, the Court having reviewed the pleadings and exhibits in the instant case, and, where relevant and necessary, in the companion cases, and having considered the written and oral arguments presented, and being fully informed in the premises, makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

I. The Badlands as open space for Peccole Ranch

1. In 1980, the City approved William Peccole's petition to annex 2,243 acres of undeveloped land to the City. Ex. A at 1-11.[1] Mr. Peccole's intent was to develop the entire parcel as a master planned development. *Id.* at 1. After the annexation, the City approved an integrated plan to develop the land with a variety of uses, called the "Peccole Property Land Use Plan." Ex. B at 12-18. In 1986, Mr. Peccole requested approval of an amended master plan featuring two 18-hole golf courses, one of which was in the general area where the Badlands golf course was later developed. Ex. C at 31-33; Ex. WW.

2. In 1988, the Peccole Ranch Partnership ("Peccole") submitted a revised master plan known as the Peccole Ranch Master Plan ("PRMP") and an application to rezone 448.8 acres for the first phase of development ("Phase I"). Ex. E at 62-93. In 1989, the City approved the PRMP and Phase I rezoning application, after Peccole agreed to limit the overall density in Phase I and reserve 207.1 acres for a golf course and drainage in the second phase of development ("Phase II") of the PRMP. *Id.* at 96-97.

3. In 1989, the City included Peccole Ranch in a Gaming Enterprise District ("GED"), which allowed Peccole to develop a resort hotel in the PRMP so long as Peccole provided a recreational amenity such as an 18-hole golf course. Ex. G at 114-124, 130, 135-37. Peccole reserved 207 acres for a golf course to satisfy this requirement. Ex. E at 96, 98; Ex. G at 123-124.

4. In 1990, Peccole applied to amend the PRMP for Phase II. Ex. H at 138-161. The revised PRMP highlighted an "extensive 253-acre golf course and linear open space system winding throughout the community [that] provides a positive focal point while creating a

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[1] References to lettered Exhibits are to the Exhibits contained in the City's Appendix. References to numbered Exhibits and/or "LO Appx" Exhibits are to the Exhibits contained in the Developer's Appendix.

mechanism to handle drainage flows." *Id.* at 145. The City approved the Phase II rezoning application under a resolution of intent subject to all conditions of approval for the revised PRMP. *Id.* at 183-94.

II. The PR-OS General Plan designation of the Badlands

5. Since 1992, the City's General Plan has designated the Badlands for parks, recreation, and open space, a designation that does not permit residential development. On April 1, 1992, the City Council adopted a new Las Vegas General Plan, including revisions approved by the Planning Commission. Ex. I at 195-204, 212-18. The 1992 General Plan included maps showing the existing land uses and proposed future land uses. *Id.* at 246. The future land use map for the Southwest Sector designated the area set aside by Peccole for an 18-hole golf course as "Parks/Schools/ Recreation/Open Space." *Id.* at 248. That designation allowed "large public parks and recreation areas such as public and private golf courses, trails and easements, drainage ways and detention basins, and any other large areas of permanent open land." *Id.* at 234-35.

6. From 1992 to 1996, Peccole developed the 18-hole golf course in the location depicted in the 1992 General Plan, and a 9-hole course to the north of the 18-hole course. *Compare id.* at 248 *with* Ex. TT; *see also* Ex. J, UU. The 9-hole course was also designated "P" for "Parks" in the City's General Plan as early as 1998. *See* Ex. K. The Badlands 18-hole and 9-hole golf courses, totaling 250 acres, remain in the same configuration today. When the City Council adopted a new General Plan in 2000 to project growth over the following 20 years ("2020 Master Plan"), it retained the "parks, recreation, and open space" [PR-OS] designation. Ex. L at 265; compare *id.* at 269 with Ex. I at 234-35, 248. Beginning in 2002, the City's General Plan maps show the entire Badlands designated as PR-OS. Ex. M at 274-77.

7. In 2005, the City Council incorporated an updated Land Use Element in the 2020 Master Plan. Ex. N at 278-82. This 2005 Land Use Element designated all 27 holes of the

Badlands golf course as PR-OS for "Park/Recreation/Open Space." *Id.* at 291. Each ordinance of the City Council updating the Land Use Element of the General Plan since 2005 has approved the designation of the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged. *See* Ex. O at 292, 300-01 (Ordinance #6056 9/2/2009); Ex. P at 302-04, 316-17 (Ordinance #6152 5/8/2011); Ex. Q at 318, 331-32 (Ordinance #6622 6/26/2018).

III. The R-PD7 zoning of the Badlands

8. In 1972, the City established R-PD7 zoning (Residential-Planned Unit Development, 7 units/acre). Ex. R. "The purpose of a Planned Unit Development [was] to allow a maximum flexibility for imaginative and innovative residential design and land utilization in accordance with the General Plan." *Id.* at 333. The "PD" in R-PD stands for "Planned Development." Planned Development zoning, generally applicable to larger development sites, "permits planned-unit development by allowing a modification in lot size and frontage requirements under the condition that other land in the development be set aside for parks, schools, or other public needs." *Zoning*, *Black's Law Dictionary* (11th ed. 2019). The R-PD district in the Las Vegas Uniform Development Code was intended "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns." Ex. R at 333. "As a[n R-PD7] Residential Planned Development, density may be concentrated in some areas while other areas remain less dense, as long as the overall density for this site does not exceed 7.49 dwelling units per acre. Therefore, portions of the subject area can be restricted in density by various General Plan designations." Ex. ZZZ at 1414-15.

9. During the 1990's, the City approved rezoning requests by a resolution of intent, meaning that a rezoning was provisional until the rezoned property was developed. Once rezoned property was developed, the City would adopt an ordinance amending the Official

Zoning Map Atlas to make the rezoning permanent. *See, e.g.* Ex. S at 341. In 1990, the City adopted a resolution of intent to rezone the 996.4 acres in Phase II in accordance with the amended PRMP. Ex. H at 189-94. To obtain the City Council's approval of tentative R-PD7 zoning for housing lining the fairways of a golf course, Peccole agreed to set aside 211.6 acres for a golf course and drainage. *Id.* at 159, 163-165, 167-168, 171-172, 187-188.

10. In 2001, the City amended the Zoning Map to rezone to R-PD7 the Phase II property previously approved for R-PD7 zoning under the resolution of intent. Ex. T at 345-61. In 2011, the City discontinued the R-PD zoning district for new developments, replacing the R-PD zoning category with "PD." The City, however, did not alter the R-PD7 zoning of the Badlands and surrounding residential areas of Phase II. Ex. U at 363.

IV. The Developers due diligence in acquiring the Badlands property

11. The principals of the Developer are accomplished and professional developers that have constructed more homes and commercial development in the vicinity of the 65-Acre Property than any other person or entity and, through this work, gained significant information about the entire 250-Acre Residential Zoned Land (which includes the 65-Acre Property).[2] *LO Appx. Ex. 22*, Decl. Lowie. They have extensive experience developing luxurious and distinctive commercial and residential projects in Las Vegas, including but not limited to: (1) One Queensridge Place, which consists of two 20-floor luxury residential high rises; (2) Tivoli Village at Queensridge, an Old World styled mixed-used retail, restaurant, and office space shopping center; (3) over 300 customs homes, and (4) multiple commercial shopping centers to name a few. *LO Appx. Ex. 22*, Decl. Lowie, at 00534, p. 1, para. 2. The Developer principles live in the Queensridge common interest community and One Queensridge Place (which is adjacent to the 250 Acre Residential Zoned Land) and are

[2] Yohan Lowie, one of the Landowners' principles, has been described as the best architect in the Las Vegas valley. *LO Appx. Ex 21* at 00418-419.

the single largest owners within both developments having built over 40% of the custom homes within Queensridge. Id.

12. In 1996, the principals of the Developer began working with William Peccole and the Peccole family (referred to as "Peccole") to develop lots adjacent to the 250-Acre Residential Zoned Land within the common interest community commonly known as "Queensridge" (the "Queensridge CIC") and consistently worked together with them in the area on property transactions thereafter. *LO Appx. Ex. 22*, Decl. Lowie, at 00534, p. 1, para. 3.

13. In or about 2001, the principals of the Developer learned from Peccole that the Badlands Golf Course was zoned R-PD7. *LO Appx. Ex 22*, Decl. Lowie, at 00535, p. 2, para. 4. They further learned that Peccole had never imposed any restrictions on the use of the 250-Acre Property and that the 250-Acre Property would eventually be developed. Id. Peccole further informed the Developer that the 250-Acre Residential Zoned Land is "developable at any time" and "we're never going to put a deed restriction on the property." Id. The Land abuts the Queensridge CIC. Id.

14. In or about 2001, the principals of the Developer retained legal counsel to confirm Peccoles' assertions and counsel advised that the 250-Acre Residential Zoned Land is "Not A Part" of the Queensridge CIC, the Land was residentially zoned, there existed rights to develop the Land, the Land was intended for residential development and that as a homeowner within the Queensridge CIC, according to the Queensridge Covenants, Conditions and Restrictions (the "CC&Rs") they had no right to interfere with the development of the 250-Acre Residential Zoned Land. *LO Appx. Ex. 22*, Decl. Lowie, at 00535, p. 2, para. 5.

15. In 2006, Mr. Lowie met with the highest ranking City planning official, Robert Ginzer, and was advised that: 1) the entire 250-Acre Residential Zone Land is zoned R-PD7; and, 2) there is nothing that can stop development of the property. *LO Appx. Ex. 22*, Decl. Lowie, at 00535, p. 2, para. 6.

16. With this knowledge and understanding, the principals of the Developer then obtained the right to purchase all five separate parcels that made up the 250-Acre Residential Zoned Land and continued their due diligence and investigation of the Land. *LO Appx. Ex. 22*, Decl. Lowie, at 00535, p. 2, para. 6.

17. In November 2014, the Developer was given six months to exercise their right to purchase the 250-Acre Residential Zoned Land and conducted their final due diligence prior to closing on the acquisition of the Land. *LO Appx. Ex. 22*, Decl. Lowie, at 00535, p. 2-3, para. 6. The Developer met with the two highest ranking City Planning officials at the time, Tom Perrigo and Peter Lowenstein, and asked them to confirm that the entire 250-Acre Residential Zoned Land is developable and if there was "anything" that would otherwise prevent development and the City Planning Department agreed to do a study that took approximately three weeks. Id.; *LO Appx. Ex. 23* at 00559-560, pp. 66-67; 69:15-16; 70:13-16 (Lowie Depo, Binion v. Fore Star).

18. After three weeks the City Planning Department reported that: 1) the 250-Acre Residential Zoned Land was hard zoned and had vested rights to develop up to 7 units an acre; 2) "the zoning trumps everything;" and, 3) any owner of the 250-Acre Residential Zoned Land can develop the property. *LO Appx. Ex. 22*, Decl. Lowie, at 00536, p. 3, para. 8; *LO Appx. Ex. 23* at 00561, pp. 74-75, specifically, 75:13; 74:22-23; 75:12 (Lowie Depo, Binion v. Fore Star).

19. The Developer requested that the City adopt its three-week study in writing as the City's official position in order to conclusively establish the developability of the entire 250-Acre Residential Zoned Land prior to closing on the acquisition of the property. *LO Appx. Ex 22*, Decl. Lowie, at 00536, p. 3, para. 9. The City agreed and provided the City's official position through a "Zoning Verification Letter" issued by the City Planning & Development Department on December 30, 2014, stating: 1) "The subject properties are zoned R-PD7 (Residential Planned Development District – 7 units per acre;" 2) "The density allowed in the R-PD District shall be reflected by a numerical designation for that

district. (Example, R-PD4 allows up to four units per gross acre.);" and, 3) "A detailed listing of the permissible uses and all applicable requirements for the R-PD Zone are located in Title 19 ("Las Vegas Zoning Code") of the Las Vegas Municipal Code." Id.; *LO Appx. Ex. 23* at 00561-562, pp. 77:24-25, 80:20-21.

20. Their due diligence now complete, Developer was ready to complete the acquisition of the subject property.

V. The Developer's acquisition and segmentation of the Badlands property

21. In early 2015, Peccole owned the Badlands through a company known as Fore Stars Ltd ("Fore Stars"). Ex. V at 365-68; Ex. VV. In March 2015, the Developer acquired Fore Stars, thereby acquiring the 250-Acre Badlands. Ex. W at 379; Ex. AAA. At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. Ex. QQQ at 1160; Ex. X at 382-410; Ex. XX. The Developer transferred 178.27 acres to 180 Land Co. LLC ("180 Land") and 70.52 acres to Seventy Acres LLC ("Seventy Acres"), leaving Fore Stars with 2.13 acres. Ex. W at 379; *see also* Ex. V at 370-77. Each of these entities is controlled by the Developer's EHB Companies LLC. *See* Ex. V at 371 and 375 (deeds executed by EHB Companies LLC). The Developer then segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands. *See* Ex. HH; Ex. BBB; Ex. LL; Ex. Z. At issue in this case is a 65-Acre parcel of the Badlands owned by 180 Land, Fore Stars, and Seventy Acres (the "65-Acre Property"). *See* Complaint for Declaratory Relief and Injunctive Relief, and Verified Claims in Inverse Condemnation filed Sept. 5, 2018 ("Compl.") ¶ 7.

VI. The City's approval of 435 luxury housing units on the 17-Acre Property

22. In November 2015, the Developer, acknowledging the need to make application to the City in order to develop a parcel of property, applied for a General Plan Amendment, Re-Zoning, and Site Development Plan Review to redevelop the 17-Acre Property from golf course use to luxury condominiums ("17-Acre Applications"). Ex. Z at 446-66. The 17-Acre Applications sought to change the General Plan designation from PR-OS, which did not permit residential development, to H (High Density Residential) and the zoning from R-PD7 to R-4 (High Density Residential). *Id.* at 449-52. The Planning Staff Report for the 17-Acre Applications noted that the proposed development required a Major Modification Application to amend the PRMP. Ex. AA at 470. In 2016, the Developer submitted a Major Modification Application and related applications, but later that year withdrew the applications. Ex. BB at 483-94; Ex. CC.

23. In February 2017, the City Council approved the 17-Acre Applications for 435 units of luxury housing and approved a rezoning to R-3, along with a General Plan Amendment to change the land use designation from PR-OS to Medium Density Residential. Ex. DD at 586, 587-89, 591-97; Ex. SSS. In approving the 17-Acre Applications, the City did not require the Developer to file a Major Modification Application.

VII. The homeowners' challenge to the City's approval of the 17-Acre Applications

24. After the City approved the 17-Acre Applications, nearby homeowners filed a Petition for Judicial Review of the City's approval, which was assigned to Judge Crockett in Department 24. Ex. EE at 599, 609 (the "Crockett Order"). On March 5, 2018, Judge Crockett granted the homeowners' petition over the objection of both the Developer and the City, vacating the City's approval on the grounds that the City Council was required to approve a Major Modification Application before approving applications to redevelop the Badlands. *Id.* at 598, 610-11. The Developer appealed the Crockett Order. *See* Ex. DDD.

Although the City did not appeal the Crockett Order, it did file an amicus brief in support of the Developer's position that a Major Modification Application was not required. Ex. CCC.

25. Following Judge Crockett's decision invalidating the City's approval, the Developer filed a lawsuit (the 17-Acre case) against the City, the Eighth Judicial District Court, and Judge Crockett. Ex. GG at 631, 632, 639. The City removed that case to federal court. Following a remand order, the 17-Acre case is now pending before Senior Judge James Bixler. On December 9, 2020 Judge Bixler denied the City's motion to dismiss the 17-Acre Complaint.

26. Ultimately, the Nevada Supreme Court reversed Judge Crockett's decision granting the Petition for Judicial Review. In its Order of Reversal filed March 5, 2020, the Nevada Supreme Court found that a Major Modification Application was not required to develop the 17-Acre Property because the City's UDC required Major Modification Applications for property zoned PD, but not property zoned R-PD. Ex. DDD. The Supreme Court subsequently denied rehearing and en banc reconsideration and issued a remittitur, rendering its determination final. Ex. EEE. The Supreme Court's decision was consistent with the City's argument in the District Court in support of it's granting of Developer's application, and in its amicus brief that a Major Modification Application was not required to develop the 17-Acre Property. Ex. CCC at 1003-06. The District Court thereafter, consistent with the Nevada Supreme Court's decision, entered an Order on November 6, 2020, denying the petition for judicial review. *See* Ex. RRR.

27. The Nevada Supreme Court's reversal of the Crockett Order reinstated the City's approval of the Developer's applications to develop the 17-Acre Property. Ex. DDD. The City provided the Developer with notice of that fact by letter on March 26, 2020. Ex. FFF at 1019. The City's letter explained that once remittitur issued in the Nevada Supreme Court's order of reversal, "the discretionary entitlements the City approved for [the Developer's] 435-unit project on February 15, 2017 . . . will be reinstated." *Id.* The City also notified the Developer that the approvals would be valid for two years after the date of the

remittitur. *Id.* On September 1, 2020, the City notified the Developer that the Nevada Supreme Court had issued remittitur, the City's original approval of 435 luxury housing units on the 17-Acre Property had been reinstated, and the Developer is free to proceed with its development project. Ex. GGG at 1021. The City again notified the Developer that the approvals would be extended for two years after the date of the remittitur. *Id.*

VIII. The 35-Acre Applications

28. While the 17-Acre Applications were pending, the Developer filed applications to redevelop the 35-Acre Property ("35-Acre Applications"). Ex. HH; Compl. ¶ 32. On June 21, 2017, the City Council denied the 35-Acre Applications due to significant public opposition to the proposed development, concerns over the impact of the proposed development on surrounding residents, and concerns on piecemeal development of the Master Development Plan area rather than a cohesive plan for the entire area. Ex. 46; *see also* Ex. II at 673-78. Developer did not submit a second application to develop the 35-Acre Property.

The Developer filed a petition for judicial review and complaint for a taking (the 35-Acre Property case), which was assigned to Judge Williams in Department 16. Ex. JJ at 680, 692. Judge Williams concluded that substantial evidence supported the Council's denial of the 35-Acre Applications, that Judge Crockett's Decision had preclusive effect, and the Developer had no vested right under the R-PD7 to approval of its application. Ex. KK at 780-82, 789-92. The Developer filed an amended complaint alleging inverse condemnation claims, which is also currently pending before Judge Williams, following the City's removal to federal court and subsequent remand. *See 180 Land Co. v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J.

IX. The Master Development Application

29. Before the City denied the 35-Acre Applications, the Developer sought a new Master Development Agreement (MDA) for the entire Badlands, including the 35-Acre Property. Ex. LL; Ex. II at 679. On August 2, 2017, the City Council disapproved the MDA by a vote of 4-3. Ex. MM at 880-82; Compl. ¶¶ 39, 42. The Developer did not seek judicial review of the City's decision to deny the development agreement.

X. The 133-Acre Applications

30. In October 2017, the Developer filed applications to redevelop the 133-Acre Property ("133-Acre Applications"). Compl. ¶ 46. On May 16, 2018, after the Crockett Order but before the Nevada Supreme Court's reversal of said order, the City Council voted to strike the 133-Acre Applications as incomplete because they did not include an application for a Major Modification, as the Crockett Order required. Compl. ¶¶68, 77, 85; Ex. BBB at 989-98.

31. The Developer filed a petition for judicial review (the 133-Acre Property case) challenging the City's action to strike the 133-Acre Applications and a complaint for a taking and other related claims. That action was assigned to Judge Sturman in Department 26, who dismissed the petition for judicial review on the grounds that the parties were bound by the Crockett Order and, therefore, the Developer's failure to file a Major Modification Application was valid grounds for the City to strike the application. Judge Sturman allowed the Developer's inverse condemnation claims to proceed. Ex. NN. The City removed the case to federal court, and it has since been remanded back to state court.

XI. The 65-Acre Applications

32. To date, there has been no evidence presented to the court that Developer has submitted any development applications to the City for consideration of a proposed development of the individual 65-Acre parcel. As noted above, there was a Master

Development application, Ex. LL; Ex. II at 679, that was eventually denied by the City but no individual applications for the 65-Acre property.

XII. The increase in value of the Badlands due to the City's approval of 435 units on the 17-Acre Property

33. Under the Membership Purchase and Sale Agreement between the Peccole Family and the Developer, the Developer purchased the 250-Acre Badlands Golf Course for $7,500,000, or $30,000 per acre ($7,500,000/250 acres = $30,000). Ex. AAA at 966. This figure does not represent the total cost to Developer as there were clearly monies spent during its due diligence process (Developer has stated that the total cost for due diligence and purchase was $45 million). $7,500,000 is however the stated figure, per the Purchase and Sale Agreement, that Developer paid for the actual property. Ex. UUU at 1300.

34. The Developer contends in its Initial Disclosures that if the Badlands can be developed with housing, it is worth $1,542,857 per acre. Ex. JJJ at 1135-36.[3] Thus, according to the Developer's own evidence, the City's approval of 435 housing units in the Badlands has increased the value of the 17-Acre Property alone to $26,228,569 (17 x $1,542,857 = $26,228,569), thereby quadrupling the Developer's property purchase investment in the Badlands. Furthermore, the Developer still owns the remaining 233 acres with the potential to continue golf course use or develop the remaining acreage.

35. Even if the Developer paid $45 million for the Badlands as it contends, or $180,000/acre ($45,000,000/250 acres = $180,000/acre), the City's approval of 435 housing units in the Badlands has increased the value of the Badlands by $23,168,569 (the City's approval improved the value of each acre in the 17-Acre Property from $180,000 to

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[3] The Developer's Initial Disclosures in the 35-Acre case make the same claim. Ex. VVV at 1319. Both initial disclosures are based in part on the Lubawy appraisal of 70 acres of the Badlands that includes the entire 17-Acre Property and a portion of the 65-Acre Property. Ex. QQQ at 1165. The Lubawy appraisal assumed that the land being appraised could be developed with medium density housing. *Id.* at 1196-97.

$1,542,857, an increase of $1,362,857 per acre ($1,362,857 x 17 = $23,168,569).

CONCLUSIONS OF LAW

The instant motion and countermotion pose three areas of inquiry for the court's consideration. First, a discussion of the legal frame work surrounding the issue of a regulatory taking. Second, a discussion of whether or not the instant claims by the Developer are ripe for court action. And third, if necessary, a discussion of the merits of the Developer's claims under summary judgment standards.

I. The Legal Framework

A. City's liability for a regulatory taking is a question of law

1. Under NRCP 56(a), summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The non-moving party must "'set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.'" *Id.* (quoting *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110 825 P.2d 588, 591 (1992)).

2. Whether the government has inversely condemned private property is a question of law. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006).

B. A regulatory taking requires extreme interference with the use or value of property

1. Courts generally defer to the exercise of land use regulatory powers by the legislative and executive branches of government

3. In the United States, planning commissions and city councils have broad authority to limit land uses to protect health, safety, and welfare. Because the right to use land for a

particular purpose is not a fundamental constitutional right, courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use. The United States Supreme Court declared that the Court does "not sit to determine whether a particular housing project is or is not desirable," since "[t]he concept of the public welfare is broad and inclusive." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Instead, where the legislature and its authorized agencies "have made determinations that take into account a wide variety of uses," it is "not for [the courts] to reappraise them." *Id.*

4. The role of the courts in overseeing land use regulation is limited to cases of the most extreme restrictions on the use of private property under the regulatory takings doctrine. The narrow scope of the doctrine stems from the separation of powers between the legislative and executive branches of government and the judicial branch. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (judicial restraint respects the political questions doctrine and separation of powers because it requires that the courts refrain from replacing the policy judgments of lawmakers and regulators with their own with regard to non-fundamental constitutional rights); *Gorieb v. Fox*, 274 U.S. 603, 608 (1926) ("State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions . . . require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.").

5. Nevada's Constitution expressly prohibits any one branch of government from impinging on the functions of another. *Secretary of State v. Nevada State Legislature,* 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Nevada State Constitution provides that the state government "shall be divided into three separate departments" and prohibits any person authorized to exercise the powers belonging to one department to "exercise any functions, appertaining to either of the others" except where expressly permitted by the Constitution. Nev. Const. art. 3 § 1.

6. Separation of powers "is probably the most important single principle of government." *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). Within this framework, Nevada has delegated broad authority to cities to regulate land use for the public good. The State has specifically authorized cities to "address matters of local concern for the effective operation of city government" by "[e]xpressly grant[ing] and delegat[ing] to the governing body of an incorporated city all powers necessary or proper to address matters of local concern so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government." NRS 268.001(6), (6)(a).

7. "Matters of local concern" include "[p]lanning, zoning, development and redevelopment in the city." NRS 268.003(2)(b). "For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land." NRS 278.020(1); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 254, 439 P.2d 219, 222 (1968) (upholding a county's authority under NRS 278.020 to require an applicant for a special use permit to present evidence that the use is necessary to the public health and welfare of the community).

8. As a charter city, the City has the right to "regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land within those districts" and "[e]stablish and adopt ordinances and regulations which relate to the subdivision of land." Las Vegas City Charter § 2.210(1)(a), (b). Cities in Nevada limit the height of buildings, the uses permitted and the location of uses on property, and many other aspects of land use that could have an impact on the community. *See, e.g.*, *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 239, 871 P.2d 320, 321 (1994) (upholding City's denial of building permit application); *State ex rel. Davie v. Coleman*, 67 Nev. 636, 641, 224 P.2d 309, 311 (1950) (upholding Reno ordinance establishing land use plan and restricting use of land).

2. To avoid encroaching on the responsibilities and authority of other branches of government, courts intervene in land use regulation only in cases of extreme economic burden on the property

9. In its Third through Seventh Causes of Action, the Developer alleges a variety of types of takings under the Fifth Amendment of the United States Constitution, which provides "nor shall private property be taken for public use, without just compensation," and its counterpart in Article 1, Section 8 of the Nevada Constitution. The Just Compensation Clause of the Fifth Amendment was originally intended to require compensation only for eminent domain – *i.e.*, direct government takings. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In 1922, the Supreme Court held that a regulation that "goes too far," such that it destroys all or nearly all of the value or use of property, equivalent to an eminent domain taking, can require the regulatory agency to compensate the property owner for the value of the property before the regulation was imposed. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005). This type of inverse condemnation that does not involve a physical occupation of private property by the government, but rather alleges excessive regulation of the property owner's use of the property, is known as a "regulatory taking."[4] Under separation of powers, however, courts intervene in regulation of land use by the legislative and executive branches of government only in cases of (1) extreme regulation where the economic impact of the regulation is equivalent to an eminent domain taking, wiping out or nearly wiping out the use of value of the property, similar to a physical ouster of the owner by eminent domain, or (2) interference with reasonable investment-backed expectations. *Lingle*, 544 US. at 539 (categorical and *Penn Central* regulatory takings test both "aim[] to identify regulatory actions that are

[4] The Developer conflates eminent domain and inverse condemnation. The two doctrines have little in common. In eminent domain, the government's liability for the taking is established by the filing of the action. The only issue remaining is the valuation of the property taken. In inverse condemnation, by contrast, the government's liability is in dispute and is decided by the court. If the court finds liability, then a judge or jury determines the amount of just compensation.

functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").[5]

10. The Nevada Supreme Court has established an identical test, requiring an extreme economic burden to find liability for a regulatory taking. *State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "'completely deprive an owner of all economically beneficial use of her property'") (quoting *Lingle*, 544 U.S. at 538); *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*, 110 Nev. at 245-46, 871 P.2d at 324-35 (taking requires agency action that "destroy[s] all viable economic value of the prospective development property").

11. The Developer cites to numerous statements and actions of the City Council, individual Council members, City officials, and City staff that the Developer contends were unfair to the Developer. Because courts defer to the authority of local government to regulate land use for the public good, the regulatory takings doctrine is not concerned with the soundness or fairness of government regulation of land use. Because the regulation is presumed valid in regulatory takings cases, it is inappropriate to delve into the validity of or the motives underlying the regulation:

> The notion that . . . a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable. [The] inquiry [as to a regulation's validity] is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but

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[5] In settling the test for a regulatory taking, *Lingle* resolved inconsistencies in prior federal and state court decisions. The *Lingle* opinion was unanimous and had no footnotes, indicating that the Supreme Court intended to bring clarity and simplicity to the regulatory takings doctrine.

> rather requires compensation "in the event of otherwise proper interference amounting to a taking.

Lingle, 544 U.S.at 543 (citing *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987)); *cf. Sproul Homes of Nev. v. State ex rel. Dept. of Highways*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (judicial interference by mandamus, not by inverse condemnation, is appropriate if an agency's action was arbitrary or accompanied by manifest abuse). Assuming the truth of the Developer's allegations regarding the statements and actions of the City Council, individual Council members, City officials, and City staff, they are not relevant unless they can be shown to result in a wipeout or near wipeout of use and value or interfere with the Developer's reasonable investment-backed expectations.

12. A requirement that regulatory agencies pay compensation to property owners for regulation short of a wipeout would encroach on the powers of the legislative and executive branches of government to regulate land use to promote the general health, safety, and welfare. *Lingle*, 544 U.S. at 544 ("[R]equir[ing] courts to scrutinize the efficacy of a vast array of state and federal regulations" to determine whether they substantially advance legitimate state interests is "a task for which courts are not well suited. Moreover, it would empower-and might often require-courts to substitute their predictive judgments for those of elected legislatures and expert agencies."); *id.* at 537 (recognizing compensable regulatory takings only when the effect of government regulation is tantamount to a direct appropriation or ouster). As a result, a regulation is not a taking unless it virtually wipes out all the economic value or use of the property, because only then is it the functional equivalent of eminent domain. *Id.* at 539. Moreover, a standard for public liability for a regulatory taking that merely reduces the use or value of private property without destroying the use or value would lose its connection to the United States and Nevada Constitutions because that regulation would not be the functional equivalent of an eminent domain taking. *Id.* at 539.

13. Complying with government regulation, like the alleged regulation of the redevelopment of the Badlands in this case, is simply a cost of doing business in a complex society. "'[G]overnment regulation—by definition—involves the adjustment of rights for the public good.'" *Id.* at 538 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)); *see also Mahon*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978) ("Legislation designed to promote the general welfare commonly burdens some more than others.").

3. The Developer alleges a categorical and *Penn Central* regulatory taking

14. The Developer has alleged two types of regulatory takings: categorical and *Penn Central*. A categorical taking occurs either when a regulation results in a permanent physical invasion of property, or when a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019). A *Penn Central* taking is determined based on review of several factors; "[p]rimary" among them is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id.* at 538-39 (quoting *Penn Central*, 438 U.S. at 124. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). Under both the categorical and the *Penn Central* takings tests, the only regulatory actions that cause takings are those "that are functionally equivalent to the classic taking in

which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.[6]

15. To be the functional equivalent of eminent domain, the challenged regulatory action must cause a truly "severe economic deprivation" to the plaintiff. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007); see also *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient to show a taking); *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing cases in which diminutions of 75% and 92.5% insufficient to show a taking); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (1979) (95% diminution not a taking); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% diminution in property value not a taking); *Brace v. United States*, 72 Fed. Cl. 337, 357 (2006) ("diminutions well in excess of 85 percent" required to show a taking).

16. The Developer cites several federal cases finding a taking even where the diminution in value was less than 100%. *E.g.*, *Formanek v. United States*, 26 Cl.Ct. 332 (Fed. Cl. Ct. 1992) (finding a taking where government action resulted in 88% decline in value). Even though the Developer's cases were decided before *Lingle* clarified the regulatory takings doctrine in 2005 to require that liability for a taking can be found only where government action wipes out or nearly wipes out the economic value of property, the cases cited did require a near wipeout of value before a finding of a taking.

17. The Developer also relies on *Tien Fu Hsu v. County of Clark*, 173 P.3d 724 (Nev. 2007); *Sisolak*, 137 P.3d 1110; *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23

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[6] The Developer's "categorical" and "regulatory per se" takings are the same thing. The majority in *Lucas v. S.C. Coastal Council* classified economic wipeouts and physical takings resulting from government regulation as "categorical" takings, while the dissent characterized the same test as a "per se" standard. 505 U.S. at 1015, 1052 (Blackmun, J., dissenting). A unanimous Supreme Court in *Lingle* also uses the terms interchangeably. 544 U.S. at 538. Similarly, the Nevada Supreme Court in *Sisolak* refers to physical takings interchangeably as "categorical" and "per se." 122 Nev. at 662-63, 137 P.3d at 1122-23).

(2012); *ASAP Storage v. City of Sparks*, 123 Nev. 639 (2008); and *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327 (9th Cir. Ct. App. 1977) for the contention that regulation that "substantially impairs" or "direct[ly] interfere[s] with or disturb[s]" the owner's property can give rise to a regulatory taking. These cases are physical takings cases (*Tien*, *Sisolak*, *Arkansas*, and *ASAP*) or precondemnation cases (*Richmond*) and are inapplicable. The Developer also contends that takings are defined more broadly in Nevada than in federal law, citing *Vacation Village, Inc. v. Clark County*, 497 F.3d 902 (9th Cir. 2007). *Vacation Village*, however, concludes only that physical takings are broader in Nevada, not regulatory takings, citing *Sisolak*. *Id.* at 915-16. The scope of agency liability for regulatory takings in Nevada is identical to the federal standard. *See State*, 131 Nev. at 419, 351 P.3d at 741 (2015); *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35.

18. To support its contention that the test for a regulatory taking is less deferential to the agency action than as established in *Lingle*, *Penn Central*, *Concrete Pipe*, *Colony Cove*, *State*, *Kelly*, and *Boulder City*, the Developer cites to a 2008 amendment to Article 1, Section 22 of the Nevada Constitution to allow owners of property taken by eminent domain to recover for damage to their property from the construction of a public improvement. This amendment concerns eminent domain and has no bearing on the test for a regulatory taking claim.

19. The Developer claims that the City has taken the 65-Acre Property because it did not comply with NRS 37.039, which sets out requirements for agencies exercising eminent domain to acquire property for open space. Because the City did not condemn the 65-Acre Property or any other portion of the Badlands, this statute does not apply.

II. The Ripeness Issue

20. A regulatory takings claim is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is

also denied. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) ("*Williamson County*"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) ("[T]he final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted."); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53 (1986) (at least two applications required to ripen takings claim).

21. The Nevada Supreme Court has fully embraced the final decision requirement:

> Generally, courts only consider ripe regulatory takings claims, and "a claim that the application of government regulations effects a taking of a property interest ***is not ripe until the government entity*** charged with implementing the regulations ***has reached a final decision regarding the application*** of the regulations to the property at issue. . . [The] regulatory takings claim is unripe for review for a failure to file any land-use application with the City. And although Ad America contends that exhaustion was futile because there was a de facto moratorium on developing property within Project Neon's path, the record does not support this contention. The opinion of Ad America's political consultant, which was based on alleged statements from only one of seven City Council members, is insufficient to establish the existence of such a moratorium." (emphasis added).

State v. Eighth Jud. Dist. Ct., 131 Nev. at 419-20, 351 P.3d at 742 (quoting *Williamson County*, 473 U.S. at 186). Because the Nevada Supreme Court follows *Williamson County*, the courts of this state require that at least two applications be denied before finding that a regulatory takings claim is ripe.

22. A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id.*

23. The Developer has failed to meet its burden to show that its regulatory takings claims are ripe. The Nevada Supreme Court requires that a regulatory takings claimant file at least two applications to develop "the property at issue." *State*, 131 Nev. at 419-20, 351 P.3d at 742.

24. The Developer filed this action seeking damages for a taking of the 65-Acre Property only. *See* Compl. ¶7. The Developer has submitted no evidence that it has filed any application, much less two or more, to redevelop the individual 65-Acre Property, and obviously, no subsequent application for a variance, reduced density, or alternate project. As such, Developer has provided City with no individual 65-Acre Property application to consider and the City cannot be said to have reached a "clear, complete, and unambiguous" decision and that the City has "drawn the line, clearly and emphatically, as to the sole use to which [the 65-Acre Property] may ever be put." *Hoehne*, 870 F.2d at 533.

25. It can certainly be said that Developer may have very well been frustrated with what had occurred. Its first application was approved, only to then find itself being sued by a group of homeowners, thereafter receiving an unfavorable District Court ruling necessitating a Nevada Supreme Court appeal and the perceived need to file multiple lawsuits. That frustration does not, however, excuse the necessity of first making application to develop the 65-Acre Property before filing the instant case against the City alleging a taking of that property. This is especially true where, as here, Developer chose to file four separate court actions specifically directed at each individual parcel of property that Developer alleged was taken.

26. It must also be noted that fifty percent (50%) of Developer's applications directed to the individual properties were approved. Their first application for the 17-Acre Property was approved by the city. The application for the 35-Acre Property was denied. The application for the 133-Acre Property was deemed incomplete because of the then controlling Crockett Order and it was never resubmitted. And, as stated above, no application was ever submitted for the 65-Acre Property at issue in the instant case.

27. This court holds that any argument that proffering a development proposal for the 65-Acre Property would be futile is without merit as the City approved fifty percent (50%) of the individual applications it received, and felt it had legal authority to consider. This court would be engaging in inappropriate speculation were it to try and guess at what type of proposal Developer would have made for the 65-Acre Property and what type of response the City would have provided.

28. The Developer argued that the denial of the Master Development Agreement (MDA) also plays into the futility argument but the court finds that stance to be unpersuasive. To begin, the MDA was made after the individual 17-Acre Property proposal was made (which was approved) and after there was an application pending before the City for the development of the individual 35-Acre Property. Any denial of the MDA proposal while multiple individual proposals were pending and/or already approved cannot be said to be at all unreasonable. Moreover, even if the MDA denial was considered as part of the futility argument, the City would still have granted one-third (1/3) of the Developer's three proposals with the fourth proposal being deemed incomplete. As such, Developer's argument still places this court in the position of having to speculate about a possible 65-Acre Property proposal and the possible response by the City. Lastly, Developer made its 133-Acre Property application after the City denied the MDA. As such, it is clear that Developer did not believe that the MDA denial rendered further individual property development applications futile, rather, Developer chose to only proceed with the application for the 133-Acre Property.

29. The City's actions simply cannot be said to have been so "clear, complete, and unambiguous" as to excuse the need for Developer to propose a development plan for the 65-Acre Property before Developer made the choice to seek court intervention for that specific parcel of property.

30. To the extent Developer argues that the approval of the 17-Acre Property was somehow vacated and therefore no applications could be said to have been granted by the

City, the Court finds this position to also be without merit. There is no evidence that the City has taken any action to limit the Developer's proposed use of the 17-Acre Property for 435 luxury housing units. The Developer's contention that the City "nullified" the 435-unit approval is without any support in the evidence. The Developer's contention that the City's declining to extend the 17-Acre approvals after Judge Crockett invalidated the approvals means that the City "nullified" the approvals is frivolous. The City supported Developer and opposed Judge Crockett's Order at the trial court level and in the Nevada Supreme Court, where the City filed an amicus brief requesting that the Supreme Court reverse the Crockett Order and reinstate the 17-Acre Property approvals. Ex. CCC.

31. Prior to the Supreme Court's Order of Reversal, the 17-Acre Property approvals were legally void and there was nothing to extend. If the City had attempted to extend the approvals, the City could arguably have been in contempt of Judge Crockett's Order. *See* NRS 22.010(3) (disobedience or resistance to any lawful writ or order issued by the court shall be deemed contempt); *see also Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007) (a judgment has preclusive effect even when it is on appeal), *abrogated on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008). After the Supreme Court reinstated the approvals, the City had no power to nullify the approvals even if it had intended to do so. And it evidenced no intent to do so. To the contrary, upon reinstatement, the City twice wrote to the Developer extending the approvals for two years after the date of the remittitur. Ex. FFF at 1019; Ex. GGG at 1021. The Court accordingly rejects the Developer's argument that the City "nullified" the City's approval of 435 luxury housing units on the 17-Acre Property. All evidence establishes the opposite. The 17-Acre approvals are valid, and the Developer may proceed to develop 435 luxury housing units on the 17-Acre Property.

32. The Developer argues that it is not subject to the final decision ripeness rule adopted by the United States and Nevada Supreme Courts because the "taking is known." This argument is circular and is rejected. The Court cannot determine whether the City has

"gone too far" unless the City denies specific applications to develop the property.

33. The Developer also argues that the final decision ripeness requirement adopted in *State* and *Kelly* has been eliminated because takings are "self-executing," citing *Knick* and *Alper v. Clark County*, 93 Nev. 569, 572, 571 P.2d 810, 811-12 (1977). *Knick* had nothing to do with final-decision ripeness, nor would it because the claimant in *Knick* alleged a physical taking. A physical taking is not subject to final-decision ripeness. *Knick*, 139 S.Ct. at 2169 ("the validity of [the] finality requirement . . . is not at issue here." The only issue in *Knick* was whether takings claims could be brought in the first instance in federal court. *Id.* at 2179.

34. In *Alper*, the Nevada Supreme Court stated that, "as prohibitions on the state and federal governments," the taking clauses of the state and federal constitutions are "self-executing," meaning that "they give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one." 93 Nev. at 572, 571 P.2d at 811-12. Thus, the "self-executing" nature of the taking clauses means only that the taking clauses do not need to be implemented by statute. Being self-executing does not mean, as the Developer asserts, that payment of just compensation is automatically due without first satisfying the requirement to obtain a final agency decision. The Developer further contends that *Alper* proscribes the ripeness requirement as a "barrier[] or precondition[]" to a taking claim. To the contrary, the Nevada Supreme Court in *Alper* did not address the ripeness requirement of taking claims. Instead, it held that the state's Six Months' Claims Statutes codified in NRS 244.245 and NRS 244.250, which require that a claimant presents his or her claim to a County before suing the County, do not apply to actions in inverse condemnation. *Alper*, 93 Nev. at 570, 572.

35. The Developer asserts that its *Penn Central* regulatory taking claim is ripe because the City disapproved the Developer's MDA for the entire Badlands. The MDA, while it included parts of the 65-Acre Property, covered the entire 250-acre Badlands outside of the 17-Acre Property, development on which the City had already approved. Ex. LL at 801. It did not constitute an application to develop the 65-Acre Property standing alone,

which is "the property at issue." *See State*, 131 Nev. at 419. The City's denial of the MDA, therefore, is not considered an application to develop the 65-Acre Property for purposes of ripeness. Even assuming that it was an application to develop the 65-Acre Property standing alone, the Developer's regulatory takings claim would not be ripe until the Developer files at least one additional application. Again, the Developer has presented no evidence that it has done so.

36. The Court also does not consider the MDA to constitute an initial application to develop the 65-Acre Property for purposes of a final decision because the MDA was not the specific and detailed application required for the City to take final action on a development project. *See* Ex. LL at 810-19 (general outline of proposed development in the Badlands). The MDA divided the Badlands into four "Development Areas" and proposed permitted uses, maximum densities, heights, and setbacks for the four areas. *Id.* at 812, 814. For Development Areas 2 and 3, which contained portions of the 65-Acre Property, the MDA proposed a maximum residential density of 1,669 housing units, and the Developer was to have the right to determine the number of units developed on each Area up to the maximum density. *Id.* at 813-14. The indefinite nature of the MDA is also evident from the uncertainty expressed about various uses. For example: "[t]he Community is planned for a mix of single family residential homes and multi-family residential homes including mid-rise tower residential homes"; "[a]ssisted living facilit(ies) . . . may be developed within Development Area 2 or Development Area 3"; and "additional commercial uses that are ancillary to multifamily residential uses shall be permitted." *Id.* at 812. Finally, the MDA provided that [t]he Property shall be developed as the market demands . . . and at the sole discretion of Master Developer." *Id.* at 814. Accordingly, the MDA was not clear as to how many housing units would eventually be built in the 65-Acre Property. Nor was the City Council apprised by the MDA of the types and locations of uses, the dimensions or design of buildings, or the amount and location of access roads, utilities, or flood control on the 65-Acre Property. *See id.* at 813-16.

37. Given the uncertainty in the MDA as to what might be developed on the 65-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 65-Acre Property. This once again places the court in the untenable position of having to speculate about what the City might have done, said speculation being improper.

38. The MDA also did not constitute a valid set of land use applications for the 65-Acre Property. A development agreement is not a substitute for the required UDC Applications. The UDC states that "all the procedures and requirements of this Title shall apply to the development of property that is the subject of a development agreement." UDC 19.16.150(D). To develop the 65-Acre Property even after an MDA were approved, the Developer would be required to file a Site Development Review application and seek a General Plan Amendment. *See* Ex. LL at 819 (City would process "all applications, including General Plan Amendments, in connection with the Property"); *id.* at 820 ("Master Developer shall satisfy the requirements of the Las Vegas Municipal Code section 19.16.100 for the filing of an application for a Site Development Plan Review").

39. Developer had applied for the required Site Development Review and General Plan Amendment in applying for the original 17-Acre Property application and was therefore clearly aware of the requirements. The version of the MDA the City Council rejected on August 2, 2017 acknowledged that the Developer must comply with all "Applicable Rules," defined as the provisions of the "Code and all other uniformly-applied City rules, policies, regulations, ordinances, laws, general or specific, which were in effect on the Effective Date." *Id.* at 804, 810. Similarly, the MDA indicated that the property would be developed "in conformance with the requirements of NRS Chapter 278, and as otherwise permitted by law." *Id.* at 802. Because the Developer did not submit any of the site-specific development applications related to the 65-Acre Property, the City Council's denial of the MDA did not constitute a final decision by the City Council regarding what development would be permitted on the 65-Acre Property.

40. The Developer contends that following the City's denial of the MDA, it would have been futile to file the UDC Applications to develop the 65-Acre Property. As with the earlier discussion on futility, the court finds Developer's position here to be unpersuasive. The Developer cites no evidence for its statement that the City insisted that the MDA was the only application it would accept to develop the 65-Acre Property. The Developer previously acknowledged that City Councilmembers expressed a preference for a holistic plan addressing the entire Badlands. Ex. WWW at 1323. Such a preference does not indicate a refusal to consider other options. Indeed, the City did consider—and approve—significant development on the 17-Acre Property within the Badlands, indicating that the City is open to considering development of this area.

41. The Developer contends that *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) supports the claim that it would be futile to file any application to develop the 65-Acre Property. In *Del Monte Dunes*, the City reviewed and denied five separate applications to develop the property, each of which proposed a lower density than the previous application. 526 U.S. at 695-96. The Court affirmed the Ninth Circuit's holding that the plaintiff had satisfied the final decision ripeness requirement. *Id.* at 698-99, 723. Unlike *Del Monte Dunes*, the Developer here has filed no application specific to the 65-Acre Property. Even if the MDA is considered an application, the ripeness rule applied in *Del Monte Dunes* requires at least a second application.

42. The Developer contends that this case is similar to *Del Monte Dunes* because the Developer conducted detailed and lengthy negotiations over the terms of the MDA with City staff and made many concessions and changes to the MDA requested by the staff before the MDA was presented to the City Council with the staff's recommendation of approval. Concessions and changes to the MDA requested by staff and a staff recommendation of approval, however, do not count for ripeness. The City Council, not the staff, is the decision-maker for purposes of a regulatory taking. An application must be made to the City Council, and if denied, at least a second application to the City Council must be made and denied

before a takings claim is ripe.

43. Furthermore, the Developer's reliance on Bills 2018-5 and 2018-24 in support of its claim of futility is misplaced. The bills imposed new requirements that a developer discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City and other requirements for the application to develop property. They were designed to increase public participation and did not impose substantive requirements for the development project, and did not prevent the Developer from applying to redevelop the 65-Acre Property. Moreover, the second bill was adopted in the Fall of 2018 after the Developer filed this action for a taking. As such, it could not have had any effect on the 65-Acre Property. The bill could not have taken property that was allegedly already taken. Both bills were also repealed in January 2020, and are therefore inapplicable to show futility. *See* Exs. LLL, MMM.

44. At the City Council hearing on the MDA, no Councilmember indicated that he/she would not approve development of the Badlands at a reduced density if the Developer submitted a revised development agreement. *See* Ex. WWW at 1365-70. The vote to deny the MDA was 4-3 (*id.* at 1370). Therefore, had a modified proposal been made regarding the MDA, it was only necessary for one of the four members who voted to deny the application to became satisfied with the proposed changes, for it to be approved. And it must be noted that two of the four City Councilmembers who voted against the MDA are no longer members. Indeed, four of the seven members of the City Council that heard the MDA are no longer on the Council.

45. Much of the commentary about the MDA from Councilmembers at the public hearing indicates that they may approve a lower density development. For example, Councilmember Coffin, who voted against the MDA, stated that he would support "some sort of development agreement" for the Badlands. Ex. WWW at 1327; *see also id.* at 1328 (Badlands "still could be developed if you paid attention to [preserving the desert landscape]"). Similarly, Councilmember Seroka, who voted to deny the MDA, noted that

three different drafts of the development agreement had been circulated in the previous week (*id.* at 1362); he had insufficient time to review and understand the version of the agreement before the City Council (*id.*); the proposed residential development was too dense (*id.* at 1361-62); and the development agreement contained no timeline for development of the Badlands (*id.* at 1363). Seroka explained that "a reasonable and equitable development agreement is possible, but this is not it," and that the Developer could resubmit a development agreement for the Council's consideration. *Id.* at 1365-66. Similarly, the majority of citizens testifying at the City Council hearing on the development agreement indicated not that they were opposed to all development of the Badlands, but rather that the density of residential development proposed in the agreement was excessive. *E.g.*, *id.* at 1339, 1344-45, 1350, 1353-55, 1357-60.

46. The City's disapproval of the MDA falls short of the "clear, complete, and unambiguous" proof that the agency has "drawn the line, clearly and emphatically, as to the sole use to which the [65-Acre Property] may ever be put." *Hoehne*, 870 F.2d at 533. Even if the MDA were considered to be an initial application, Nevada law requires that the Developer file at least one additional application and have that denied before its regulatory takings claims are ripe for adjudication.

47. In sum, Developer chose to file applications to develop each of the three other individual properties at issue in the aforementioned cases, while also filing a MDA. Developer chose not to file any application for the individual 65-Acre Property at issue in this case before instituting this court action, which is specific to the individual 65-Acre Property. The City indicated a willingness to reasonably consider the applications and has granted one of the two individual applications that were proposed, while denying a third due to the then controlling Crockett Order. The City was not, however, given an opportunity to evaluate an application for the individual 65-Acre Property. The court does not find that filing an application for the 65-Acre Property would have been futile. Accordingly, the Court concludes that the Developer's categorical and *Penn Central* regulatory takings claims are

unripe and the Court has no jurisdiction over the claims. The Court grants summary judgment to the City on that ground.

III. The Remaining Issues

48. Because the court finds that the failure to have made an application to the City in regard to the development of the individual 65-Acre Property renders the Developer's claims in the instant case unripe, that decision is fatal to Developer's case and renders further court inquiry unnecessary.

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

ORDER

IT IS HEREBY ORDERED THAT the City's Motion for Summary Judgment is **GRANTED** and Developer's Countermotion is **DENIED** as **MOOT.**

Dated this 29 day of December 2020.

Douglas W. Herndon, District Court Judge

Exhibit 3

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X,

Defendants.

Case No. A-17-758528-J

Dept. No. XVI

CITY'S OPPOSITION TO DEVELOPER'S MOTION TO DETERMINE TAKE AND MOTION FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF

AND

COUNTER-MOTION FOR SUMMARY JUDGMENT

Hearing date: September 23, 2021
Hearing time: 1:30 pm

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INTRODUCTION

Resolution of this case does not require a deep understanding of regulatory takings, merely logic and common sense. At the time the Developer purchased the Badlands golf course and drainage in 2015, the property was designated Park/Recreation/Open Space ("PR-OS") in the City's General Plan. The Badlands had been designated PR-OS since 1992 when the original developer, as a condition of approval of the Peccole Ranch Master Plan ("PRMP"), set aside the Badlands as a golf course and drainage to serve the surrounding community. The Developer thus walked into the Badlands with its eyes open. When it bought the Badlands, the PR-OS designation did not permit residential use. The City Council would be required to exercise its discretion to change the PR-OS designation to permit construction of housing.

Because the Badlands could not be redeveloped with housing without a change in the law, which change was subject to the City's discretion, the Developer paid $4.5 million for the Badlands, or $18,000/acre, which was the going price for golf courses. The Developer claims, however, that the value of the Badlands *if* it can be developed with housing is $1,542,857/acre.[1] In sum, a real estate developer bought a golf course on the speculation that it could persuade the City to change the applicable law to permit residential development, in which case the developer stood to make a profit.

The Developer's gamble paid off. In June of 2017, the City lifted the PR-OS designation and approved the Developer's 435-unit luxury housing project on a 17-Acre portion of the Badlands, which, by the Developer's own evidence, increased the value of just the 17-Acre portion of the Badlands to $26,228,569, nearly six times the Developer's investment in the entire 250-acre property.[2] Despite the City's *approval* of the 435-unit project, the Developer has indicated that it has no intention of building anything in the Badlands and claims instead that the City has effected a "taking" of the entire Badlands, including the 17-Acre Property that the City *approved* for 435 luxury housing units. For its taking claim, the Developer demands that this Court compel the taxpayers to pay it $386

[1] *See* Developer's Initial Disclosures, City's Appendix in Support of Motion for Summary Judgment and Opposition to Developer's Motion for Summary Judgment. Ex. VVV at 1319. References to lettered exhibits are to the City's Appendix of Exhibits. References to numbered exhibits are to the Developer's Appendix of Exhibits.

[2] 17 acres x $1,542,857/acre (Developer's figure) = $26,228,569.

million in damages, an 8,500 percent profit.[3] A finding that the City is liable for a taking of the Developer's property would not only reward a plaintiff that has suffered no injury, but would bring down the entire system of land use regulation in the State of Nevada. The Court should reject this lawsuit and enter summary judgment for the City.

It is hard to conceive of a greater abuse of the legal system than this case. The takings doctrine was designed to provide relief to owners who buy property subject to a regulatory scheme that allows the buyer's intended use, and the government later changes the law to disallow any use of the property, destroying the property's value. This case presents the polar opposite facts. Were the Developer to prevail, this would be the first regulatory taking case in the history of American Jurisprudence where the agency not only did not decrease the use and value of the property, but rather approved the Developer's applications to develop the property in full, thus *increasing* the use and value.

In this lawsuit, the Developer claims that the City has "taken" the 35-Acre Property the Developer carved out of the Badlands, even though the economic impact of the City's regulation on the parcel as a whole – the 250-acre Badlands – was to increase its value. Because the Developer purchased the Badlands in a single transaction from a single owner for a single price and the entire 250-acres had been used continuously for golf course and drainage for the previous 23 years, the courts treat the entire Badlands, at a minimum, as the parcel as a whole for a regulatory taking analysis. *See, e.g.*, *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 650-51, 855 P.2d 1027, 1034-35 (1993).[4] The PR-OS designation applied to the entire Badlands when the Developer bought the Badlands in 2015. The Developer's segmentation of the Badlands into four development sites is a transparent ploy – prohibited by the courts in cases such as *Kelly* – for the Developer to claim that the economic impact of the long-standing PR-OS designation has had a severe economic impact on a single segment, in this case, the 35-Acre Property. Indeed, the Developer makes the same taking claim

[3] 250 acres x $1,542,857/acre = $386,000,000.

[4] As will be shown, the parcel as a whole is actually the 1,539-acre PRMP, of which the Badlands was a part. 84% of the PRMP has been developed with thousands of housing units, retail, hotel, and casino. Accordingly, even if the City did not permit any part the Badlands to be developed, the City would not be liable for a taking because the City allowed substantial development of the parcel as a whole. Even if the Badlands deemed the parcel as a whole, however, the approval of 435 luxury housing units undercuts the Developer's taking claims.

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in the other three cases where the Developer has sued for damages for each of the properties the Developer segmented from the Badlands (including the 17-Acre Property, where the City *approved* the Developer's housing project). But even if the City ultimately decides not to change the PR-OS designation for the 35-Acre Property, the City could not be liable for a taking by merely leaving intact the regulation that historically applies to the property.

Undaunted by the fact that it has no injury, only an enormous profit, the Developer engages in elaborate acrobatics of argument, all the while misrepresenting and contorting the facts and law, to conjure a narrative of victimization by the City. First, the Developer contends that the City nullified its approval of the 435-unit project, despite the Nevada Supreme Court's March 2020 Order reinstating the City's approval and the City's September 2020 letter to the Developer stating:

> Remittitur issued on August 24, 2020. . . . Accordingly, the City Council's February 2017 action approving all discretionary entitlements required for your client's 435-unit project on the 17-acre portion of the Badlands *are now valid and will remain so for two years after the date of the remittitur* . . . . Now that there are no more discretionary entitlements required to develop your client's project, the City will accept applications for any ministerial permits required to begin construction . . . .

Ex. GGG at 1021 (emphasis added). The Developer's contention that the City "clawed back" or "nullified" the 17-acre approval is demonstrably false. In the 65-Acre case, Judge Herndon found that the Developer's claim that the City has nullified the Developer's permits to develop 435 housing units in the Badlands is "frivolous." Ex. CCCC at 1508. As a matter of fact and law, the City's approval of 435 houses in the Badlands, by itself, is fatal to the Developer's taking claims.

The Developer makes the bizarre claim that the City's approvals of the 435-unit project (Ex. SSSS) have vanished into thin air, despite the Nevada Supreme Court's reinstatement of the approvals in September 2020 and the City's September 2020 notice to the Developer that the approvals are valid. The Developer's failure to move forward with the 435-unit project, its rejection of its permits for the 435-unit project, the Developer's opposition to remanding its 133-Acre applications to the City Council for a decision on the merits, the Developer's failure to file a second application to develop the 35-Acre Property at a lower density, and the Developer's failure to file any applications to develop the 65-Acre Property, demonstrate that the Developer has no intention of developing anything on the Badlands. The Developer has made it clear that it only wants a $386 million gift from the taxpayers,

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for doing nothing other than applying for development and then suing the City.

Even if the Court were to suspend reality and disregard the approval of the 435-unit project, the Developer cannot prevail. This Court has already entered findings of fact and conclusions of law that demolish the Developer's taking claims. In its order denying the Developer's Petition for Judicial Review ("PJR"), this Court held:

> The four Applications submitted to the Council for a general plan amendment [etc.] were all subject to the Council's discretionary decision making, no matter the zoning designation."). ¶¶ ***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. ¶ 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. ¶ 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. ¶ The Applications included requests for a General Plan Amendment and Waiver. In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, no matter the zoning designation. UDC 19.00.030, 19.16.030, 19.16.050, 19.16.100, 19.16.130. ¶ 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). ¶ [T]the City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development.

Ex. XXX at 1392-94 (emphasis added).

Having no basis whatsoever in the law (the Developer fails to cite a single case that supports its claims), the Developer's case for $386 million in damages is an emotional one only. The Developer contends that the City will not permit any use of the 35-Acre Property other than golf course and drainage, and those uses, according to the Developer, have no value. To the contrary, the Badlands had been in continuous use as two golf courses and drainage for at least 16 years *before* the Developer bought the property. During that time, the PR-OS designation of the Badlands was a matter of public record. Although housing was not a legal use of the Badlands, the Developer voluntarily shut down the

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golf course in 2016. The City has not stopped the Developer from using its property for its historic use as a golf course and drainage. Even if the 35-Acre Property has no economic value under the PR-OS designation (the Developer has not made that showing), the City did not compel the Developer to buy the Badlands. The Developer, according to its own allegations, bought a property that had no economic use under the applicable law. As a logical and legal matter, the Developer paid a price for the Badlands that took into account the legal constraints on redeveloping the property with housing. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). If the property had no economic use allowed by law as the Developer's claims (i.e., if golf course is not an economically viable use), then the Developer could either have declined to buy the property or paid a nominal amount for it. The takings doctrine does not make the City an involuntary guarantor of the Developer's business decisions. The City's job is to regulate the use of the Badlands in the public interest.

Even indulging the fiction that the City did not change the PR-OS designation to allow 435 housing units in the Badlands, the Developer would still have exactly what it bought after the City declined to change the long-standing law – golf course – for which it paid the golf course price of $18,000/acre. Accordingly, even if the Court accepts isolation of the 35-Acre Property as the parcel as a whole, the 35-Acre Property was worth $18,000/acre *before* the City's alleged refusal to amend the PR-OS designation, and $18,000/acre *after* the City's alleged refusal to amend the PR-OS designation. No change in the law means no change in use, no reduction in value, no injury, and no taking.

The Developer attempts a Houdini-esque escape from these inconvenient facts and laws – and from matters already decided by this Court – by misrepresenting that the City imposed the PR-OS designation for the sole purpose of thwarting the Developer's plans to build housing in the Badlands, or that the City failed to follow proper procedures in adopting the PR-OS designation. Unfortunately for the Developer, that horse left the barn in 1992, when the City imposed the PR-OS designation on the Badlands.[5] The Badlands have been designated PR-OS continuously since then. The City cannot

[5] As one of the developers of housing in the PRMP, the Developer benefitted from the PR-OS designation. The original developer, the Peccole family, agreed to set aside 16% of the PRMP land area for a recreation, open space, and drainage amenity to serve the other 84% of the PRMP. The recreational and open space amenity protected by the PR-OS designation increased the value of, and profit from, the housing and retail the Developer built in the PRMP. The Developer, therefore, seeks a double windfall.

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be liable for a regulatory taking – under either law or logic – by simply maintaining the status quo, especially when the Developer had full knowledge of that status quo when it purchased the property and paid a lower price reflecting that legal restriction. That explains why the Developer completely ignores the history of the development of the PRMP and the regulation of the Badlands (as well as the 17-Acre approval), pretending that this case started in 2017 when the City denied a single set of applications to develop housing on the 35-Acre Property. The Developer's actual complaint is with the PR-OS designation in 1992. The 25-day statute of limitations under NRS 278.0235 to challenge that designation, however, expired 23 years before the Developer bought the Badlands.

Attempting another miraculous escape from the overwhelming facts and law and this Court's prior ruling against it, the Developer relies on the nonsensical claim that zoning, any zoning, of property grants each owner of property in the zone a constitutionally protected "property right" or "vested right" to build whatever it wants, as long as the use is a "permitted" use in the district. All property in the City is located in a zoning district that "permits" one or more uses; *e.g.*, office, housing, retail, industrial. According to the Developer, therefore, all property owners in the City have constitutional rights to approval of their applications to develop their property. This claim necessarily means that the City has *no discretion* to limit that development, as long as the use is "permitted" by the zoning. The City would have no say over the density, form, location, height, setbacks, access, drainage, fire safety, or other aspects of construction, except to require that the development be a use "permitted" in the zoning district, or else pay the owner for a "taking" of its "property right."

This contention is completely without authority and is preposterous. Zoning limits the use of property; it does not confer rights on property owners, no less constitutional rights. Like virtually every other state in the nation, the Nevada State Legislature has ordered local agencies to engage in sound land use planning to ensure a high quality of life for the state's residents and guests. In that regard, the Legislature directs every city in Nevada to adopt a General Plan that designates land uses for all areas of the city. NRS 278.150. In the following section of NRS Chapter 278, the Legislature requires cities to adopt zoning ordinances that implement the General Plan. NRS 278.250. In the case of a conflict between a zoning ordinance and the General Plan, zoning must yield to the higher authority of the General Plan. NRS 278.250(2).

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In this case, the City followed the Legislature's mandate by designating the Badlands PR-OS to preserve the open space and drainage amenity that the original developer set aside to benefit the surrounding community. Exs. I, L, N, O, P, Q. The zoning of the Badlands (Residential – Planned Development) implements the General Plan by allowing the City to exercise its *discretion* to designate the location of housing *and open space supporting that housing* in the R-PD zone. LVMC (Uniform Development Code ["UDC"]) 19.10.050.

If the City has *no discretion* to implement the General Plan and zoning because the owner of the zoned property has a constitutionally protected right to build whatever it desires, the general plans of every city in Nevada and the Legislature's dictate that zoning must be consistent with the General Plan would be rendered meaningless. Moreover, every time a City changes the zoning of property to further limit use in any way (e.g., increase the setback requirement or require solar on roofs), the city would have to pay compensation for a "taking" to every property owner in the zoning district, an unthinkable result. The Developer cannot possibly prevail here unless this Court ignores state statutes directly on point. And if the Developer were to prevail, the result would be devastation of Nevada's carefully crafted system of land use regulation. This Court correctly rejected the Developer's outlandish claim:

> The decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. *See Enterprise Citizens Action Committee v. Clark County Bd. of Comm'rs*, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996); *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). ¶¶ A zoning designation does not give the developer a vested right to have its development applications approved. . . *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60 [(2004)] (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). ¶ "[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 also Nevada Contractors*[*v. Washoe Cty.*], 106 Nev. [310,] at 311, 792 P.2d [31,] at 31-32 [(1990)] (affirming county commission's denial of a special use permit even though property was zoned for the use). ¶ In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. ***It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment*** or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, ***no matter the zoning designation***. ¶ The Court rejects the Developer's attempt to distinguish the *Stratosphere* case, which concluded that the very same decision-

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> 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. The Court rejects the Developer's argument that the RPD-7 zoning designation on the Badlands Property somehow required the Council to approve its Applications. ¶ Statements from planning staff or the City Attorney that the Badlands Property has an RPD-7 zoning designation do not alter this conclusion.

Ex. XXX at 1385-86, 1391-92 (emphasis added).[6]

Moreover, the Developer cannot have a constitutionally protected "property right" to build housing on the 35-Acre Property because that use would conflict with the PR-OS General Plan designation. PR-OS does not permit housing. The Developer ignores the Court's finding of fact that the 35-Acre Property is validly designated PR-OS and the Court's conclusion of law that the Developer could build housing on the 35-Acre Property only if the City, in its discretion, agreed to lift the PR-OS designation. Because that finding alone requires rejection of the Developer's takings claims, the Developer offers the smoke-and-mirror argument that the General Plan does not exist, or if it exists it is invalid, or if it's valid it does not apply. The Developer further argues that if the PR-OS designation applies, the R-PD7 zoning conflicts with the PR-OS designation, and zoning controls over a General Plan designation. This Court has rejected each of these unsupported contentions. Ex. XXX at 1392-94 (*see* Judge Williams' FFCL above at p. 4).

The R-PD7 zoning that the Developer contends grants a constitutional right to build as one pleases actually grants the City broad discretion to approve, disapprove, or condition proposed development, which cannot be reconciled with the Developer's claim that zoning confers a constitutional right to develop. Because the City had complete discretion to deny an amendment of the PR-OS designation, the Developer cannot have a constitutional right to develop the 35-Acre Property with housing.

Out of pure desperation, the Developer attempts to shed this Court's decisive findings of fact

[6] Judge Herndon found that he did not need to reach the issue as to whether a property owner has a constitutional vested right to develop its property under zoning because the Developer had not filed, and the City had not denied, at least two meaningful applications to develop the 65-Acre Property standing alone. Ex. CCCC at 1504-15. Judge Herndon found that the claim that the City has "taken" the 65-Acre Property is not ripe because the City had not denied at least two applications for development. On that basis, Judge Herndon held, he could not tell whether the City would deny all or nearly all development, which is required for regulatory taking. *Id*. The same reasoning applies here. If the Developer were to file the appropriate applications, it is possible that the City Council could lift the PR-OS designation and allow residential development of the 35-Acre Property.

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and conclusions of law denying its PJR by contending that *none of the Court's findings of fact and conclusions of law denying the PJR exist for purposes of the Developer's taking claims*. True, denial of a PJR does not necessarily mean that the alleged government action does not effect a taking. The standard of liability for a PJR (lack of substantial evidence) is different from the standard of liability for a regulatory taking (denial of essentially all economic use or value and interference with investment-backed expectations), the evidence could be different (PJR: limited to evidence in the Administrative Record; taking: any formal action of the City Council that has the force of law can be considered), and the remedies are different (PJR: equitable; taking: damages). It is the height of absurdity, however, to contend that the City Council had discretion to decline to amend the PR-OS designation if the Developer later files a PJR, but had no discretion if the Developer later challenges the very same action of the City Council as a taking.

The Developer's argument to disappear the Court's FFCL is tantamount to saying that a regulatory taking proceeding is an alternative universe where the Court should ignore facts *and* law that exist in the original universe; i.e., the facts and law that exist if the Developer chooses one form of relief, a PJR, are not the facts and law if the Developer chooses a different remedy, a taking claim. The Developer's argument has no support in the law. This is like saying that the sky is blue is a fact if the Developer files a PJR, but is not a fact if the Developer files a taking claim. The *fact* of the PR-OS designation of the Badlands (City Ordinances Exs. I, L, N, O, P, Q and diagrams showing the Badlands as PR-OS), the *law* that the City has discretion to lift the PR-OS designation (*e.g.*, *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995); *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989)), the *law* that zoning does not confer a constitutional "property right" or anything like it (*e.g.*, *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. at 527-28, 96 P.3d at 759-60 (2004); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 246, 871 P.2d 320, 325 (1994)), and the *law* that even if the zoning of the 35-Acre Property and the General Plan designation conflict (they don't), the General Plan designation would be controlling (*e.g.*, NRS 278.250; *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112), are a basis for denial of *both* the PJR and the categorical and *Penn Central* taking claims. The City had complete discretion to lift the PR-OS designation in effect when the Developer bought the 35-Acre Property. Such

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discretion cannot, as a matter of long-standing Nevada law and of logic, coexist with a constitutionally protected property right to build housing in the Badlands. *Boulder City*, 110 Nev. at 246, 871 P.2d at 325 ("If the City Council had any discretion in granting or denying the permit, there could be no entitlement and no constitutionally protected interest."); *Stratosphere Gaming*, 120 Nev. at 528, 96 P.3d at 760 (the City's site development process "requires the Council to consider a number of factors and to exercise its discretion in reaching a decision. There is no evidence that the Stratosphere had a vested right to construct the proposed ride"). Given the Court's prior rulings, the Developer's regulatory taking claims fail.

In arguing that the City had discretion to deny the 35-Acre Applications if the Developer chooses to file a PJR, but no discretion if the Developer later sues the City for a taking, the Developer misunderstands regulatory taking law. A regulatory taking cannot be found unless the City denies all or virtually all economic use of the property. The City does not argue that it has discretion to deny all economic use of the 35-Acre Property. To the contrary, the City contends that because the Developer acquired the Badlands while it was subject to the PR-OS designation, which does not permit residential development unless the City Council, in exercise of its discretion, amends that designation, by electing not to amend the designation the City did not take anything from the Developer. The Developer still has the value ($18,000/acre) and use (PR-OS) it bought – nothing more, nothing less. Moreover, because the City has discretion to amend the PR-OS designation, the Developer cannot possibly have a constitutional property right to build housing on the property. This Court's conclusion of law that the PR-OS designation is valid and prevents residential development unless the City exercises its discretion to amend the PR-OS designation is relevant and fully applicable to the Developer's taking claims.

The Developer's inability to show that the City's regulation effected a wipe out or near wipe out of use and value, as required under the takings doctrine, explains the Developer's novel theory that the City has taken its property "right." There is no authority that a public agency can take a property "right," only a property "interest." The regulatory takings doctrine provides that destruction of the use and value of property is the functional equivalent of eminent domain, where the government takes fee title to the property after paying the owner the value of the property. The only property interest at issue

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is the Developer's fee simple title to the 35-Acre Property. By slight of hand, the Developer requests that the Court adjudicate the nature of the property "interest" the Developer holds (the Developer's motion was entitled "Motion to Determine Property Interest"), but then in its motion and proposed order, the Developer asks the Court to declare that it has a property "right" that the City has "taken." If liable for a taking in either eminent domain or inverse condemnation, the City would be required to pay the Developer the fair market value of the property, and then it would take fee title to the property. Fee title is a property interest, it is not a "right." If found liable for a taking under the Developer's theory, the City would be buying the Developer's rights to build housing, but the Developer would keep title to the property. This absurd result follows from the Developer's unprecedented theory of relief and would not fit within any takings case.

Recognizing that it has no chance of success on its claims for excessive regulation of the use of the Badlands, the Developer resorts to a claim that the City has effected a physical regulatory taking of the Badlands, which the Developer styles as a "per se regulatory taking," because the City adopted an ordinance, Bill 2018-24, allegedly requiring the Developer to allow the public to occupy the Badlands. This claim is without the slightest merit. On its face, the legislation never applied to the Developer or the Badlands and did not require the Developer to allow the public on its land.

The Developer also purports to state a "nonregulatory taking" claim. That claim, however, requires either (a) a physical taking by the government, where the government physically occupies the property or a public improvement fails and causes physical damage to the property, or (b) unreasonable precondemnation conduct. A nonregulatory taking must render the property valueless and useless. The nonregulatory taking claim fails because there is no evidence that the City physically occupied the Badlands, that a City improvement damaged the property, that the City condemned or indicated an intent to condemn the Badlands, or that the City took any other nonregulatory action that rendered the Badlands valueless or useless. To the contrary, the City's regulatory action increased the value of the Badlands by six times what the Developer paid for the property only two years earlier, and the Developer still has 233 acres on which to seek development or to use as a golf course.

Further attempting to deflect facts and unanimous legal authorities against it, the Developer attempts to recast its taking claims as a due process claim. The Developer spends most of its argument

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in this case on allegations that after the City had approved the 435-unit project, two former members of the seven-member Las Vegas City Council made it clear that they opposed further development of housing in the Badlands. Because the City can limit the use of the Badlands only by a law adopted by a majority of the City Council, the statements or actions of individual members of the City Council cannot be attributed to the City Council as a whole and are irrelevant. In a regulatory taking case, it is axiomatic that only *laws* passed by a majority vote of the legislature can restrict the use of property, not statements of individual legislators. This Court agrees:

> The statements of individual council members are not indicative of any arbitrary or capricious decision making. The action that the Court is tasked with reviewing is the decision of the governing body, not statements made by individual council members leading up to that decision. . . . The Council's action to deny the Applications occurred with its vote, not with the prior statements made by individual council members.

Ex. XXX at 1391.[7]

Moreover, even if the statements of the two Councilmembers were relevant, the Developer's claim that the Councilmembers based their vote to deny the 35-Acre Applications on improper reasons sounds in due process, rather than takings. Due process is concerned with the wisdom of government regulation; i.e., the quality of the reasons for a decision. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543-44 (2005). Takings, in contrast, is concerned solely with the economic impact of regulation; the reasons for the regulation are entirely irrelevant. *Id*. In denying the PJR, this Court rejected the Developer's disguised due process claim:

> The Council's Decision was free from any arbitrary or capricious decision making because it provided multiple reasons for denial of the Applications, all of which are well supported in the record. . . . The Council properly exercised its discretion to conclude that the development proposed in the Applications was not compatible with surrounding areas and failed to set forth an orderly development plan to alter the open space designation found in both the City's General Plan and the Peccole Ranch Master Development Plan.

Ex. XXX at 1388. As will be shown, the Ninth Circuit tossed out an identical claim brought by the Developer against the City in a separate action. That decision is an issue preclusion bar to the Developer's claim that it has a property right in zoning and the due process claim in this case.

[7] By the same token, statements of individuals Councilmembers made after the Council's action are irrelevant.

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Mischaracterizing garden-variety land use regulation as the City's "war" on the Developer, the Developer portrays the statements and actions of the two individual Councilmembers as demonstrating a sinister conspiracy with neighboring property owners to deny the Developer's constitutional rights. But the entire purpose of the City Council's land use regulation is to limit the use of private property for the good of the surrounding community. *That is the City Council's job*. Federal, Nevada, and Las Vegas law give the City Council broad powers to adopt zoning and General Plan designations to limit the use of private property to protect community interests. For example, the zoning and General Plan designations that limit the density of development protect the surrounding community from traffic and parking congestion. Height limits protect light, air, and views for surrounding properties. As the United States Supreme Court declared, protection of community, rather than individual property interests is the very essence of land use regulation:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 33 (1954). Nevada law is the same. *See also* NRS 278.150, 278.250; *Boulder City*, 110 Nev at 246, 871 P.2d at 325 ("'[This] standard represents a sensitive recognition that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government—not by federal courts.'") (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *id*. 110 Nev at 249, 871 P.2d at 327 ("The United States Constitution simply does not forbid democratic government to succumb to individual and public pressures in reaching land use decisions that work to the detriment of an individual litigant.").

Under the modern system for land use regulation in the United States and Nevada, even if the City Council had maintained the PR-OS designation for the entire Badlands (it didn't), that would have been a political decision that does not involve the courts. The only limit on the City's discretion in amending the PR-OS designation is a constitutional one – the Takings Clause – which applies only if, after the Developer bought the Badlands, the City changed the law to wipe out or nearly wipe out the value or use of the property. Here the City did the opposite, increasing the value of the Developer's property by a factor of six and leaving the remaining 233 acres for potential use for development or as

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a golf course. The Developer's claims boil down to the contention that if an individual public official opposes a development project because he/she believes that the project would not be in the best interest of the community, the City violates the developer's constitutional rights. The Developer fundamentally misconstrues land use regulation. The purpose of land use regulation is not to grant rights to property owners, but rather to limit the owner's use to protect the public.

This case is a frontal assault on the power of local government in Nevada to regulate land use for the good of the community. The case is meritless and should never have been brought. Stripped of the Developer's rhetoric and obfuscations of fact and law, it is a naked attempt to use the Court to extort money from the taxpayers. The City's Countermotion for Summary Judgment should be granted and the Developer's Motion for Summary Judgment and to "Determine Take" should be denied.

FACTUAL BACKGROUND

Judge Williams' Facts: The following facts are relevant facts reproduced verbatim from this Court's Findings of Fact and Conclusions of Law on Petition for Judicial Review filed 11/21/18 ("Judge Williams FFCL").

[Start of quote from Judge Williams FFCL]

> 7. The City's General Plan identifies the Badlands Property as Parks, Recreation and Open Space ("PR-OS"). (ROR 25546).
>
> 13. Like its predecessor, the Master Development Plan identified the golf course area as being for flood drainage and golf course purposes, which satisfied the City's open space requirement. (ROR 2658-2660).
>
> 47. Based on the reduction and compatibility effort made by the Developer, the Council approved the 17-Acres Applications with certain modifications and conditions. (ROR 11233; 17352-57).
>
> 48. Certain nearby homeowners petitioned for judicial review of the Council's approval of the 17-Acres Applications. *See Jack B. Binion, et al v. The City of Las Vegas, et al.*, A-17-752344-J.
>
> 49. On March 5, 2018, the Honorable James Crockett granted the homeowners' petition for judicial review, concluding that a major modification of the Master Development Plan to change the open space designation of the Badlands Golf Course was legally required before the Council could approve the 17-Acres Applications ("the Crockett Order"). The Court takes judicial notice of the Crockett Order.

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C. The 35-Acres Applications at Issue in this Petition for Judicial Review

51. The Applications consisted of: an application for a General Plan Amendment for 166.99 acres to change the existing City's General Plan designation from Parks Recreation/Open Space to Low Density Residential (ROR 32657); a Waiver on the size of the private streets (ROR 34009); a Site Development Review for 61 lots (ROR 34050); and a Tentative Map Plan application for the 35-Acre Property. (ROR 34059).

52. The development proposed in the Applications was inconsistent with the proposed 2016 Development Agreement that was being negotiated. (ROR 1217-1221; 17250-52; 32657; 34050; 34059).

63. The City Council voted to deny the Applications. (ROR 24397). **[End of quote from Judge Williams FFCL]**

Ex. XXX at 1376-85.

Judge Herndon Facts: The following additional facts are, in general, reproduced verbatim from Judge Herndon's Findings of Fact and Conclusions of Law Granting City's Motion for Summary Judgment filed 12/30/21 in the 65-Acre Case ("Judge Herndon FFCL"). The City has updated the facts to reflect development since December 2020. The City which Judge Herndon cited are the same exhibits submitted in the instant action.

[Start of quote from Judge Herndon FFCL]

I. The Badlands as open space for Peccole Ranch

3. In 1989, the City included Peccole Ranch in a Gaming Enterprise District ("GED"), which allowed Peccole to develop a resort hotel in the PRMP so long as Peccole provided a recreational amenity such as an 18-hole golf course. Ex. G at 114-124, 130, 135-37. Peccole reserved 207 acres for a golf course to satisfy this requirement. Ex. E at 96, 98; Ex. G at 123-124.

4. In 1990, Peccole applied to amend the PRMP for Phase II. Ex. H at 138-161. The revised PRMP highlighted an "extensive 253-acre golf course and linear open space system winding throughout the community [that] provides a positive focal point while creating a mechanism to handle drainage flows." *Id*. at 145. The City approved the Phase II rezoning application under a resolution of intent subject to all conditions of approval for the revised PRMP. *Id*. at 183-94.

II. The PR-OS General Plan designation of the Badlands

5. Since 1992, the City's General Plan has designated the Badlands for parks, recreation, and open space, a designation that does not permit residential development. On April 1, 1992, the City Council adopted a new Las Vegas General Plan, including revisions approved by the Planning Commission. Ex. I at 195-204, 212-18. The 1992 General Plan included maps showing the existing land uses and proposed future land uses. *Id.* at 246. The future land use map for the Southwest

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Sector designated the area set aside by Peccole for an 18-hole golf course as "Parks/Schools/ Recreation/Open Space." *Id.* at 248. That designation allowed "large public parks and recreation areas such as public and private golf courses, trails and easements, drainage ways and detention basins, and any other large areas of permanent open land." *Id.* at 234-35.

6. From 1992 to 1996, Peccole developed the 18-hole golf course in the location depicted in the 1992 General Plan, and a 9-hole course to the north of the 18-hole course. *Compare id.* at 248 *with* Ex. TT; *see also* Ex. J, UU. The 9-hole course was also designated "P" for "Parks" in the City's General Plan as early as 1998. *See* Ex. K. The Badlands 18-hole and 9-hole golf courses, totaling 250 acres, remain in the same configuration today. When the City Council adopted a new General Plan in 2000 to project growth over the following 20 years ("2020 Master Plan"), it retained the "parks, recreation, and open space" [PR-OS] designation. Ex. L at 265; compare *id.* at 269 with Ex. I at 234-35, 248. Beginning in 2002, the City's General Plan maps show the entire Badlands designated as PR-OS. Ex. M at 274-77.

7. In 2005, the City Council incorporated an updated Land Use Element in the 2020 Master Plan. Ex. N at 278-82. This 2005 Land Use Element designated all 27 holes of the Badlands golf course as PR-OS for "Park/Recreation/Open Space." *Id.* at 291. Each ordinance of the City Council updating the Land Use Element of the General Plan since 2005 has approved the designation of the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged. *See* Ex. O at 292, 300-01 (Ordinance #6056 9/2/2009); Ex. P at 302-04, 316-17 (Ordinance #6152 5/8/2011); Ex. Q at 318, 331-32 (Ordinance #6622 6/26/2018).

III. The R-PD7 zoning of the Badlands

8. In 1972, the City established R-PD7 zoning (Residential-Planned Unit Development, 7 units/acre). Ex. R. "The purpose of a Planned Unit Development [was] to allow a maximum flexibility for imaginative and innovative residential design and land utilization in accordance with the General Plan." *Id*. at 333. The "PD" in R-PD stands for "Planned Development." Planned Development zoning, generally applicable to larger development sites, "permits planned-unit development by allowing a modification in lot size and frontage requirements under the condition that other land in the development be set aside for parks, schools, or other public needs." *Zoning*, *Black's Law Dictionary* (11th ed. 2019). The R-PD district in the Las Vegas Uniform Development Code was intended "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns." Ex. R at 333. "As a[n R-PD7] Residential Planned Development, density may be concentrated in some areas while other areas remain less dense, as long as the overall density for this site does not exceed 7.49 dwelling units per acre. Therefore, portions of the subject area can be restricted in density by various General Plan designations." Ex. ZZZ at 1414-15.

9. . . . In 1990, the City adopted a resolution of intent to rezone the 996.4 acres in Phase II in accordance with the amended PRMP. Ex. H at 189-94. To obtain the City Council's approval of tentative R-PD7 zoning for housing lining the fairways of a golf course, Peccole agreed to set aside 211.6 acres for a golf course and drainage. *Id*. at 159, 163-165, 167-168, 171-172, 187-188.

IV. The Developer's acquisition and segmentation of the Badlands

21. In early 2015, Peccole owned the Badlands through a company known as

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Fore Stars Ltd ("Fore Stars"). Ex. V at 365-68; Ex. VV. In March 2015, the Developer acquired Fore Stars, thereby acquiring the 250-Acre Badlands. Ex. W at 379; Ex. AAA. At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. Ex. QQQ at 1160; Ex. X at 382-410; Ex. XX. The Developer transferred 178.27 acres to 180 Land Co. LLC ("180 Land") and 70.52 acres to Seventy Acres LLC ("Seventy Acres"), leaving Fore Stars with 2.13 acres. Ex. W at 379; *see also* Ex. V at 370-77. Each of these entities is controlled by the Developer's EHB Companies LLC. *See* Ex. V at 371 and 375 (deeds executed by EHB Companies LLC). The Developer then segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands. *See* Ex. HH; Ex. BBB; Ex. LL; Ex. Z.

V. The City's approval of 435 luxury housing units on the 17-Acre Property

22. In November 2015, the Developer, acknowledging the need to make application to the City in order to develop a parcel of property, applied for a General Plan Amendment, Re-Zoning, and Site Development Plan Review to redevelop the 17-Acre Property from golf course use to luxury condominiums ("17-Acre Applications"). Ex. Z at 446-66. The 17-Acre Applications sought to change the General Plan designation from PR-OS, which did not permit residential development, to H (High Density Residential) and the zoning from R-PD7 to R-4 (High Density Residential). *Id.* at 449-52. The Planning Staff Report for the 17-Acre Applications noted that the proposed development required a Major Modification Application to amend the PRMP. Ex. AA at 470. In 2016, the Developer submitted a Major Modification Application and related applications, but later that year withdrew the applications. Ex. BB at 483-94; Ex. CC.

23. In February 2017, the City Council approved the 17-Acre Applications for 435 units of luxury housing and approved a rezoning to R-3, along with a General Plan Amendment to change the land use designation from PR-OS to Medium Density Residential. Ex. DD at 586, 587-89, 591-97; Ex. SSS. In approving the 17-Acre Applications, the City did not require the Developer to file a Major Modification Application.

VI. The homeowners' challenge to the City's approval of the 17-Acre Applications

24. After the City approved the 17-Acre Applications, nearby homeowners filed a Petition for Judicial Review of the City's approval, which was assigned to Judge Jim Crockett. Ex. EE at 599, 609 (the "Crockett Order"). On March 5, 2018, Judge Crockett granted the homeowners' petition over the objection of both the Developer and the City, vacating the City's approval on the grounds that the City Council was required to approve a Major Modification Application before approving applications to redevelop the Badlands. *Id.* at 598, 610-11. The Developer appealed the Crockett Order. *See* Ex. DDD. Although the City did not appeal the Crockett Order, it did file an amicus brief in support of the Developer's position that a Major Modification Application was not required. Ex. CCC.

26. Ultimately, the Nevada Supreme Court reversed Judge Crockett's decision granting the Petition for Judicial Review. In its Order of Reversal filed March 5, 2020, the Nevada Supreme Court found that a Major Modification Application was not required to develop the 17-Acre Property because the City's

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UDC required Major Modification Applications for property zoned PD, but not property zoned R-PD. Ex. DDD. The Supreme Court subsequently denied rehearing and en banc reconsideration and issued a remittitur, rendering its determination final. Ex. EEE. The Supreme Court's decision was consistent with the City's argument in the District Court and in its amicus brief that a Major Modification Application was not required to develop the 17-Acre Property. Ex. CCC at 1003-06. The District Court thereafter, consistent with the Nevada Supreme Court's decision, entered an Order on November 6, 2020, denying the petition for judicial review. *See* Ex. RRR.

27. The Nevada Supreme Court's reversal of the Crockett Order reinstated the City's approval of the Developer's applications to develop the 17-Acre Property. Ex. DDD. The City provided the Developer with notice of that fact by letter on March 26, 2020. Ex. FFF at 1019. The City's letter explained that once remittitur issued in the Nevada Supreme Court's order of reversal, "the discretionary entitlements the City approved for [the Developer's] 435-unit project on February 15, 2017 . . . will be reinstated." *Id.* The City also notified the Developer that the approvals would be valid for two years after the date of the remittitur. *Id*. On September 1, 2020, the City notified the Developer that the Nevada Supreme Court had issued remittitur, the City's original approval of 435 luxury housing units on the 17-Acre Property had been reinstated, and the Developer is free to proceed with its development project. Ex. GGG at 1021. The City again notified the Developer that the approvals would be extended for two years after the date of the remittitur. *Id*.

VII. The Master Development Application

29. Before the City denied the 35-Acre Applications, the Developer sought a new Master Development Agreement (MDA) for the entire Badlands, including the 35-Acre Property. Ex. LL; Ex. II at 679. On August 2, 2017, the City Council disapproved the MDA by a vote of 4-3. Ex. MM at 880-82; Compl. ¶¶ 39, 42. The Developer did not seek judicial review of the City's decision to deny the development agreement.

VIII. The 133-Acre Applications

30. In October 2017, the Developer filed applications to redevelop the 133-Acre Property ("133-Acre Applications"). Compl. ¶ 46. On May 16, 2018, after the Crockett Order but before the Nevada Supreme Court's reversal of said order, the City Council voted to strike the 133-Acre Applications as incomplete because they did not include an application for a Major Modification, as the Crockett Order required. Compl. ¶¶68, 77, 85; Ex. BBB at 989-98.

31. The Developer filed a petition for judicial review (the 133-Acre Property case) challenging the City's action to strike the 133-Acre Applications and a complaint for a taking and other related claims. That action was assigned to Judge Sturman in Department 26, who dismissed the petition for judicial review on the grounds that the parties were bound by the Crockett Order and, therefore, the Developer's failure to file a Major Modification Application was valid grounds for the City to strike the application. Judge Sturman allowed the Developer's inverse condemnation claims to proceed. Ex. NN. The City removed the case to federal court, and it has since been remanded back to state court.[8]

[8] Rather than consider the merits of the 133-Acre Applications, the City Council struck the 133-Acre Applications in 2018 because the Developer failed to comply with the Crockett Order requiring the filing of an MMA. Following the Nevada Supreme Court's reversal of the Crockett Order, the City
(footnote continued on next page)

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IX. The 65-Acre Applications

32. To date, there has been no evidence presented to the court that Developer has submitted any development applications to the City for consideration of a proposed development of the individual 65-Acre parcel. As noted above, there was a Master Development application, Ex. LL; Ex. II at 679, that was eventually denied by the City but no individual applications for the 65-Acre property. Judge Herndon rejected the Developer's contention that he must hear the Developer's Motion to Determine Property Interest before the City's Motion for Summary Judgment. Judge Herndon accordingly held a single hearing on the Developer's Motion to Determine Property Interest and the City's Motion for Summary Judgment. Judge Herndon found that he did not need to reach the issue as to whether a property owner has a property or vested right to develop its property under zoning because the Developer had not filed, and the City had not denied, at least two meaningful applications to develop the 65-Acre Property standing alone. Ex. CCCC at 1514-15. Judge Herndon found that the claim that the City has taken the 65-Acre Property is not ripe and granted summary judgment to the City, also denying the Developer's Motion to Determine Property Interest as moot. *Id*.

After Judge Herndon was seated on the Nevada Supreme Court, the 65-Acre case was assigned to Judge Trujillo. In considering the Developer's Motion for a New Trial and Rehearing, Judge Trujillo questioned Judge Herndon's conclusion on a single issue of law – whether final decision ripeness applies to categorical wipeout taking claims – and whether Judge Herndon had ruled on all of the Developer's claims. Judge Trujillo has not yet ruled on the Motion for New Trial. Judge Trujillo has not questioned any other aspect of Judge Herndon's FFCL, including the finding that the 65-Acre regulatory taking claims were unripe because the Developer failed to obtain the City Council's denial of two separate applications to develop the 65-Acre Property standing alone and on the merits. The City has since renewed its Motion for Summary Judgment and the Developer has refiled its Motion to Determine Property Interest. Judge Trujillo heard both motions in the same hearing. The motions and the Developer's Motion for New Trial are under submission..

X. The increased value of the Badlands due to the City's approval of 435 units on the 17-Acre Property

33. Under the Membership Purchase and Sale Agreement between the Peccole Family and the Developer, the Developer purchased the 250-acre Badlands golf course for $7,500,000, or $30,000 per acre ($7,500,000/250 acres = $30,000). Ex. AAA at 966. This figure does not represent the total cost to Developer as there were clearly monies spent during its due diligence process (Developer has stated that the total cost for due diligence and purchase was $45 million). $7,500,00 is however the stated figure, per the Purchase and Sale Agreement, that Developer paid for the

wrote to the Developer inviting it to resubmit the 133-Acre Applications for the City's consideration on the merits. Ex. OOO at 1153-54. The Developer did not respond to that letter or resubmit its applications. The City also filed a formal motion asking Judge Sturman to remand the 133-Acre Applications to the City Council to allow the Council to consider the 133-Acre Applications on the merits. The Developer's staunch opposition to that motion, coupled with its refusal to use its approvals for 435 luxury housing units, indeed, its absurd denial that such approvals exist, establishes beyond a doubt that the Developer does not want to build anything in the Badlands; its sole objective is to extort more than $300 million from the taxpayers.

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actual property. Ex. UUU at 1300.[9]

34. The Developer contends in its Initial Disclosures that if the Badlands can be developed with housing, it is worth $1,542,857 per acre. Ex. VVV at 1319-36.

Herndon fn The Developer's Initial Disclosures in the 65-Acre case make the same claim. Ex. JJJ at 1135-36. Both initial disclosures are based in part on the Lubawy appraisal of 70 acres of the Badlands that includes the entire 17-Acre Property and a portion of the 65-Acre Property. Ex. QQQ at 1165. The Lubawy appraisal assumed that the land being appraised could be developed with medium density housing. *Id*. at 1196-97. [End of fn]

Thus, according to the Developer's own evidence, the City's approval of 435 housing units in the Badlands has increased the value of the 17-Acre Property alone to $26,228,569 (17 x $1,542,857 = $26,228,569), thereby multiplying the Developer's property purchase investment in the Badlands by a factor of six ($26,228,569/$4,500,000 = 6 [rounded]). Furthermore, the Developer still owns the remaining 233 acres with the potential to continue golf course use or develop the remaining acreage.

35. Even if the Developer paid $45 million for the Badlands as it contends, or $180,000/acre ($45,000,000/250 acres = $180,000/acre), the City's approval of 435 housing units in the Badlands has increased the value of the Badlands by $23,168,569 (the City's approval improved the value of each acre in the 17-Acre Property from $180,000 to $1,542,857, an increase of $1,362,857 per acre ($1,362,857 x 17 = $23,168,569). **[End of quote from Judge Herndon FFCL]**

Ex. CCCC at 1484-96.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Under NRCP 56(a), summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The non-moving party must "'set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against

[9] For more than a year, the Developer refused to produce any records showing the purchase price for the Badlands, despite the City's repeated discovery requests. The City established from records ultimately produced by the Developer pursuant to this Court's order granting the City's motion to compel that $3,000,000 of that purchase price was consideration for other real estate interests, putting the price paid for the Badlands at $4,500,000, or $18,000 per acre. Ex. FFFF at 1591-95. The Developer has no evidence to contravene the City's evidence that the purchase price for the Badlands was $4,500,000. Although the Developer alleges that the purchase price was $45 million (Ex. 12 at 456; Ex. 57 at 2-3), it concedes that it has no documents or other objective evidence to support that claim. Ex. UUU at 1300; Ex. FFFF at 1595-97. Moreover, section 9.05 of the Purchase and Sale Agreement ("PSA") by which the Developer purchased the Badlands provides: "This Agreement (along with the documents referred to herein [none of which state that the purchase price was $45 million]) constitutes the entire agreement among the Parties pertaining to the subject matter contained herein and supersedes all prior agreements, representations and understandings of the Parties. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by the Party to be bound." Ex. AAA at 973.

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him.'" *Id.* (quoting *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110 825 P.2d 588, 591 (1992)).

The City's liability for a regulatory taking is a question of law. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006). The Developer admits that liability for a taking must be established through official government records of official government action:

> The question of whether a taking has occurred is based on Government action and can frequently be determined solely based on government documents (the truth and authenticity of the same are rarely in question). Therefore, this Court can review the facts as presented in the City's own documents and apply the law to those facts to make the judicial determination of a taking.

Landowners' Reply In Support of Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims Etc. filed 3/21/19 at 2. Accordingly, there are no triable issues of fact in this case. The City imposes land use regulations only by vote of a majority of the City Council's Members. The official City Council actions alleged to constitute takings are matters of public record. The Developer, by filing its own motion for summary judgment, concedes that there is no triable issue of fact in this case. Based on the undisputed material facts and overwhelming legal authority, the Court should reject each of the Developer's claims and enter judgment for the City.

ARGUMENT

The Developer alleges five taking claims: (1) categorical, (2) *Penn Central* [*Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978)], (3) regulatory per se, (4) nonregulatory, and (5) temporary. Compl. ¶¶ 162-223.[10] None of the Developer's claims has any support in the facts or law.

I. The City should have summary judgment on the Developer's categorical and *Penn Central* taking claims because the City's regulation did not deprive the Developer of all or virtually all use or value of the 35-Acre Property

The Developer seeks a ruling that the City has no discretion to retain the PR-OS designation of the Badlands or to limit the Developer's redevelopment of the Badlands in any way. That result would turn Nevada land use law upside down.

A. Nevada grants broad discretion to cities to limit land uses to promote the general health, safety, and welfare

Under their land use regulatory powers delegated by the state, Nevada cities are required to

[10] The Developer added a sixth claim for a judicial taking contingent on this Court's following the Crockett Order. Compl. ¶¶ 224-26. Because the Crockett Order was reversed, this cause of action is moot.

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adopt a General Plan (the terms "General Plan," "Master Plan," and "Comprehensive Plan" are used interchangeably) that designates the uses of land in each area of the city:

> 1. The planning commission shall prepare and adopt a comprehensive, long-term general plan for the physical development of the city . . . which in the commission's judgment bears relation to the planning thereof.
>
> 2. The plan must be known as the master plan, and must be so prepared that all or portions thereof . . . may be adopted by the governing body . . . as a basis for the development of the city

NRS 278.150. To implement the policies in the General Plan, in a later section of the NRS, the Legislature requires cities to adopt zoning ordinances:

> 1. . . . [T]he governing body may divide the city, county or region into zoning districts of such number, shape and area . . . . Within the zoning district, it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land.
>
> 2. The zoning regulations must be adopted in accordance with the master plan for land use.

NRS 278.250. The General Plan and zoning are in the same relationship as a constitution and statutes; the General Plan establishes fundamental policies for future land use, while the zoning ordinances implement those policies. Zoning ordinances must be consistent with the General Plan. In the case of a conflict between a zoning ordinance and the General Plan, zoning must yield to the higher authority of the General Plan. NRS 278.250(2).

State statute makes clear that cities are to exercise broad discretion in adopting, amending, and applying General Plan policies and zoning ordinances. Planning Commissions are required to adopt General Plan policies "which in the commission's judgment bears relation to the planning [for physical development of the city]." NRS. 278.250(1).

> [Z]oning regulations must be designed:
>
> (a) To preserve the quality of air and water resources.
>
> (b) To promote the conservation of open space and the protection of other natural and scenic resources from unreasonable impairment.
>
> (c) To consider existing views and access to solar resources by studying the height of new buildings…
>
> (d) To reduce the consumption of energy by encouraging the use of products and materials which maximize energy efficiency in the construction of buildings.

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(e) To provide for recreational needs.

(f) To protect life and property in areas subject to floods, landslides and other natural disasters.

(g) To conform to the adopted population plan, if required by NRS 278.170.

(h) To develop a timely, orderly and efficient arrangement of transportation and public facilities and services…

(i) To ensure that the development on land is commensurate with the character and the physical limitations of the land.

(j) To take into account the immediate and long-range financial impact of the application of particular land to particular kinds of development, and the relative suitability of the land for development.

(k) To promote health and the general welfare.

(l) To ensure the development of an adequate supply of housing for the community, including the development of affordable housing.

(m) To ensure the protection of existing neighborhoods and communities, including the protection of rural preservation neighborhoods and, in counties whose population is 700,000 or more, the protection of historic neighborhoods.

(n) To promote systems which use solar or wind energy.

(o) To foster the coordination and compatibility of land uses with any military installation in the city, county or region, taking into account the location, purpose and stated mission of the military installation.

NRS 278.250(2).

It would be impossible to implement the above policies without broad discretion. All real property is unique, all development projects are unique, and the community surrounding each development project is unique. It is therefore plain that "[i]n exercising the powers granted in this section [NRS 278.250], the governing body may use any controls relating to land use or principles of zoning *that the governing body determines to be appropriate*." NRS 278.250(4) (emphasis added). In short, in adopting and applying General Plan policies and zoning ordinances to comply with its responsibilities for planning sound communities under state law, the City must have broad discretion.

The discretion granted to the Council generally in applying land use regulations is even more explicit in the R-PD7 zoning ordinance that the Developer incorrectly claims here allows *no discretion* on the part of the City Council. R-PD stands for "Planned Development." That zoning classification applies to large acreage parcels where a single developer seeks to build significant improvements.

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Under this zoning category, the City is granted wide discretion to locate different uses in the property to provide a comprehensive, safe, healthy, efficient, quality living, working, and recreational environment for the residents and surrounding community. UDC 19.10.050 provides:

> **19.10.050 - R-PD Residential Planned Development Districts**
>
> **A. Intent of R-PD District**
>
> The R-PD District has been to provide for *flexibility and innovation* in residential development, with *emphasis on enhanced residential amenities, efficient utilization of open space*, the separation of pedestrian and vehicular traffic, and homogeneity of land use patterns. . . ."
>
> **C. Permitted Land Uses**
>
> 1. 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*. In addition, the following uses are permitted as indicated:
>
>   a. Home Occupations for which proper approvals have been secured.
>
>   b. Child Care-Family Home and Child Care-Group Home, *to the extent the Director determines that such uses would be permitted in the equivalent standard residential district*.
>
> * * *
>
> **D. Plan Amendment Approvals, Conditions, Conformance**
>
> Amendments to an approved Site Development Plan Review shall be reviewed and approved pursuant to LVMC 19.16.100(H). *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.*

(Emphasis added.) UDC 19.18.020, entitled "Words and Terms Defined," defines "Permitted Land Uses" as that term is used in UDC 19.10.050C:

> **Permitted Use**. 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). Accordingly, while the Developer claims that R-PD7 zoning allows the City *no discretion to disapprove or condition its development applications*, discretion in fact pervades the ordinance. The Staff Report for the Developer's 35-Acre Applications explained how R-PD7 zoning functions:

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> The subject parent parcel . . . is a significant portion of a developed golf course that is located within the Peccole Ranch Master Plan. . . . As a Residential Planned Development, density may be concentrated in some areas while other areas remain less dense, as long as the overall density for this site does not exceed 7.49 dwelling units per acre. Therefore, portions of the subject area can be restricted in density by various General Plan designations.

Ex. ZZZ at 1414-15. The terms of the R-PD7 zoning ordinance on which the Developer relies, granting wide discretion to the City Council, cannot be reconciled with the Developer's claim that zoning confers constitutional rights on property owners to be free from that exercise of discretion. *Boulder City*, 110 Nev. at 246, 871 P.2d at 325 ("If the City Council had any discretion in granting or denying the permit, there could be no entitlement and no constitutionally protected interest."); *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759 ("In the context of governmental immunity, we have defined a 'discretionary act' as 'an act that requires a decision requiring personal deliberation and judgment.' The language used in section 19.18.050 clearly indicates a discretionary act on the part of the City Council."); *id*. 120 Nev. at 528, 96 P.3d at 760 ("Under section 19.18.050, the City Council must approve the Stratosphere's proposed development of the property through the City's site development plan review process. That process requires the Council to consider a number of factors and to exercise its discretion in reaching a decision. There is no evidence that the Stratosphere had a vested right to construct the proposed ride"). This Court agreed:

> The four Applications submitted to the Council for a general plan amendment [etc.] were all subject to the Council's discretionary decision making, no matter the zoning designation."). ¶ 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. ¶ The Applications included requests for a General Plan Amendment and Waiver. In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, no matter the zoning designation. UDC 19.00.030, 19.16.030, 19.16.050, 19.16.100, 19.16.130.

Ex. XXX at 1392-94. Judge Herndon also agrees:

[Start of quote from Judge Herndon FFCL]

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Courts generally defer to the exercise of land use regulatory powers by the legislative and executive branches of government

3. In the United States, planning commissions and city councils have broad authority to limit land uses to protect health, safety, and welfare. ***Because the right to use land for a particular purpose is not a fundamental constitutional right***,[11] courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use. The United States Supreme Court declared that the Court does "not sit to determine whether a particular housing project is or is not desirable," since "[t]he concept of the public welfare is broad and inclusive." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Instead, where the legislature and its authorized agencies "have made determinations that take into account a wide variety of uses," it is "not for [the courts] to reappraise them." *Id.*

4. The role of the courts in overseeing land use regulation is limited to cases of the most extreme restrictions on the use of private property under the regulatory takings doctrine. The narrow scope of the doctrine stems from the separation of powers between the legislative and executive branches of government and the judicial branch. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (judicial restraint respects the political questions doctrine and separation of powers because it requires that the courts refrain from replacing the policy judgments of lawmakers and regulators with their own with regard to non-fundamental constitutional rights); *Gorieb v. Fox*, 274 U.S. 603, 608 (1926) ("State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions . . . require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.").

5. Nevada's Constitution expressly prohibits any one branch of government from impinging on the functions of another. *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Nevada State Constitution provides that the state government "shall be divided into three separate departments" and prohibits any person authorized to exercise the powers belonging to one department to "exercise any functions, appertaining to either of the others" except where expressly permitted by the Constitution. Nev. Const. art. 3 § 1.

6. Separation of powers "is probably the most important single principle of government." *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). Within this framework, Nevada has delegated broad authority to cities to regulate land use for the public good. The State has specifically authorized cities to "address matters of local concern for the effective operation of city government" by "[e]xpressly grant[ing] and delegat[ing] to the governing body of an incorporated city all powers necessary or proper to address matters of local concern so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government." NRS 268.001(6), (6)(a).

7. "Matters of local concern" include "[p]lanning, zoning, development and redevelopment in the city." NRS 268.003(2)(b). "For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing

[11] [Emphasis added.] This conclusion of law by itself is fatal to the Developer's claim to a constitutionally protected property right under zoning to build whatever it pleases and requires rejection of its regulatory taking claims.

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bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land." NRS 278.020(1); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 254, 439 P.2d 219, 222 (1968) (upholding a county's authority under NRS 278.020 to require an applicant for a special use permit to present evidence that the use is necessary to the public health and welfare of the community).

8. As a charter city, the City has the right to "regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land within those districts" and "[e]stablish and adopt ordinances and regulations which relate to the subdivision of land." Las Vegas City Charter § 2.210(1)(a), (b). Cities in Nevada limit the height of buildings, the uses permitted and the location of uses on property, and many other aspects of land use that could have an impact on the community. *See, e.g.*, *Boulder City v. Cinnamon Hills Assocs*., 110 Nev. 238, 239, 871 P.2d 320, 321 (1994) (upholding City's denial of building permit application); *State ex rel. Davie v. Coleman*, 67 Nev. 636, 641, 224 P.2d 309, 311 (1950) (upholding Reno ordinance establishing land use plan and restricting use of land).

To avoid encroaching on the police powers of other branches of government, courts intervene in land use regulation only in cases of extreme economic burden on the property

9. In its Third through Seventh Causes of Action, the Developer alleges a variety of types of takings under the Fifth Amendment of the United States Constitution, which provides "nor shall private property be taken for public use, without just compensation," and its counterpart in Article 1, Section 8 of the Nevada Constitution. The Just Compensation Clause of the Fifth Amendment was originally intended to require compensation only for eminent domain – *i.e*., direct government takings. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In 1922, the Supreme Court held that a regulation that "goes too far," such that it destroys all or nearly all of the value or use of property, equivalent to an eminent domain taking, can require the regulatory agency to compensate the property owner for the value of the property before the regulation was imposed. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005). This type of inverse condemnation that does not involve a physical occupation of private property by the government, but rather alleges excessive regulation of the property owner's use of the property, is known as a "regulatory taking."

Herndon fn The Developer conflates eminent domain and inverse condemnation. The two doctrines have little in common. In eminent domain, the government's liability for the taking is established by the filing of the action. The only issue remaining is the valuation of the property taken. In inverse condemnation, by contrast, the government's liability is in dispute and is decided by the court. If the courts finds liability, then a judge or jury determines the amount of compensation. [End of fn]

Under separation of powers, however, courts intervene in regulation of land use by the legislative and executive branches of government only in cases of (1) extreme regulation where the economic impact of the regulation is equivalent to an eminent domain taking, wiping out or nearly wiping out the use of value of the property, similar to a physical ouster of the owner by eminent domain, or (2) interference with reasonable investment-backed expectations. *Lingle*, 544 US. at 539 (categorical and *Penn Central* regulatory takings test both "aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which

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government directly appropriates private property or ousts the owner from his domain").

Herndon fn In settling the test for a regulatory taking, *Lingle* resolved inconsistencies in prior federal and state court decisions. The *Lingle* opinion was unanimous and had no footnotes, indicating that the Supreme Court intended to bring clarity and simplicity to the regulatory takings doctrine. [End of fn]

10. The Nevada Supreme Court has established an identical test, requiring an extreme economic burden to find liability for a regulatory taking. *State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "'completely deprive an owner of all economically beneficial use of her property'") (quoting *Lingle*, 544 U.S. at 538); *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*, 110 Nev. at 245-46, 871 P.2d at 324-35 (taking requires agency action that "destroy[s] all viable economic value of the prospective development property").

11. The Developer cites to numerous statements and actions of the City Council, individual Council members, City officials, and City staff that the Developer contends were unfair to the Developer. Fairness, however, is not the test for a regulatory taking. Because courts defer to the authority of local government to regulate land use for the public good, the regulatory takings doctrine is not concerned with the soundness or fairness of government regulation of land use. Because the regulation is presumed valid in regulatory takings cases, it is inappropriate to delve into the validity of or the motives underlying the regulation:

> The notion that . . . a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable. [The] inquiry [as to a regulation's validity] is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking.

Lingle, 544 U.S.at 543 (citing *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987)); *cf. Sproul Homes of Nev. v. State ex rel. Dept. of Highways*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (judicial interference by mandamus, not by inverse condemnation, is appropriate if an agency's action was arbitrary or accompanied by manifest abuse). Assuming the truth of the Developer's allegations regarding the statements and actions of the City Council, individual Council members, City officials, and City staff, they are not relevant unless they can be shown to result in a wipeout or near wipeout of use and value or interfere with the Developer's reasonable investment-backed expectations.

12. A requirement that regulatory agencies pay compensation to property owners for regulation short of a wipeout would encroach on the powers of the legislative and executive branches of government to regulate land use to promote the general health, safety, and welfare. *Lingle*, 544 U.S. at 544 ("[R]equir[ing] courts to scrutinize the efficacy of a vast array of state and federal regulations" to determine whether they substantially advance legitimate state interests is "a task for

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which courts are not well suited. Moreover, it would empower-and might often require-courts to substitute their predictive judgments for those of elected legislatures and expert agencies."); *id.* at 537 (recognizing compensable regulatory takings only when the effect of government regulation is tantamount to a direct appropriation or ouster). As a result, a regulation is not a taking unless it virtually wipes out all the economic value or use of the property, because only then is it the functional equivalent of eminent domain. *Id.* at 539. Moreover, a standard for public liability for a regulatory taking that merely reduces the use or value of private property without destroying the use or value would lose its connection to the United States and Nevada Constitutions because that regulation would not be the functional equivalent of an eminent domain taking. *Id*. at 539.

13. Complying with government regulation, like the alleged regulation of the redevelopment of the Badlands in this case, is simply a cost of doing business in a complex society. "'[G]overnment regulation—by definition—involves the adjustment of rights for the public good.'" *Id.* at 538 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)); *see also Mahon*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978) ("Legislation designed to promote the general welfare commonly burdens some more than others.").

The Developer alleges a categorical and *Penn Central* regulatory taking

14. The Developer has alleged two types of regulatory takings: categorical and *Penn Central*. A categorical taking occurs either when a regulation results in a permanent physical invasion of property, or when a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019). A *Penn Central* taking is determined based on review of several factors; "[p]rimary" among them is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id*. at 538-39 (quoting *Penn Central,* 438 U.S. at 124. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). Under both the categorical and the *Penn Central* takings tests, the only regulatory actions that cause takings are those "that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle,* 544 U.S. at 539.

Herndon fn The Developer's "categorical" and "regulatory per se" takings are the same thing. The majority in *Lucas v. S.C. Coastal Council* classified economic wipeouts and physical takings resulting from government regulation as "categorical" takings, while the dissent characterized the same test as a "per se" standard. 505 U.S. at 1015, 1052 (Blackmun, J., dissenting). A unanimous Supreme Court in *Lingle* also uses the terms interchangeably. 544 U.S. at 538. Similarly, the Nevada Supreme Court in *Sisolak* refers to physical takings interchangeably as "categorical" and "per se." 122 Nev. at 662-63, 137 P.3d at 1122-23). [End of fn]

15. To be the functional equivalent of eminent domain, the challenged regulatory action must cause a truly "severe economic deprivation" to the plaintiff. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007); see also *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient to show a taking); *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S.

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602, 645 (1993) (citing cases in which diminutions of 75% and 92.5% insufficient to show a taking); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (1979) (95% diminution not a taking); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% diminution in property value not a taking); *Brace v. United States*, 72 Fed. Cl. 337, 357 (2006) ("diminutions well in excess of 85 percent" required to show a taking).

16. The Developer cites several federal cases finding a taking even where the diminution in value was less than 100%. *E.g., Formanek v. United States*, 26 Cl.Ct. 332 (Fed. Cl. Ct. 1992) (finding a taking where government action resulted in 88% decline in value). Even though the Developer's cases were decided before *Lingle* clarified the regulatory takings doctrine in 2005 to require that liability for a taking can be found only where government action wipes out or nearly wipes out the economic value of property, the cases cited did require a near wipeout of value before a finding of a taking.

17. The Developer also relies on *Tien Fu Hsu v. County of Clark*, 173 P.3d 724 (Nev. 2007); *Sisolak*, 137 P.3d 1110; *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23 (2012); *ASAP Storage v. City of Sparks*, 123 Nev. 639 (2008); and *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327 (9th Cir. Ct. App. 1977) for the contention that regulation that "substantially impairs" or "direct[ly] interfere[s] with or disturb[s]" the owner's property can give rise to a regulatory taking. These cases are physical takings cases (*Tien*, *Sisolak*, *Arkansas*, and *ASAP*) or precondemnation cases (*Richmond*) and are inapplicable. The Developer also contends that takings are defined more broadly in Nevada than in federal law, citing *Vacation Village, Inc. v. Clark County*, 497 F.3d 902 (9th Cir. 2007). *Vacation Village*, however, concludes only that physical takings are broader in Nevada, not regulatory takings, citing *Sisolak*. *Id*. at 915-16. The scope of agency liability for regulatory takings in Nevada is identical to the federal standard. *See State*, 131 Nev. at 419, 351 P.3d at 741 (2015); *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35. **[End of quote from Judge Herndon FFCL]**

Ex. CCCC at 1496-1504 (emphasis added).

Judge Herndon's characterization of *Sisolak* is particularly significant. Judge Herndon soundly rejects the Developer's attempt to confuse the Court by citations to *Sisolak*, a physical taking case, as authority for the standard of liability for the Developer's categorical and *Penn Central* claims. Those claims concern regulation of the Developer's *use* of the 35-Acre Property; physical taking cases like *Sisolak* do not apply. The Court in *Sisolak* held:

> Categorical rules apply when a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property. . . The second type of per se taking, complete deprivation of value, is *not at issue in this case* because Sisolak never argued that the Ordinances completely deprived him of all beneficial use of his property.

122 Nev. 662-63, 137 P.3d at 1122 (emphasis added). The *Sisolak* Court explained the origins of the

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physical taking doctrine:

> In *Loretto* [*v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982)], a New York statute required landlords to permit a cable television company to install cables and junction boxes in their buildings. The Supreme Court held that the New York statute authorized a permanent physical occupation of the landowners' property that required compensation.

122 Nev. 666-67, 137 P.3d at 1124-25. The Court went on to find that "the Ordinances authorize a physical invasion of Sisolak's property and require Sisolak to acquiesce to a permanent physical invasion. Thus, the County has appropriated private property for public use without compensating Sisolak and has effectuated a *Loretto*-type per se regulatory taking." 122 Nev. at 667, 137 P.3d at 1125. Accordingly, *Sisolak* is a physical taking case and is not relevant to the Developer's categorical and *Penn Central* taking claims.

B. The Developer's categorical and *Penn Central* taking claims are not ripe

In his FFCL, Judge Herndon held that the Developer's categorical and *Penn Central* claims in the 65-Acre case were not ripe and granted summary judgment for the City. Judge Herndon's findings of fact and conclusions of law are directly applicable to this 35-Acre case and compel the same conclusion with respect to the Developer's categorical and *Penn Central* claims.

[Start of quote from Judge Herndon FFCL]

> 20. A regulatory takings claim is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is also denied. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) ("*Williamson County*"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) ("[T]he final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted."); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53 (1986) (at least two applications required to ripen takings claim).
>
> 21. The Nevada Supreme Court has fully embraced the final decision requirement:
>
> > Generally, courts only consider ripe regulatory takings claims, and "a claim that the application of government regulations effects a taking of a property interest **is not ripe until the government entity** charged with implementing the regulations **has reached a final decision regarding the application** of the regulations to the property at issue. . . [The] regulatory takings claim is unripe for review for a failure to file any land-use application with the City. And although Ad America contends that exhaustion was futile

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> because there was a de facto moratorium on developing property within Project Neon's path, the record does not support this contention. The opinion of Ad America's political consultant, which was based on alleged statements from only one of seven City Council members, is insufficient to establish the existence of such a moratorium." (emphasis added).

State v. Eighth Jud. Dist. Ct., 131 Nev. at 419-20, 351 P.3d at 742 (quoting *Williamson County*, 473 U.S. at 186). Because the Nevada Supreme Court follows *Williamson County*, the courts of this state require that at least two applications be denied before finding that a regulatory takings claim is ripe.

> 22. A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id*." **[End of quote from Judge Herndon FFCL]**

Ex. CCCC at 1504-05 (emphasis original).

C. Both categorical and *Penn Central* claims require a showing that the City's regulation wiped out or nearly wiped out the economic use of the property

In its first and second causes of action for categorical and *Penn Central* takings, the Developer alleges that the City's regulation prevented any and all *use* of the 35-Acre Property. A categorical taking by excessive regulation of the *use* of property occurs when a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019). If a regulation does not completely wipe out "all economically beneficial use," a property owner may still allege a *Penn Central* taking. Liability for a *Penn Central* taking is determined based on review of several factors; "[p]rimary" among them is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id*. at 538-39 (quoting *Penn Central*, 438 U.S. at 124. The Supreme Court made clear, however, that even a *Penn Central* claim requires a near wipeout:

> [T]hese . . . inquiries (reflected in . . . <u>*Lucas*</u> . . . and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. . . . In the *Lucas* context [categorical taking], of course, the complete elimination of a property's value is the determinative factor. . . . And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact

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and the degree to which it interferes with legitimate property interests.

Lingle, 544 U.S. at 539-40. As Judge Herndon held, "[u]nder *both* the categorical and *Penn Central* takings tests, the only regulatory actions that cause takings are those 'that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.' *Lingle*, 544 U.S. at 539." Ex. CCCC at 1502-03. Judge Herndon went on to hold:

> 15. To be the functional equivalent of eminent domain, the challenged regulatory action must cause a truly "severe economic deprivation" to the plaintiff. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007); see also *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient to show a taking); *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing cases in which diminutions of 75% and 92.5% insufficient to show a taking); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (1979) (95% diminution not a taking); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% diminution in property value not a taking); *Brace v. United States*, 72 Fed. Cl. 337, 357 (2006) ("diminutions well in excess of 85 percent" required to show a taking).
>
> 17. The Developer also relies on *Tien Fu Hsu v. County of Clark*, 173 P.3d 724 (Nev. 2007); *Sisolak*, 137 P.3d 1110; *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23 (2012); *ASAP Storage v. City of Sparks*, 123 Nev. 639 (2008); and *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327 (9th Cir. Ct. App. 1977) for the contention that regulation that "substantially impairs" or "direct[ly] interfere[s] with or disturb[s]" the owner's property can give rise to a regulatory taking. These cases are physical takings cases (*Tien*, *Sisolak*, *Arkansas*, and *ASAP*) or precondemnation cases (*Richmond*) and are inapplicable. The Developer also contends that takings are defined more broadly in Nevada than in federal law, citing *Vacation Village, Inc. v. Clark County*, 497 F.3d 902 (9th Cir. 2007). *Vacation Village*, however, concludes only that physical takings are broader in Nevada, not regulatory takings, citing *Sisolak*. *Id*. at 915-16. The scope of agency liability for regulatory takings in Nevada is identical to the federal standard. *See State*, 131 Nev. at 419, 351 P.3d at 741 (2015); *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35.

Ex. CCCC at 1503-04.

D. The final decision ripeness requirement of *Williamson County* and *State* applies to both categorical and *Penn Central* claims

The Developer contends that the *Williamson County* final decision requirement as adopted by the Nevada Supreme Court in *State* applies only to its *Penn Central* claim and not to its categorical taking claim.[12] This contention is preposterous. Judge Herndon correctly found that the final decision requirement applies to both the Developer's categorical and *Penn Central* claims and granted

[12] The final decision requirement does not apply to the Developer's physical or nonregulatory taking claims. It applies only where an owner claims that regulation has limited the *use* of the property.

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summary judgment to the City. Ex. CCCC at 1504-15. Moreover, it is illogical to suggest that the final decision requirement of *Williamson County* applies to *Penn Central* claims (near wipe-outs) but not categorical claims (total wipe-outs). In both instances, if a property owner rests its claim on only one (or no) government denial of an application for development, doubt will remain as to whether the government might permit some lesser—but still economically beneficial—use of the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19 (2001). Indeed, even where an initial government decision arguably denies the owner all economically beneficial use of its property, unless the owner takes "reasonable and necessary steps" to allow the government to "exercise [its] full discretion in considering development plans for the property, including the opportunity to grant variances or waivers . . . the extent of the restriction on [the] property is not known." *Id.* at 620-21.

Consistent with this logic, the Supreme Court has made it clear that the *Williamson County* ripeness requirement applies equally to all regulatory taking claims alleging denial of use, including categorical claims. In *Palazzolo*, for instance, the Court applied the *Williamson County* ripeness analysis to a categorical claim, in which the landowner alleged that the government's denial of a development proposal "deprived him of 'economically, beneficial use' of his property […], resulting in a total taking requiring compensation" under *Lucas*. 533 U.S. at 616, 618-26. The *Palazzolo* Court's explanation of the rationale behind the *Williamson County* final decision requirement leaves zero doubt that it applies to both *Penn Central* and categorial claims:

> 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, *see Lucas*, *supra*, at 1015, 112 S.Ct. 2886, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, *see Penn Central*, *supra*, at 124, 98 S.Ct. 2646. These matters cannot be resolved in definitive terms until a court knows the extent of permitted development on the land in question.

Id. at 618 (internal quotations omitted).

The lower federal courts have likewise consistently held that the *Williamson County* ripeness doctrine applies to both *Penn Central* and categorical takings claims. *See, e.g., Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 124-25, 131 (2d Cir. 2003) (applying *Williamson County* to claim alleging categorical taking under *Lucas*) (*abrogated on other grounds by*

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San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005)); *Barlow & Haun, Inc. v. U.S.*, 805 F.3d 1049, 1057-59 (Fed. Cir. 2015) (same to claim alleging categorical taking of oil and gas leasing rights); *Seiber v. U.S.*, 364 F.3d 1356, 1365-66, 1368 (Fed. Cir. 2004) (same to claim alleging that denial of logging permit effected temporary categorical taking of landowner's property).[13]

In sum, there is no legal or logical basis for the Developer's contention that the *Williamson County* and *State* final decision ripeness requirement does not apply to its categorical taking claim.

E. The Developer failed to file the necessary applications to allow the Court to determine whether the categorical and *Penn Central* claims are ripe

"[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). If the government does not take final action, however, a court cannot determine the value of the property "after the government action." A regulatory taking claim, therefore, is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is also denied. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) ("*Williamson County*"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) ("[T]he final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted."); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-43 (1986) (at least two applications required to ripen takings claim). This is the final decision ripeness doctrine: "[a] court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348. Here, the City did not make a final decision as to the uses that the 35-Acre Property could be put. Accordingly, the Court cannot determine how far the

[13] Tellingly, the majority of courts applying the *Williamson County* final decision requirement apply it to claims that are only described as "regulatory takings claims." *See, e.g., Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 96 (2d Cir. 1992) (landowner's "takings argument represents a regulatory taking claim to which . . . the *Williamson* ripeness test [is] fully applicable"). This lack of distinction underscores not only that *Williamson County* applies to all regulatory takings claims, but also that this principle is so uncontroversial that it requires no explanation.

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City's regulation goes, and the categorical and *Penn Central* taking claims are not ripe.

The court in *State* concluded that the regulatory takings claim was unripe in that case because the developer had "fail[ed] to file any land-use application with the City." *State*, 131 Nev. at 419-20. It rejected the developer's contention that filing an application would be futile, finding that an opinion of futility based on an alleged statement of only one City Council member was insufficient to show futility. *Id.* Because the Nevada Supreme Court follows *Williamson County*, the courts of this State require that at least two applications be denied before finding that a regulatory takings claim is ripe.

A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id*. The Developer has failed to meet its burden to show that its categorical and *Penn Central* claims are ripe.

Judge Herndon found that the Developer failed to obtain a final decision from the City as to the level of development the City would allow on the 65-Acre Property because the Developer did not file, and the City did not deny, at least two applications for development of the 65-Acre Property standing alone. Ex. CCCC at 1504-15. Because the City was not given the chance to definitively decide the use of the 65-Acre Property, Judge Herndon concluded that he would have to speculate as to what action the City would have taken on hypothetical applications for development, and further speculate as to the value of the 65-Acre Property after the hypothetical denials of the applications. *Id*. Accordingly, Judge Herndon held that the Developer's categorical and *Penn Central* claims are unripe. *Id*.

The Developer filed this action seeking damages for a taking of the 35-Acre Property only. *See* Compl. ¶ 8. The Developer filed only one application to develop the 35-Acre Property standing alone. Ex. HH; Compl. ¶ 32; Ex. 46; *see also* Ex. II at 673-78. The Developer has submitted no evidence that it has filed a subsequent application for a variance, reduced density, or an alternate project after the City denied its initial application. As such, like the 65-Acre case, the City cannot be said to have reached a "clear, complete, and unambiguous" decision or that the City has "drawn the line, clearly and emphatically, as to the sole use to which [the 35-Acre Property] may ever be put." *Hoehne*, 870

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F.2d at 533. Thus, the City is entitled to summary judgment on the Developer's categorical and *Penn Central* taking claims in this 35-Acre case on the same basis as the 65-Acre case.

Judge Herndon also correctly rejected the Developer's argument that the filing of further applications would be futile. In so holding, Judge Herndon dismissed the Developer's assertion that applications to develop property *other than* the 35-Acre Property standing alone count as applications to develop the 35-Acre Property for purposes of final decision ripeness. Judge Herndon held that it is incumbent on the Developer to file and have rejected two applications, regardless of representations of City staff or individual City Councilmembers as to their preference for applications to develop the Badlands:

> 25. It can certainly be said that Developer may have very well been frustrated with what had occurred. Its first application was approved, only to then find itself being sued by a group of homeowners, thereafter receiving an unfavorable District Court ruling necessitating a Nevada Supreme Court appeal and the perceived need to file multiple lawsuits. That frustration does not, however, excuse the necessity of first making application to develop the 65-Acre Property before filing the instant case against the City alleging a taking of that property. This is especially true where, as here, Developer chose to file four separate court actions specifically directed at each individual parcel of property that Developer alleged was taken.
>
> 26. It must also be noted that fifty percent (50%) of Developer's applications directed to the individual properties were approved. Their first application for the 17-Acre Property was approved by the city. The application for the 35-Acre Property was denied. The application for the 133-Acre Property was deemed incomplete because of the then controlling Crockett Order and it was never resubmitted. And, as stated above, no application was ever submitted for the 65-Acre Property at issue in the instant case.
>
> 27. This court holds that any argument that proffering a development proposal for the 65-Acre Property would be futile is without merit as the City approved fifty percent (50%) of the individual applications it received, and felt it had legal authority to consider. This court would be engaging in inappropriate speculation were it to try and guess at what type of proposal Developer would have made for the 65-Acre Property and what type of response the City would have provided.

Ex. CCCC at 1506-07.

1. The Master Development Agreement was not an application to develop "the property at issue" as required by the Nevada Supreme Court in *State*

The Developer asserts that its categorical and *Penn Central* regulatory taking claims are ripe because the City disapproved the Developer's Master Development Agreement ("MDA") and that

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when added to the City's denial of the 35-Acre Applications, the City denied two applications on the merits as required under *State* for final decision ripeness. The MDA, while it included the 35-Acre Property, covered the entire 250-acre Badlands. Ex. LL at 801. It did not constitute an application to develop the 35-Acre Property standing alone, which is "the property at issue" in the takings inquiry. *See State*, 131 Nev. at 419. The City's denial of the MDA, therefore, is not considered a second application to develop the 35-Acre Property for purposes of ripeness.

Judge Herndon considered the Developer's argument and rejected it:

> 28. The Developer argued that the denial of the Master Development Agreement (MDA) also plays into the futility argument but the court finds that stance to be unpersuasive. To begin, the MDA was made after the individual 17-Acre Property proposal was made (which was approved) and after there was an application pending before the City for the development of the individual 35-Acre Property. Any denial of the MDA proposal while multiple individual proposals were pending and/or already approved cannot be said to be at all unreasonable. Moreover, even if the MDA denial was considered as part of the futility argument, the City would still have granted one-third (1/3) of the Developer's three proposals with the fourth proposal being deemed incomplete. As such, Developer's argument still places this court in the position of having to speculate about a possible 65-Acre Property proposal and the possible response by the City. Lastly, Developer made its 133-Acre Property application after the City denied the MDA. As such, it is clear that Developer did not believe that the MDA denial rendered further individual property development applications futile, rather, Developer chose to only proceed with the application for the 133-Acre Property.
>
> 29. The city's actions simply cannot be said to have been so "clear, complete, and unambiguous as to excuse the need for Developer to propose a development plan for the 65-Acre Property before Developer made the choice to seek court intervention for that specific parcel of property.
>
> 35. The Developer asserts that its Penn Central regulatory taking claim is ripe because the City disapproved the Developer's MDA for the entire Badlands. The MDA, while it included parts of the 65-Acre Property, covered the entire 250-acre Badlands outside of the 17-Acre Property, development on which the City had already approved. Ex. LL at 801. It did not constitute an application to develop the 65-Acre Property standing alone, which is "the property at issue." See State, 131 Nev. at 419. The City's denial of the MDA, therefore, is not considered an application to develop the 65-Acre Property for purposes of ripeness. Even assuming that it was an application to develop the 65-Acre Property standing alone, the Developer's regulatory takings claim would not be ripe until the Developer files at least one additional application. The Developer has presented no evidence that it has done so.
>
> 36. The Court also does not consider the MDA to constitute an initial application to develop the 65-Acre Property for purposes of a final decision because the MDA was not the specific and detailed application required for the City to take final action on a development project. *See* Ex. LL at 810-19 (general outline of proposed development in the Badlands). The MDA divided the Badlands into four "Development Areas" and proposed permitted uses, maximum densities, heights,

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and setbacks for the four areas. *Id.* at 812, 814. For Development Areas 2 and 3, which contained portions of the 65-Acre Property, the MDA proposed a maximum residential density of 1,669 housing units, and the Developer was to have the right to determine the number of units developed on each Area up to the maximum density. *Id.* at 813-14. The indefinite nature of the MDA is also evident from the uncertainty expressed about various uses. For example: "[t]he Community is planned for a mix of single family residential homes and multi-family residential homes including mid-rise tower residential homes"; "[a]ssisted living facilit(ies) . . . may be developed within Development Area 2 or Development Area 3"; and "additional commercial uses that are ancillary to multifamily residential uses shall be permitted." *Id.* at 812. Finally, the MDA provided that [t]he Property shall be developed as the market demands . . . and at the sole discretion of Master Developer." *Id.* at 814. Accordingly, the MDA was not clear as to how many housing units would eventually be built in the 65-Acre Property. Nor was the City Council apprised by the MDA of the types and locations of uses, the dimensions or design of buildings, or the amount and location of access roads, utilities, or flood control on the 65-Acre Property. *See id.* at 813-16.

37. Given the uncertainty in the MDA as to what might be developed on the 65-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 65-Acre Property. This once again places the court in the untenable position of having to speculate about what the City might have done, said speculation being improper.

40. The Developer contends that following the City's denial of the MDA, it would have been futile to file the UDC Applications to develop the 65-Acre Property. As with the earlier discussion on futility, the court finds Developer's position here to be unpersuasive. The Developer cites no evidence for its statement that the City insisted that the MDA was the only application it would accept to develop the 65 Acre Property was the MDA. The Developer previously acknowledged that City Councilmembers expressed a preference for a holistic plan addressing the entire Badlands. Ex. WWW at 1323. Such a preference does not indicate a refusal to consider other options. Indeed, the City did consider—and approve—significant development on the 17-Acre Property within the Badlands, indicating that the City is open to considering development of this area.

Ex. CCCC at 1507, 1509-12.

The MDA was not the specific and detailed second application to develop the 35-Acre Property required for the City to take final action on a development project. *See* Ex. LL at 810-19 (general outline of proposed development in the Badlands). As indicated by Judge Herndon, the MDA divided the Badlands into four "Development Areas" and proposed permitted uses, maximum densities, heights, and setbacks for the four areas. *Id.* at 812, 814. For Development Area 4, which included the 35-Acre Property, the MDA proposed "a maximum of sixty-five (65) residential lots." *Id.* at 812-14. The Developer was to have the right to decide the number of units developed on each Area up to the maximum density. *Id.* As Judge Herndon ruled, the MDA was "not the specific and detailed application required for the City to take final action on a development project." Ex. CCCC at 1512.

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The MDA also did not constitute a valid set of land use applications for the 35-Acre Property. A development agreement is not a substitute for the required UDC Applications. The UDC states that "all the procedures and requirements of this Title shall apply to the development of property that is the subject of a development agreement." UDC 19.16.150(D). To develop the 35-Acre Property even if an MDA had been approved, the Developer would be required to file a Site Development Review application and seek a General Plan Amendment. *See* Ex. LL at 819 (City would process "all applications, including General Plan Amendments, in connection with the Property"); *id.* at 820 ("Master Developer shall satisfy the requirements of the Las Vegas Municipal Code section 19.16.100 for the filing of an application for a Site Development Plan Review"). The version of the MDA the City Council rejected on August 2, 2017 acknowledged that the Developer must comply with all "Applicable Rules," defined as the provisions of the "Code and all other uniformly-applied City rules, policies, regulations, ordinances, laws, general or specific, which were in effect on the Effective Date." *Id.* at 804, 810. Similarly, the MDA indicated that the property would be developed "in conformance with the requirements of NRS Chapter 278, and as otherwise permitted by law." *Id.* at 802. Because the Developer did not submit two site-specific development applications related to the 35-Acre Property, the City Council's denial of the MDA did not constitute a final decision by the City Council regarding what development would be permitted on the 35-Acre Property.

Given the uncertainty in the MDA as to what might be developed on the 35-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 35-Acre Property. This once again places the Court in the untenable position of having to speculate about what the City might have done. Accordingly, the Developer cannot carry its burden to show that compliance with the two-application requirement of *Williamson County* and *State* would be futile.

2. The City's approval of the 17-Acre Project and finding that the 133-Acre Applications were incomplete based on the Crockett Order demonstrates that a second application to develop the 35-Acre Property would not have been futile

The Developer's contention that proffering a second development proposal for the 35-Acre Property would be futile is also without merit because, as Judge Herndon held, the City approved fifty percent of the individual applications it received and had legal authority to consider. Ex. CCCC at 1506-07. The City approved the Developer's first application for the 17-Acre Property and that

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approval was ultimately upheld by the Nevada Supreme Court. The Developer's contention that the City disapproved the 17-Acre Applications because the Developer failed to file an MMA and that the City argued before Judge Crockett that an MMA was required because the property was designated PR-OS is a flagrant misrepresentation. The City approved the 17-Acre Applications and did not require an MMA. *Judge Crockett* invalidated the 17-Acre Approvals over the City's objection. The City's approval of the 17-Acre Applications is evidence that the City could approve a second, revised application to develop the 35-Acre Property.

The City deemed the application for the 133-Acre Property incomplete because of the then-controlling Crockett Order. The Developer's contention that the City disapproved the 133-Acre Applications because the property was designated PR-OS is another flagrant misrepresentation. The City Council did not disapprove the 133-Acre Applications. It struck the Applications as incomplete because, as this Court and Judge Sturman found, the City was bound by the Crockett Order and would have been in contempt of court had it disobeyed that Order. The City Council did not consider the 133-Applications on the merits. Nor did its action turn on the PR-OS designation. The Developer never resubmitted the 133-Acre Applications, even after the Supreme Court reversed the Crockett Order, resulting in the 133-Acre Applications now being complete and ready for consideration on the merits, and even after the City invited the Developer to resubmit the Applications. Ex. OOO at 1153. Moreover, the Developer has opposed the City's Motion to Remand the 133-Acre Applications to the City Council for a decision on the merits. The City has given the Developer ample opportunity to ripen its taking claims. But the last thing the Developer wants is to actually build anything in the Badlands, preferring instead to seek cash from the taxpayers based on its unripe taking claims.

Finding that the City approved an application for significant development of the 17-Acre Property, struck the 133-Acre Applications under a court order, disapproved the first and only 35-Acre Applications, and that the Developer failed to file any application for the 65-Acre Property, Judge Herndon correctly ruled that the Developer's taking claims regarding the 65-Acre Property were not ripe. This Court would similarly be engaging in inappropriate speculation were it to guess what type of second proposal the Developer would have made for the 35-Acre Property and what response the City would have provided. The categorical and Penn Central taking claims are unripe.

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3. Statements at the City Council hearing on the MDA indicate that a second application to develop the 35-Acre Property would not be futile

At the City Council hearing on the MDA, no Councilmember indicated that he/she would not approve development of the Badlands at a reduced density if the Developer submitted a revised development agreement. *See* Ex. WWW at 1365-70. The vote to deny the development agreement was 4-3 (*id*. at 1370). Therefore, had a modified proposal been made regarding the MDA or the 35-Acre Property standing alone, it was only necessary for one of the four members who voted to deny the application to become satisfied with the proposed changes for it to be approved. And two of the four City Councilmembers who voted against the MDA, Seroka and Coffin, are no longer members of City Council. Moreover, four of the seven members of the City Council that considered the MDA are no longer on the Council. *See* https://www.lasvegasnevada.gov/Government/Mayor-City-Council.[14] Accordingly, there is a realistic chance that a modified proposal for the 35-Acres would be approved.

Much of the commentary about the MDA from Councilmembers at the public hearing indicates that they might approve a lower density development. For example, Councilmember Coffin, who voted against the MDA, stated that he would support "some sort of development agreement" for the Badlands. Ex. WWW at 1327; *see also id.* at 1328 (Badlands "still could be developed if you paid attention to [preserving the desert landscape]"). Similarly, Councilmember Seroka, who voted to deny the MDA, noted that three different drafts of the development agreement had been circulated in the previous week (*id*. at 1362); he had insufficient time to review and understand the version of the agreement before the City Council (*id*.); the proposed residential development was too dense (*id.* at 1361-62); and the development agreement contained no timeline for development of the Badlands (*id*. at 1363). Seroka explained that "a reasonable and equitable development agreement is possible, but this is not it," and that the Developer could resubmit a development agreement for the Council's consideration. *Id*. at 1365-66. Similarly, the majority of citizens testifying at the City Council hearing on the development agreement indicated not that they were opposed to all development of the Badlands, but rather that the density of residential development proposed in the agreement was excessive. *E.g.*, *id.* at 1339, 1344-45, 1350, 1353-55, 1357-60. The City's disapproval of the MDA

[14] Two of the three members who voted for the MDA are still on the City Council.

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falls short of the "clear, complete, and unambiguous" proof that the agency has "drawn the line, clearly and emphatically, as to the sole use to which the [35-Acre Property] may ever be put." *Hoehne*, 870 F.2d at 533.

In sum, the Developer chose to file applications to develop two of the three other individual properties at issue in the aforementioned cases, while also filing a MDA. The Developer chose not to file a second application for the individual 35-Acre Property before instituting this court action, which is specific to the 35-Acre Property. The City has granted one of the two individual applications that were proposed, while denying a third due to the then controlling Crockett Order. Filing a second application for the 35-Acre Property would not have been futile. Accordingly, the Developer's categorical and *Penn Central* regulatory takings claims are unripe and the Court has no jurisdiction over the claims.

4. The Developer's contention that the City "nullified" or "clawed back" its approval of 435 luxury housing units on the 17-Acre Property is frivolous

The Developer argues that the approval of the 17-Acre Property was somehow vacated and therefore no applications could be said to have been granted by the City. The City approved the 17-Acre Applications, defended them in Judge Crockett's Court, defended them in the Nevada Supreme Court, and notified the Developer as soon as the remittitur had been issued that the Approvals were once again valid and the Developer was free to proceed with the 435-unit project. The Developer has not a shred of evidence that the City has taken any action since the Supreme Court reinstated the 17-Acre Approvals to "nullify" or "claw back" the approvals. Nor has the Developer presented any authority that the City has the power to "nullify" its approvals of development, no less approvals that the Nevada Supreme Court validated and ordered to be reinstated. Judge Herndon found that the Developer's claim that the City nullified the 17-Acre Approvals to be wholly unsupported by evidence and "frivolous." Ex. CCCC at 1508. Judge Herndon concluded:

> 30. To the extent Developer argues that the approval of the 17-Acre Property was somehow vacated and therefore no applications could be said to have been granted by the City, the Court finds this position to also be without merit. There is no evidence that the City has taken any action to limit the Developer's proposed use of the 17-Acre Property for 435 luxury housing units. The Developer's contention that the City "nullified' the 435-unit approve is without any support in the evidence. The Developer's contention that the City's

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> declining to extend the 17-Acre approvals after Judge Crockett invalidated the approvals means that the City "nullified" the approvals is frivolous. The City supported Developer and opposed Judge Crockett's Order at the trial court level and in the Nevada Supreme Court, where the City filed an amicus brief requesting that the Supreme Court reverse the Crockett Order and reinstate the 17-Acre Property approvals. Ex. CCC.
>
> 31. Prior to the Supreme Court's Order of Reversal, the 17-Acre approvals were legally void and there was nothing to extend. If the City had attempted to extend the approvals, the City could arguably have been in contempt of Judge Crockett's Order. *See* NRS 22.010(3) (disobedience or resistance to any lawful writ or order issued by the court shall be deemed contempt); *see also Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007) (a judgment has preclusive effect even when it is on appeal), abrogated on other grounds by *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008). After the Supreme Court reinstated the approvals, the City had no power to nullify the approvals even if it had intended to do so. To the contrary, upon reinstatement, the City twice wrote to the Developer extending the approvals for two years after the date of the remittitur. Ex. FFF at 1019; Ex. GGG at 1021. The Court accordingly rejects the Developer's argument that the City "nullified" the City's approval of 435 luxury housing units on the 17-Acre Property. All evidence establishes the opposite. The 17-Acre approvals are valid, and the Developer may proceed to develop 435 luxury housing units on the 17-Acre Property.

Ex. CCCC at 1507-08.

In addition to the specious claim that the City nullified the 17-Acre approvals by refusing to "extend" an entitlement that Judge Crockett had voided,[15] the Developer asserts that the City's alleged denial of its attempt to add access to the Badlands and build fencing around a pond in the Badlands shows that the City has somehow nullified the 17-Acre Approvals. The Developer blatantly misrepresents facts.

The 17-Acre Property already had access at the time the Developer filed the 17-Acre Applications. The Developer had not applied for additional access in the Applications. Ex. DDDD at 1518. Even if the City had denied additional access to the 17-Acre Property, it would not have voided the 17-Acre Approvals. The Developer fails to mention that the fencing the Developer sought was not even on the 17-Acre Property. Ex. DDDD at 1519, 1541.

The Developer also misrepresents that the City denied its requests to install fencing and build three new access points to the Badlands. On the contrary, the Director of the City Planning Department correctly applied the City Code when it required the Developer to file the *correct*

[15] Judge Herndon found that if the City had granted an extension to a permit that Judge Crockett had voided, the City would likely be contempt of court. Ex. CCCC at 1508.

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applications for major review before building fencing and adding access points. *See* Ex. DDDD ¶¶ 9-18; Exs. DDDD-5 at 1537, DDDD-7 at 1539-41. The Developer never filed the proper applications. Ex. DDDD at 1519. It is therefore untrue that the City "denied" the Developer access or fencing. Moreover, if the Developer was aggrieved by the City's requirement that the Developer file the appropriate applications for access or fencing, its remedy was to appeal that decision to the City Council. If it was still aggrieved, its remedy would be a PJR, not an action for a taking, which is essentially asking this Court to second-guess the City Planning staff's application of Las Vegas' ordinances to the Developer request for additional access or fencing. *See* UDC 19.16.100; *see also* NRS 278.3195. The Developer never appealed the Directors decision, nor did it file a PJR. The Developer, therefore, cannot be heard to complain that the City imposed improper requirements to apply for access or fencing or that the City's alleged denial nullified the 17-Acre Approvals. *See* NRS 278.3195.

The 17-Acre approvals are valid and the Developer may proceed to develop 435 luxury housing units in the Badlands. The fact that the Developer has done nothing to date to develop the 17-Acre Property and has opposed a remand of the 133-Acre Applications to the City Council for a decision on the merits speaks volumes as to the Developer's motivation in bringing and continuing to prosecute this lawsuit. The Developer wants the taxpayers not only to bail it out of its $4.5 million investment, but also to reward its absurd contention that it cannot build in the Badlands with compensation of $386 million. If the Developer admits that it has the right to proceed with construction of its 435-unit luxury housing project, its narrative of victimization in this and the other three lawsuits is exposed as a fraud and a cynical appeal to the courts to help it extort hundreds of millions of dollars from the taxpayers.

5. The City's adoption of legislation affecting the application requirements for redevelopment of golf courses does not show futility

The Developer's reliance on Bills 2018-5 and 2018-24 in support of its claim of futility is misplaced. Judge Herndon found that the bills merely imposed new requirements that a developer discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City, along with imposing other requirements for applications to redevelop property. Ex.

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CCCC at 1513. He further found that the purpose of the legislation was to increase public participation, that it did not impose substantive requirements for the development project, and that it did not prevent the Developer from applying to redevelop the 65-Acre Property. *Id*. Moreover, the second bill was adopted in the Fall of 2018, after the Developer filed this action for a taking. Judge Herndon found that the bill could not have taken the 65-Acre Property that, like the 35-Acre Property, was allegedly already taken. *Id*. Both bills were repealed in January 2020, and are therefore inapplicable to show futility. *See* Exs. LLL, MMM.

The Developer's claim that the two bills were aimed specifically at the Developer is also wrong. The legislation applied to all golf courses in the City. Ex. 130 at 3202-03. The evidence cited to support the Developer's claim consists entirely of statements of a citizen who supported the Developer, the Developer's own attorneys, and one member of the City Council who supported the Developer. Dev. MSJ at 29 & fns. 25, 26. However, legislative intent is not relevant in a takings case. Even if it were, the opinions of private citizens or the Developer's counsel, or even one member of the City Council do not determine legislative intent. *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) ("[I]f motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant."). Finally, the bill could not have been targeted at the Developer where it applied to "proposals" for redeveloping golf courses (Ex. DDDD-9 at 1554), and the Developer had no "proposals to redevelop the Badlands pending at the time they were enacted, and did not propose any redevelopment of the Badlands during the 15-month period in which the bills were in effect. Finally, the bills could not have been aimed at the Developer where the "maintenance of ongoing public access" provision of which the Developer complains applied only at the City's discretion, and the City never elected to apply that provision to the Developer. Ex. DDDD at 1519-20.

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F. Even if the City had made a final decision disallowing housing on the 35-Acre Property, declining to change the PR-OS designation in effect when the Developer bought the Badlands would not change the use or value of the property and thus could not amount to a taking

Even if the Court finds that the Developer's categorical and *Penn Central* takings claims are ripe, the claims fail on the merits. There can be no genuine dispute that the City is required by state law to adopt a General Plan and General Plan maps designating the future uses of all property, the City has discretion in enacting and amending its General Plan, and the City's General Plan designation of the 35-Acre Property as PR-OS does not permit residential development. As a matter of law and logic, therefore, the City cannot have "taken" the 35-Acre Property by declining to change the legal limits on development of the property that were in effect when the Developer bought it.

The Developer has the burden to show that the City's refusal to approve the Developer's housing project for the 35-Acre Property either (a) has "completely deprived [the 35-Acre Property] of 'all economically beneficial us[e]'" under the categorical and *Penn Central* tests (*Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019); *see also Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35 (taking requires agency action that "destroy[s] all viable economic value of the prospective development property")), or (b) "has interfered with distinct investment-backed expectations'" under the *Penn Central* test. *Lingle*, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124). The Developer cannot make that showing in this case.

The Developer also would have the Court waste time reviewing the mountain of irrelevant evidence it has submitted in its multi-volume appendix by asserting that the Court should look at "all City actions in the aggregate" to determine whether the City took the Developer's property, in reliance on a Michigan case. However, there is no Nevada Supreme Court precedent finding that the "aggregate" of an agency's action is relevant to determine whether a regulatory taking has occurred. The only actions of the City relevant to a regulatory taking claim under Nevada law are, by definition, *regulations*. The regulation must have the force of law, restrict the use of the property, and virtually wipe out or nearly wipe out the economic use the property. The only actions of the City that have the force of law are actions of a majority of the City Council. None of the City Council's actions meets the above tests for a regulatory taking.

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1. Even if the City had declined to lift the PR-OS designation, by leaving the law unchanged, the City would merely have maintained the status quo

The Developer cannot meet either the categorical or *Penn Central* tests. Even if the Court were to suspend reality and disregard the City's approval of 435 residential units in the Badlands, the Developer's taking claims would be meritless because the Badlands has been designated PR-OS in the City's General Plan since 1992. *See* Exs. I, L, N, O, P, Q. The PR-OS designation does not permit residential use. *E.g.*, Ex. N at 290. Even if the City declined to amend the General Plan to approve the Developer's housing project for the 35-Acre Property, that action could not wipe out the value of the 35-Acre Property. As a matter of logic, the 35-Acre Property would have the same use (golf course and drainage) and value when the Developer bought the property ($630,000).[16] The City's hypothetical action (not changing the law; maintaining the status quo) would not only *not* wipe out the use or value of the 35-Acre Property, it would have *no* economic impact on the property. *See Colony Cove*, 888 F.3d at 451 ("[E]conomic impact is determined by comparing the total value of the affected property before and after the government action."). Accordingly, the Developer cannot show the economic impact required to establish a categorical taking or *Penn Central* taking as a matter of law.

Nor could the City's hypothetical action interfere with the Developer's investment-backed expectations. The law requires that the Developer's expectations be objective. *See Bridge Aina Le'a, LLC v. Land Use Commission*, 950 F.3d 610, 633-34 (9th Cir. 2020) ("[W]e must 'use 'an objective analysis to determine the reasonable investment backed expectations of the owners.'"") (citation omitted). The Developer bought a golf course and drainage property designated PR-OS in the City's General Plan at the time of purchase, meaning the Developer acquired property whose legal use was limited. Having bought the Badlands subject to the PR-OS designation, the Developer cannot allege a taking where the City merely declined to change the law and permitted the property to continue in its historic use as a golf course and drainage. *See Penn Cent.*, 438 U.S. at 136 (New York City law did not interfere with property owner's "primary expectation concerning the use of the parcel" where the law did not interfere with "present uses" of the property); *see also Kelly*, 109 Nev. at 651, 855 P.2d at 1035 (rejecting takings claim where at time developer purchased property "he had adequate notice that

[16] $4,500,000/250 = $18,000/acre x 35 = $630,000.

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his development plans might be frustrated"); *Bridge Aina Le'a, LLC*, 950 F.3d at 634-35 (developer could not have reasonably expected the Commission to not enforce conditions in place when it purchased 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"); *Dodd v. Hood River Cty.*, 136 F.3d 1219, 1230 (9th Cir. 1998) (*Penn Central* claim rejected where owner had no reasonable investment-backed expectation to build housing in area designated exclusively for forest use at time owner purchased property). The PR-OS designation is fatal to the Developer's categorical and *Penn Central* claims.

The Developer argues, without authority or logic, that it should not be bound by the PR-OS designation because its "due diligence" before purchasing the Badlands indicated that the General Plan PR-OS designation was either invalid or did not apply. It is hard to take this remarkable contention seriously. The Developer describes itself as "accomplished and professional developers that have constructed more homes and commercial development in the vicinity of the 35 Acre Property than any other person or entity and, through this work, gained significant information about the 250 Acre Residential Zoned Land (which includes the 35 Acre Property)." *Id*. at 9-10. Any real estate developer and its attorneys could easily find NRS 278.150 requiring the City to prepare a General Plan to designate future uses permitted in each area of the City; the City's General Plan website where the Badlands is clearly shown in green for "PR-OS" on the map of the Southwest Sector (https://files.lasvegasnevada.gov/planning/Land-Use-Rural-Neighborhoods-Preservation-Element.pdf at 68), which map indicates that it was adopted by ordinance of the City Council; the General Plan definition of PR-OS precluding residential development; NRS 278.250 providing that zoning is subordinate to the General Plan; and the text of the City's General Plan and UDC 19.00.040 and UDC 19.16.010(A) stating that zoning is subordinate to the General Plan under NRS 278.250. Indeed, the Developer expressly acknowledged that the Badlands was designated PR-OS in its sales literature in 2016, before it applied to develop property in the Badlands, confirming that it knew full well that the PR-OS designation was a major obstacle to any redevelopment of the Badlands for residential. Ex. Y at 420. Moreover, according to the Developer's own evidence, if the Developer had a constitutional

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right to develop the Badlands with housing, it would have paid more than $1.5 million/acre rather than $18,000/acre.

2. The Developer's arguments to disappear the PR-OS designation are unavailing

To avoid the reality that the PR-OS designation of the 35-Acre Property demolishes its taking claim, the Developer pretends that the General Plan ordinances and maps the City attached to its Appendix (Exs. I, L, K, N, O, P, Q) showing the Badlands subject to the PR-OS designation are not real; if real, are meaningless; if not meaningless, are cancelled out by zoning. The Developer is wrong on all counts.

a. Because the original developer of the PRMP set aside the Badlands for recreation, open space, and drainage as a condition of approval of the PRMP, the City designated the Badlands PR-OS

The original developer of the PRMP set aside the Badlands for recreation, and open space in 1990. Ex. E at 96, 98; Ex. G at 23-24; Ex. H at 145, 153. In 1992, the City Council imposed the PR-OS designation on the Badlands to ensure that the property remained open space. Ex. I at 212-18, 234-35, 246, 248 (Ordinance approving 1992 General Plan). These Ordinances designating the Badlands as PR-OS in the General Plan have the force of law. NRS 278.250. A city's master plan is a "standard that commands deference and a presumption of applicability." *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989). The Developer simply ignores these ordinances.

The following maps show the PR-OS designation in green on the Badlands as reflected in the City's land use element maps adopted by Ordinance 6152 on May 8, 2012 (Ex. P) and Ordinance 6622 on June 20, 2018 (Ex. Q). The 35-Acre Property is outlined in black.

Thus, before, during, and after the Developer's purchase of the Badlands in 2015, the 35-Acres (and the remainder of the Badlands) were designated PR-OS. The City could not have taken the 35-

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Acre Property by simply declining to amend the long-standing PR-OS designation.

b. This Court already decided that the PR-OS designation is valid and prevents residential use of the property unless the City Council exercises discretion to amend the designation

In denying the Developer's PJR, this Court has already rejected the Developer's argument, finding that "[t]he 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." Ex. XXX at 1392. This Court further concluded that "[i]t is up to the Council—through its discretionary decision making—to decide whether a change in the areas or conditions justify the development sought by the Developer and how any such development might look." *Id.* at 1394-95 (citing *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723). Finally, the Court concluded that "[a] city's master plan is the 'standard that commands deference and presumption of applicability.'" *Id.* (quoting *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723).[17]

The Developer's attempt to erase the PR-OS designation despite this Court's prior ruling is remarkable in that the Developer does not cite a single case or statute to support its argument. The Developer has no answer for the City's overwhelming authority showing that the PR-OS designation is valid and binding, or that a General Plan map can be amended only by the City Council in the exercise of discretion. *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60. Nevada law is clear that all development in Las Vegas must be consistent with the General Plan and the City Council must amend the General Plan to allow a change in land use. NRS 278.150; NRS 278.250; UDC 19.00.040; *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 11.

Rather than cite any decisional or statutory authority for its contention that the PR-OS designation is invalid, the Developer relies on "ten orders" that it claims support its position. In actuality, the "ten orders" either contradict the Developer's position or say nothing about the PR-OS designation. The majority of the orders are interlocutory denials of the City's Motions to Dismiss, which mean only that the Developer has properly plead claims, or the Nevada Supreme Court's denial

[17] This Court made these conclusions of law in its order denying the PJR. The Court later issued an order *nunc pro tunc* which did not affect its findings and conclusions cited above. Ex. YYY at 1404.

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of a Writ Petition where the Supreme Court expressly stated that it made no ruling on the merits. Dev. MSJ at 6-7, citing LO Appx., Exs. 11, 132.

Accordingly, the Court should affirm its prior conclusions of law and determine, consistent with all Nevada law, that the PR-OS designation on the 35-Acre Property undermines the Developer's taking claims.

c. The Developer's argument that this Court's ruling that the PR-OS designation is valid and controlling does not apply to the Developer's taking claims is nonsense

The Developer attempts to avoid the unanimous Nevada Supreme Court authorities that reject the Developer's "property rights in zoning claim" (*e.g.*, *Stratosphere Gaming*, *Boulder City*) and this Court's entire FFCL by contending that none of these decisions of the Nevada Supreme Court and none of this Court's findings of fact and conclusions of law denying the PJR exist for purposes of the Developer's taking claims because these are "PJR facts and law," rather than "takings facts and law." Although denial of a PJR does not necessarily mean that the alleged government action does not effect a taking, there is nothing to prevent the validity of both causes of action from turning on the same underlying facts and substantive law. The fact that liability for a PJR (lack of substantial evidence) is different from the standard of liability for a regulatory taking (denial of essentially all economic use or value and interference with investment-backed expectations), the evidence could be different (PJR: limited to evidence in the Administrative Record; taking: court can consider any formal action of the City Council that has the force of law), and the remedies are different (PJR: equitable; taking: damages), is a distinction without a difference. Both causes of action turn on Nevada land use and property law. *It is nonsensical to contend that the City Council had discretion to decline to amend the PR-OS designation if the Developer later files a PJR, but had no discretion if the Developer later challenges the very same action of the City Council as a taking.*

The Developer's taking argument relies on the identical underlying claim it made in the PJR: that it has a constitutionally protected property right to build housing in the Badlands. Property rights are created and defined by state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972); *see also Malfitano v. County of Storey By and Through Storey County Board of County Commissioners*, 133 Nev. 276, 282 (2017) (citing *Roth*); *Vandevere v. Lloyd*, 644 F.3d 957, 963 (9th

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Cir. 2011) ("whether a property right *exists* […] is a question of state law") (emphasis in original). Therefore, courts look to state and local law to determine the existence of property rights in takings actions. Where state law does not recognize a plaintiff's claimed property right, her takings claim necessarily fails. *Vandevere*, 644 F.3d at 966 (no regulatory taking where permits were not a protected property interest under Alaska law); *see also Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 723 (10th Cir. 1989) (plaintiff had property interest in permits only to the extent Oklahoma state law or local ordinances gave it one); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1548 (11th Cir. 1991) (no protected property interest in rezoning application where, under Florida law, a property owner has no vested or cognizable interest in an existing or future zoning classification); *Quinn v. Board of County Commissioners for Queen Anne's County, Maryland*, 862 F.3d 433 (4th Cir. 2017) (no property right to sewer service where Maryland law did not create one). The unanimous holdings of *Stratosphere*, *Boulder City*, etc. that a property owner has no property rights under zoning is based squarely on Nevada law of property rights. These laws apply to any cause of action, PJR or otherwise.

Moreover, the Ninth Circuit's decision in *180 Land v. City of Las Vegas* (Ex. III at 1125-26) rejecting the Developer's identical "property rights" claim as a basis for a due process violation, and the Nevada Supreme Court's rejection of a due process challenge by a developer claiming a vested right to a building permit in *Boulder City*, 110 Nev. at 246, 871 P.2d at 325, *are not PJR cases*. Like the instant case, they involve *constitutional challenges* to government regulation. *Stratosphere*, et al., on which this Court relies to reject the Developer "property rights" claim, are directly on point.

Accordingly, the *fact* of the PR-OS designation of the Badlands (City Ordinances Exs. I, L, N, O, P, Q and diagrams showing the Badlands as PR-OS), the *law* that the City has discretion to lift the PR-OS designation (*e.g.*, *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. at 807, 898 P.2d at 112; *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989)), the *law* that zoning does not confer a constitutional "property right" (*e.g.*, *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60; *Boulder City*, 110 Nev. 238, 246, 871 P.2d 320, 325 (1994)), and the law that even if the zoning of the 35-Acre Property and the General Plan designation conflict, the General Plan designation would be controlling (*e.g.*, NRS 278.250; *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112),

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are a basis for denial of *both* the PJR and the MTDPI. The City had discretion to deny the 35-Acre Applications under zoning and the General Plan. Likewise, the Developer cannot have a constitutionally protected property right to build housing in the Badlands if the City has discretion to decline to allow housing on the 35-Acre Property under either or both the zoning and PR-OS designation in effect when the Developer bought the property.

The Developer's assertion that the recent Nevada Supreme Court decision in *City of Henderson v. Eighth Judicial District Court*, 137 Nev. 26 (2021) prohibiting joinder of civil complaints and PJRs requires this Court to disregard its FFCL is wrong. The findings and conclusions are directly relevant to both the PJR and the Developer's civil complaint and do not vanish merely because the two pleadings were improperly joined.

d. The statements of the City's Planning Director, Planning Staff, City Attorney, the Developer's counsel, and other persons that the R-PD7 zoning granted the Developer a right to build housing in the Badlands regardless of the PR-OS designation are irrelevant

The Developer ignores contrary language in NRS 278.150, NRS 278.250, UDC 19.00.040, UDC 19.16.010(A), and duly adopted ordinances of the City to assert that the City Planning Director and former City Attorney were either unaware of the PR-OS designation of the Badlands or were of the opinion that the General Plan designation is subordinate to the zoning. The Planning Director, Planning Staff, and the City Attorney do not make the law; the City Council makes the law. Under Nevada's Open Meeting Law, the City can only adopt regulations through the City Council at a properly noticed public meeting that meets all statutory requirements. *See* NRS 241.015, .020, .035, .036; *see also Pac. Tel. & Tel. Co. v. City of Seattle*, 14 F.2d 877, 880 (W.D. Wash. 1926) (A "city can speak only through its council."). A public body that must be 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). Absent compliance with all statutory requirements, the City's action would be void. NRS 241.036. The City Council adopted ordinances designating the Badlands PR-OS.

That a City employee is unaware of or misunderstands the law does not determine whether that law exists or is valid. Moreover, the Developer undercuts its reliance on the statements in question where it simultaneously contends that City staff orally informed the Developer that the General Plan

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designation was irrelevant but then refused to accept the Developer's applications without an application to lift the PR-OS General Plan designation. Dev. MSJ at 6.

The Developer also claims that the Peccoles, the Developer's attorneys, the CC&Rs for a property adjacent to the Badlands, and other persons stated that the Developer could build housing in the Badlands, that the PR-OS designation does not apply, and the City Council has no discretion to prevent residential use of the Badlands. Dev. MSJ at 9-13. For the same reasons stated above, these statements are irrelevant. The Nevada Legislature and the Las Vegas City Council make the law, not these other parties. Under that law, the PR-OS designation does not permit residential use of the Badlands unless the City Council, in its discretion, amends that designation.

e. The 35-Acre Property has been designated PR-OS in the General Plan at all relevant times

Rather than cite any decisional or statutory authority for its contention that the PR-OS designation is either non-existent, meaningless, or unenforceable, the Developer contends that the Badlands were designated "M" or "MED" in the City's 1981 General Plan, meaning "medium density housing," and that that designation applies today. The Developer presented no evidence that City's General Plan contained an "M" or "MED" land use designation in 1981. Regardless, the City Council adopted a series of ordinances beginning in 1992 designating the Badlands PR-OS in the General Plan that supersede any prior General Plan designation. Exs. I, K, M, N, O, P, Q; *see also* Ex. QQQQ at 2376-39 (declaration of Community Development Director explaining that "M" or "MED" did not exist in 1981 General Plan, and even if they did, they would be superseded by ordinances designating Badlands PR-OS since 1992).

f. The notation on the official General Plan maps does not undermine the validity of the maps

The Developer selectively quotes from a notation on the lower right corner of the General Plan maps stating that the map "is for reference only," arguing that the map is somehow *not* the City's General Plan map.[18] The full notation reads "GIS maps are normally produced only to meet the needs

[18] The Court can take judicial notice that the maps the City submits to the Court in its Appendices are the official General Plan maps and have the force of law. Aside from the official City seal on each
(footnote continued on next page)

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of the City . . . this map is for reference only." See Exs. N, O, P, Q. This notation serves to notify the public that the City's General Plan maps are constantly changing as the City amends the map, either by the City Council's changing the designation of areas in the City or by approving development applications where the City Council amends the map. The changes are concurrently incorporated in a digital version of the map on the City's website at https://files.lasvegasnevada.gov/map/Citywide-General-Plan.pdf. Accordingly, once a map is approved by ordinance and printed, it is only accurate on the date it is printed. The City thus avoids misleading the public that General Plan designations in printed General Plan maps are static, hence the warning. By no means does the notation mean that the map is not the legally binding General Plan map of the City. All General Plan maps of the City's Southwest Sector submitted to the Court from 1992 through 2018 bear the City's official seal, date adopted, date printed, the number of the City Council ordinance that approved the map, and other identifying information proving that the maps are authentic and are judicially noticeable. The maps uniformly show the Badlands as PR-OS, including the current map that can be accessed at the link above, which clearly shows the Badlands designated PR-OS as it has been for more than 22 years. *See* Exs. I, L, M, N, O, P, Q. The PR-OS designation of the Badlands on the official maps the City submitted to the Court is binding law.

g. The Developer cannot shift the burden to the City to show that the ordinances adopting and readopting the PR-OS designation complied with proper procedures

The Developer contends that the City failed to follow the requirements of NRS Chapter 278 and LVMC 19.16.030 in adopting the Ordinances imposing the PR-OS, without stating what those requirements are or why the City's ordinances did not comply, and without presenting any evidence to support the claim. The Developer attempts to flip the burden to the City to show that it complied with applicable procedures when it adopted ordinances from 1992-2018. To the contrary, the Developer has the burden to show that the City failed to comply with the law. The 25-day statute of limitations to challenge each of the City's ordinances, however, has expired. NRS 278.0235; *League to Save Lake*

map, references to the ordinance adopting the maps, and other indicia that the maps are official, the City's Community Development Director has authenticated the maps. *See* Ex. QQQQ at 2376-79; Exs. QQQQ-8 at 2803, QQQQ-10, QQQQ-14 at 3458, QQQQ-16 at 3552.

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Tahoe v. Tahoe Reg'l Planning Agency, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977), overruled on other grounds by *Cty. of Clark v. Doumani*, 114 Nev. 46, 952 P.2d 113 (1998).

h. The PR-OS designation and R-PD7 zoning of the 35-Acre Property are not inconsistent

The Developer contends that Ordinance 3636 adopting the PR-OS designation of the Badlands in the 1992 General Plan indicated that it did not modify or invalidate any preceding zoning designation. The Developer contends that the R-PD7 zoning designation, tentatively adopted for a part of the PRMP that included the Badlands in 1990, is both inconsistent with the PR-OS designation and prevails over the PR-OS designation. Therefore, the Developer argues, the PR-OS designation is meaningless. These contentions must be rejected.

The PR-OS designation and R-PD7 zoning are not inconsistent. The purpose of R-PD7 zoning ("Planned Development") is to determine which portions of the district will be open space and those portions that will be developed with housing. UDC 19.10.050A ("The R-PD District has been to provide for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, *efficient utilization of open space*. . . ."). UDC 19.10.050A (emphasis added). In 1990, to obtain tentative R-PD7 zoning for 614.24 acres in the PRMP, Peccole had to develop a 614.24-acre portion of the PRMP "in accordance with the [PRMP]." NRS 278.250(2); Ex. QQ at 948-50. Peccole was also required to set aside 211.6 acres of the 614.24 acres for a golf course and drainage. Ex. H at 159, 163-165, 167-168, 171-172, 187-188. Under R-PD7 zoning, the City has authority to determine not only if housing will be permitted in an R-PD7 zoning district, but it also determines where the housing and the open space are located, as the City did for the PRMP when it designated parts of the R-PD7 for medium density housing and part for the Badlands. Under this authority, the City designated the golf course and drainage part of the R-PD7 zone PR-OS in the General Plan and designated the housing portion ML (Medium-Low Density Residential) in the General Plan. *E.g.*, Ex. K at 257; Ex. L at 274. Thus, the statement in the ordinance approving the PR-OS designation of the Badlands that it did not repeal the R-PD7 designation cannot be construed to mean that the PR-OS designation conflicts with, or is inferior to, the zoning.

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i. Even if the zoning of the 35-Acre Property conflicted with the General Plan, the General Plan would control

The Developer argues that the PR-OS designation is meaningless because the R-PD7 zoning, which permits residential use, is superior to the General Plan designation that does not permit residential use. The Developer has it backwards. Even if the zoning and the General Plan designation conflict (they don't), the General Plan designation prevails and the zoning would yield. NRS 278.250(2); *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112; *Nova Horizon, Inc,* 105 Nev. at 96, 769 P.2d at 723. Nevada Revised Statutes 278.250(2) states: "The zoning regulations must be adopted in accordance with the master plan for land use and be designed . . . [t]o promote the conservation of open space . . . [and] [t]o provide for recreational needs. . . ." Las Vegas' UDC states:

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

UDC 19.16.010(A). The UDC further 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. *See* also Ex. XXX at 1394.

j. The Nevada Supreme Court did not hold that zoning prevails over a General Plan designation in the 17-Acre case

The Developer further claims that the Nevada Supreme Court determined that the R-PD7 zoning solely governs the use of the 17-Acre Property and that the PR-OS designation is irrelevant. In the 17-Acre appeal, the sole issue before the Supreme Court was whether the City should have required the Developer to file an MMA before granting the Developer's applications to develop the 17-Acre Property. Ex. DDD at 1012. The Supreme Court agreed with the City that because the 17-Acre property "carries a zoning designation of residential planned development district" [R-PD] rather

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than "planned development district" [PD] and the City's UDC requires an MMA for a "planned development district" [PD] but not a "residential planned development district" [R-PD], no MMA was required. *Id.* at 1013. The Developer bases its claim that the Court held that the PR-OS designation is irrelevant on the fact that the Developer argued in the trial court and on appeal that an MMA was not required because the PR-OS designation was invalid, and, because the Supreme Court reversed Judge Crockett's Order, the Supreme Court must have agreed that the PR-OS designation was irrelevant. The Court, however, did not sustain the Developer's argument. The Court based its ruling solely on the plain language of the City's ordinances: PD zoning requires an MMA, R-PD does not.

Aside from its reliance on the distinction between PD and R-PD zoning, the Court did not make any rulings or statements regarding what R-PD zoning permits or whether an owner has rights under a zoning ordinance. The Court did not determine that the R-PD7 zoning of the 17-Acre Property "governs" irrespective of the General Plan designation. The zoning of the 17-Acre Property was not in dispute. Nor did the Court determine that the R-PD7 zoning prevails over the PR-OS General Plan designation. To the contrary, the Supreme Court confirmed that the Developer is required to obtain an amendment of the PR-OS designation to build housing in the Badlands: "The governing ordinances require the City to make specific findings *to approve a general plan amendment*, LVMC 19.16.030(1), a rezoning application, LVMC 19.16.090(L), and a site development plan amendment, LVMC 19.16.100(E)." *Id.* at 1014 (emphasis added). Rather than supporting the Developer's position, therefore the Nevada Supreme Court rejected it.

Issue preclusion applies to an issue of law or fact where: "(1) the issue decided in the prior litigation [is] identical to the issue presented in the current action; (2) the initial ruling [was] on the merits and [] became final; . . . (3) the party against whom the judgment is asserted [was] a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated." *Five Star Capital Corp.*, 124 Nev. at 1055, 194 P.3d at 713 (internal quotation omitted). Each of these elements is present here and thus the decision of the Nevada Supreme Court in the 17-Acre case that "[t]he governing ordinances require the City to make specific findings to approve a general plan amendment" to develop the 17-Acre Property with housing (Ex. DDD at 1014) binds the Developer in the instant case. The Supreme Court's finding that the Developer required an amendment to the PR-

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OS designation to build housing in the 17-Acre Property is inconsistent with the Developer's claim that it had a constitutionally protected right to build housing under the zoning.

k. NRS 278.349 is inapplicable

The Developer cites Nev. Op. Att'y Gen. 19 at 18-19 (1984) for the notion that zoning ordinances are superior to General Plan land use designations. First, Opinions of the Attorney General are not binding on this Court. *Univ. & Cmty. Coll. Sys. of Nevada v. DR Partners*, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001). Second, the Opinion does not support the Developer's arguments. The Developer relies on a portion of the Opinion that interprets NRS 278.349(3)(e), a 1977 statute governing the approval of tentative maps, and concludes that an amended master plan does not invalidate existing zoning ordinances. The Opinion conflicts with NRS 278.250(2), which flatly states that "zoning regulations must be adopted *in accordance with* the master plan for land use." Third, the Nevada Supreme Court has held that cities have a legal obligation to reject development proposals that are not in conformance with a master plan adopted under NRS 278.150. *Serpa v. County of Washoe*, 111 Nev. 1081, 1084, 901 P.2d 690, 692 (1995). Fourth, even if NRS 278.250 does not supersede NRS 278.349, as demonstrated above at pp. 57-58, the R-PD7 zoning and PR-OS General Plan designation are not inconsistent. The determination of consistency is subject to the City Council's discretion. NRS. 278.249(3). The City Council has repeatedly designated the Badlands PR-OS, which at all relevant times has also been zoned R-PD7, indicating that the City Council believes them to be consistent. Accordingly, NRS 278.349(3)(e) regarding inconsistency of zoning with the General Plan does not apply.

3. The Court should deny the Motion to "Determine Take" because the R-PD7 zoning did not confer a property right on the Developer to construct housing on the 35-Acre Property, and even if it did, the PR-OS designation is superior to zoning

The Developer claims that the R-PD7 zoning of the 35-Acre Property grants to the Developer a property right or vested right (the Developer uses the terms interchangeably) to build housing on the 35-Acre Property, although it does not explain how much or what type. The Developer further contends that this "right" is both a constitutional right and absolute and, necessarily, that the PR-OS designation is irrelevant, invalid, and/or unenforceable. In its Motion to Determine Take, the

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Developer seems to allege that the City's denial of the 35-Acre Applications was a categorical and *Penn Central* "taking" of this "right," requiring the City to compensate the Developer to the tune of $54,000,000.[19] These contentions are utter nonsense and have no support in the law.

a. The Developer confuses property "rights" and property "interests"; property rights are meaningless in takings jurisprudence

As demonstrated above, the Developer's cannot show that the City's actions effected a wipe out or near wipe out of use and value of the 35-Acre Property or interfered with its objective investment-backed expectations. These are the only applicable regulatory taking tests for liability. Seeing the handwriting on the wall, the Developer concocts an unprecedented theory of takings liability – that the City has taken its property "right" conferred by zoning to build housing on the 35-Acre Property. Putting aside that zoning does nothing of the sort, there is no authority that a public agency can take a property "right." The City can only "take" a property "interest." The Developer's theory simply does not fit any regulatory taking case or the very concept of regulatory takings.

The regulatory takings doctrine provides that destruction of the use and value of property is the functional equivalent of eminent domain. Consistent with eminent domain law, after the government pays the owner the value of the property without the regulation, the government takes fee title to the property. The only property interest at issue is the Developer's fee simple title to the property. The Developer distorts the regulatory taking doctrine by requesting that the Court adjudicate the nature of the property "interest" the Developer holds (the Developer's motion was entitled "Motion to Determine Property Interest"), but then in its motion and proposed order, the Developer asks the Court to declare that it has a property "right" that has been "taken." If liable for a taking in either eminent domain or inverse condemnation, the City take fee title to the property after paying just compensation. Fee title is a property "interest," it is not a "right." Interests give rise to certain rights. If found liable for a taking under the Developer's theory, the City would be buying the Developer's "right to build housing," but the Developer would keep title to the property. This absurd result follows from the Developer's unprecedented theory of relief, and does not fit within the regulatory taking doctrine.

[19] The Developer does not appear to contend that its "property right in zoning" theory applies to its physical and nonregulatory taking claims, only to its categorical and *Penn Central* claims for excessive regulation of use.

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b. Nevada authority is unanimous that zoning does not confer property rights

Nevada authorities are unanimous that zoning limits the use of property and does not confer "rights," and certainly not constitutionally protected :property rights." *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60 (holding that because City's site development review process involved discretionary action by Council, the project proponent had no vested right to construct); *id*. ("[C]ompatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest.") *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, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest."); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992) ("Although the land upon which Von Goerken intended to construct a tavern was zoned to accommodate such a commercial enterprise, it is clear that compatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *Nevada Contractors v. Washoe County*, 106 Nev. 310, 314, 792 P.2d 31 (1990) ("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., Inc.*, 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 . . . "); *Bd. of Cty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983) (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 broad discretion granted to the City to limit the use of property cannot be reconciled with the notion that a property owner has a constitutionally protected "right" to build on their property. Judge Herndon agrees: "Because the right to use land for a particular purpose is not a fundamental constitutional right, courts generally defer to the decisions of legislatures and administrative agencies charged with

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regulating land use." Ex. CCCC at 1496-97. Accordingly, the City should have summary judgment on the Developer's categorical and *Penn Central* taking claims and deny the Developer's motion for summary judgment.

c. This Court has already decided that the Developer has no property or vested right to the City's approval of its applications to develop the 35-Acre Property with housing under the R-PD7 zoning

This Court emphatically rejected the Developer's property rights claim, holding instead that "[t]he decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act." Ex. XXX at 1385-86 (citing *Enterprise Citizens Action Committee v. Clark County Bd. of Comm'rs*, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996); *Stratosphere Gaming*, 120 Nev. at 528, 96 P.3d at 760). The Court concluded that "[a] zoning designation does not give the developer a vested right to have its development applications approved." *Id.* (citing *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60. The court also held that the Developer's assertion "that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong," finding instead that the Council had the discretion to deny the applications "*no matter the zoning designation*." Ex. XXX at 1392-94 (emphasis added).

In addition to rejecting the notion that the zoning of the Badlands somehow conferred property or vested rights on property owners to build housing, this Court found that the Badlands are designated PR-OS in the City's General Plan, which prohibits housing development, and the General Plan designation is superior to zoning in determining the allowable uses of the property. *Id.* at 1392-94. The Court should again reject the Developer's property right claim. As shown above, the above authorities are based on Nevada property and land use law that is the dispositive substantive law in any cause of action, whether PJR or otherwise. Moreover, the *180 Land Co*. and *Boulder City* cases hold that zoning does not confer property rights in a constitutional challenge like the instant case. Judge Herndon did not mince words in rejecting the Developer's claim: "Because *the right to use land for a particular purpose is not a fundamental constitutional right*, courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use." Ex. CCCC at 1496-97 (emphasis added). Accordingly, these bedrock principles of property and land use law apply to both the Developer's PJR and taking claims.

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d. *Sisolak* does not support the Developer's claim that zoning confers property rights

The Developer relies on *McCarran Int'l Airport v. Sisolak* 137 P.3d 1110, to support its "property right in zoning" theory. As Judge Herndon correctly held, *Sisolak* is a physical taking case and has no relevance to the Developer's categorical and *Penn Central* claims, which allege excessive regulation of the Developer's *use* of the property, rather than the Developer's right to exclude others. Ex. CCCC at 1504. The Developer incorrectly portrays *Sisolak* as regulation-of-use case. In evaluating an owner's physical taking claim, the *Sisolak* Court stated: "The term 'property' includes all rights inherent in ownership, including the right to possess, use, and enjoy the property." 122 Nev. at 658, 137 P.3d at 1119. It is undisputed that property owners have the right to possess, use, and enjoy their property. But the *Sisolak* Court used the term "vesting" in the context of "ownership" of fee simple title. The Court meant that if title in the airspace of Sisolak's property "vests" in Sisolak, i.e., he is the owner of fee simple title to the property, he has the right to exclude others and thus to be free from a physical taking by government, among the other rights that come with ownership. The right to use property that inheres in ownership, however, is subject to significant limits imposed by zoning, General Plans, and other land use regulations. *See* NRS 278 150; NRS 278.250; *Stratosphere*; and other authorities cited above. There is no authority, in *Sisolak* or otherwise, that a property owner has a constitutional "property right" or constitutional "vested right" to approval of an application to develop property under the takings clause, only a right to be free from an economic wipeout or near wipeout or interference with reasonable investment-backed expectations. *State*, 131 Nev. at 419, 351 P.3d at 741; *Lingle*, 544 U.S. at 538; *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Penn Central*, 438 U.S. at 124. Even if the Developer had a "property right" to approval of an application to develop housing on the 35-Acre Property, and even if the City had disapproved an application, the City's hypothetical limit on use of the 35-Acre Property could not be a taking because the Developer cannot meet the test for a regulatory taking.

e. The Ninth Circuit's decision in 180 Land Co. rejecting the Developer's "property rights" theory of zoning binds this Court

The Ninth Circuit Court of Appeals has also rejected the Developer's contention that zoning

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confers a property or vested right to construct housing in the Badlands. In paragraph 49.d of its Complaint Pursuant to 42 U.S.C. § 1983 in *180 Land Co. LLC v. City of Las Vegas*, United States Court of Appeals for the Ninth Circuit Case No. 19-16114 (March 26, 2018) ("*180 Land Co.*"), the Developer alleged that it has "vested zoning rights to develop residential units on the [Badlands]." Ex. HHH at 1037. The District Court dismissed this claim. In its reply brief on appeal to the Ninth Circuit, the Developer asserted that because the City denied the Developer's application to develop portions of the Badlands with housing, the Developer was deprived of "a protected property interest of the most basic kind." Ex. TTT at 1290. The Ninth Circuit rejected that claim, finding that under Nevada property law, the Developer had no such property right.

> "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 . . . ."

Ex. III at 1125-26.

The Ninth Circuit's decision in *180 Land Co*. binds the parties in this action. Issue preclusion applies to an issue of law or fact where: "(1) the issue decided in the prior litigation [is] identical to the issue presented in the current action; (2) the initial ruling [was] on the merits and [] became final; . . . (3) the party against whom the judgment is asserted [was] a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated." *Five Star Capital Corp.*, 124 Nev. at 1055, 194 P.3d at 713 (internal quotation omitted). Each of these elements is present here.

f. The Supreme Court's decision that the CC&Rs for part of the Badlands do not grant the homeowners rights to control the use of the Badlands has nothing to do with this case, which concerns government regulation of property

The Developer argues that *Peccole v. Fore Stars,* Case No. 72410 (Nev. 2018), an unpublished decision of the Nevada Supreme Court, held that the Developer has a property right to develop housing in the Badlands. Although the City was originally a party to this case, the City was dismissed before the trial court issued any relief to the parties. That case involved whether the CC&Rs for a development in the PRMP – a contract between private parties – precluded development of housing in

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the Badlands. The Nevada Supreme Court affirmed the decision of the trial court without deciding any issue regarding the City's regulatory powers or the Developer's rights vis a vis the City. *See Guar. Tr. Co. of New York v. Henwood*, 307 U.S. 247, 258-59 (1939) ("[C]ontracts between private parties cannot create vested rights which serve to restrict and limit an exercise of a constitutional power of Congress."). This decision does not help the Developer.

g. This Court has not ruled that the zoning of the 35-Acre Property granted a constitutionally protected property right to the Developer to build housing on the property

The Developer next contends that this Court ruled in the Developer's Motion to Determine Property Interest that "the zoning determines the property interest issue in an inverse condemnation case" and that the Court "Affirmed the Right to Develop in the 35 Acre Case," which "right" the Developer contends was conferred on the Developer by the R-PD7 zoning. Although the Developer requested that this Court find that the R-PD7 zoning conferred a property right or a vested right to develop housing in the Badlands, it did not grant that relief and instead ordered merely that the Badlands is zoned R-PD7 and that single-family and multi-family housing are permitted uses by right in an R-PD7 zone.[20] This Court did not rule that the City did not have discretion to approve or disapprove an application for housing in the Badlands. Such a decision would have defied unanimous Nevada Supreme Court authority *and this Court's own rulings to the contrary*, and now the Ninth Circuit, which ruled against the Developer on the identical claim.

h. The eminent domain cases cited by the Developer do not hold that zoning confers a constitutionally protected right to develop permitted uses in the zone

The Developer contends that inverse condemnation and eminent domain actions are "governed by the same rules" and that "[e]minent domain law unanimously holds that the underlying property interest in an eminent domain case is determined based on the hard zoning, unless it can be shown that a higher zoning could be achieved," citing *City of Las Vegas v. Bustos*, 119 Nev. 360, 360-62, 75 P.3d

[20] In signing the Developer's proposed order stating that "*the* permitted uses by right" in an R-PD7 zone are single and multi-family residential, the Developer led the Court into error. The R-PD7 zoning ordinance, UDC 19.10.050, permits, in addition to housing, Home Occupations, Child Care-Family Homes, Child Care-Group Homes, "enhanced residential amenities" that could take many forms, *and open space*.

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351, 352 (2003), which is an eminent domain case, and other eminent domain cases.[21] Each of these cases recognizes that zoning is a limitation on the use of property and that in valuing property in an eminent domain case, an appraiser may not give an opinion of value of the property assuming a use that is not permitted by the zoning unless there is a reasonable probability that the zoning will be changed. *E.g.*, *Bustos*, 119 Nev. at 362. On this basis, these cases stand for the opposite of the Developer's claim.

i. The "zoning letter" does not grant the Developer a property right

The Developer claims that a December 30, 2014 letter the City sent to the Developer grants the Developer a constitutional right to build housing in the Badlands. *See* Ex. 134 at 4406. The Court disagrees. The letter merely confirms that the Badlands is zoned R-PD7 and that any residential development cannot exceed seven units per acre. *Id*. The letter does not state that single and multi-family residential use of the Badlands is the only permitted use. To the contrary, the letter states that "A detailed listing of the permissible uses and all applicable requirements for the R-PD zone are located in Title 19 . . . of the Las Vegas Municipal Code." *Id*. (UDC 19.10.050, of course, permits several uses in an R-PD zone other than single or multi-family residential, including open space to support residential uses in the zone.) The letter then refers the Developer to the City's website for more information about R-PD zoning. *Id*. The Letter does not state that the Developer has any rights, constitutional or otherwise, or that the City is obligated to approve any use of the Badlands, residential or otherwise. The letter does not state that the Developer is not subject to the General Plan designation of the property or that zoning is superior to the General Plan designation. The letter does mention the General Plan.

[21] The instant case is an inverse condemnation case of the regulatory takings type. As Judge Herndon pointed out, there are crucial differences between eminent domain and inverse condemnation. Ex. CCCC at 1499 n.4. In eminent domain, liability of the public agency for payment of just compensation is established by the filing of the eminent domain action. The only controverted issue is the market value of the property taken. *Id*.; *see also* NRS 37.110. Accordingly, eminent domain is a one-phase proceeding. In contrast, inverse condemnation is a two-phase proceeding. The liability of the defendant agency for a regulatory taking is the primary issue in the case and is decided by the court in the first phase. Ex. CCCC at 1499 n.4. If the Court finds the agency liable, the just compensation for the taking is determined in the second phase. *Id*.

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j. "Permitted as a matter of right" in planning parlance does not mean constitutional rights

The Developer contends that because single and multi-family residential uses are "permitted uses" "as a matter of right" in an R-PD7 zoning district, the Developer has a constitutionally protected "property right" to construct housing on the 35-Acre Property that eliminates the City's discretion. In addition to contradicting unanimous caselaw and statutory authority, the Developer's assertion is undermined by the provisions of R-PD7 zoning. There is a significant difference between housing being a "permitted" use; *i.e.*, the City can permit that use in the zoning district, and a requirement that the City approve any and all applications to build housing in the district, without any discretion, and without requiring consistency with the General Plan. UDC 19.10.050.A states: "The R-PD District has been to provide for *flexibility and innovation* in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space, ..." Accordingly, open space is one of the "supporting uses" under UDC 19.10.050.C.1. Finally, the definition of "Permitted Land Use" applicable to UDC 19.10.050.C in UDC 19.18.020 provides that a permitted use is "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*." Taken together, (a) NRS 278.250, which confers considerable discretion on cities in the application of zoning ordinances, (b) the intent of R-PD zoning to "provide for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space," (c) allowing the City to determine whether residential uses are "compatible with surrounding uses," (d) the definition of "permitted use" only "if it is conducted in accordance with the restrictions applicable to that district" leaves little doubt that the City retains a high degree of discretion in applying zoning ordinances. To harmonize with these statutes, "by right" cannot mean that every property owner in every zoning district has a constitutional right to build whatever uses are "permitted" in that zone free of any agency discretion. *See Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983) (court should read every sentence, word, and phrase of ordinance within context of the purpose of the legislation).

k. The Developer's "property rights" theory does not fit with the concept of zoning

The Developer's theory that it had a "property right" to build housing on the 65-Acre Property

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begs the question, "what exactly would it have the right to build"? The Developer's property rights theory would be impossible to apply, given how zoning functions in general and R-PD7 zoning functions in particular. Determining what the Developer could build would be particularly difficult here, where the Developer never filed an application for a specific project to develop the 65-Acre Property. To fit within the provisions of UDC 19.10.050 or the bedrock principle repeatedly reaffirmed by the Nevada Supreme Court that local agencies have broad discretion in applying zoning regulations, even under the Developer's theory the City would have to retain a degree of discretion.

But the Developer's simplistic theory does not explain where the City's discretion ends and the Developer's rights begin, and thus would be unworkable. The Court would have no guidance whether the City would have discretion to limit the Developer to one or two houses per acre, or would the City have no discretion to deny an application for seven units per acre? Could the City deny the application if it exercised "flexibility" and its "innovative powers" to require the Developer to site the houses on the property in a way that the Developer opposed? Would the City have any discretion to limit the height, bulk, and setbacks of the development? Would it have discretion to require and determine the design of buildings, open space, parking, access, drainage, landscaping, and amenities if the Developer disagrees? These unanswered and unanswerable questions sink the Developer's theory of the law.

The Developer's theory devolves into the claim that, because the Developer has a "property right," the City would have to approve *any* application the Developer files as long as it does not provide for more than seven houses per acre. That result would turn Nevada land use law upside down, shifting decision-making regarding land use from the people's elected government to property owners. It would wipe out the City's ability to protect neighborhoods, the environment, and other community values through land use regulation. A property owner could build virtually anything it chooses as long as it does not exceed the maximum density of the zoning ordinance, with no public oversight. Accordingly, the Developer's "property right" claim collapses under its own weight.

l. The Assessor's opinion of the land use controls applicable to the property is irrelevant

Without authority, the Developer contends that this Court should be bound by the opinion of the Clark County Assessor as to the how the City's zoning law and General Plan should be interpreted

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and applied. The Clark County Assessor values property in the City based on her appraisal, which is an opinion of value. The County Assessor has no authority to adopt or implement City law and her opinion is irrelevant. This Court already rejected the Developer's claim:

> The Clark County Assessor's assessment determinations regarding the Badlands Property did not usurp the Council's exclusive authority over land use decisions. . . . The Council alone and not the County Assessor, has the sole discretion to amend the open space designation for the Badlands Property. *See* NRS 278.020(1); Doumani, 114 Nev. at 53, 952 P. 2d at 17.

Ex. XXX at 1393.

Because the Developer had voluntarily shut down the golf course, under Nevada law the Developer could no longer qualify for a tax concession for maintaining a golf course. The Assessor was required to find that the legal land use of the 35-Acre Property was single family residential, and it assessed taxes on the property accordingly. Ex. 49 at 1172-73; Ex. 50. On September 25, 2017, after the Developer filed its first amended petition for judicial review in this case, which asserted claims for inverse condemnation, the Developer stipulated to the County assessor's determination that the Badlands did not qualify for assessment as open-space. *See* Ex. 120.

If the Developer disagreed with the tax assessor's opinion, the appropriate remedy was to have the opinion overturned by the State Board of Equalization, and if unsuccessful, then to file a petition for judicial review in district court. *See Montage Marketing, LLC v. Washoe County ex rel. Washoe County Bd. of Equalization*, 134 Nev. 294, 297, 419 P.3d 129, 131 (2018) (describing petition for judicial review in district court following a State Board of Equalization determination). However, after initially appealing to the State Board, the Developer stipulated with the Assessor's Office that the property did not qualify for open space assessment. Ex. 120. Thus, the Developer cannot now seek to remedy this decision by filing claims for inverse condemnation.

m. The Developer confuses zoning with property rights

The Developer's claim to a right of any kind under a zoning ordinance, which by law actually *limits* the use of property, defies Nevada law and the law of every state. Property rights are relative to other individuals and other property owners. They determine the owner's rights to use the property for legal purposes and to exclude others. *See* Black's Law Dictionary (11th ed. 2019) (defining "property rights" to "include the right to possess and use, the right to exclude, and the right to transfer"). These

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rights are determined as against other individuals or other property owners: each interest in the bundle of sticks that comprise property rights can have only one owner or set of owners. For example, the holder of property burdened with an easement in favor of another person cannot prevent the easement holder from using the property under the terms of the easement.

Zoning, however, is a completely different concept. Zoning defines the relationship between property owners and the government. By its very nature, zoning limits the use of property. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court upheld a city ordinance

> establishing a comprehensive zoning plan for *regulating and restricting* the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc. The entire area of the village is divided by the ordinance into six classes of use districts . . . . The use districts are classified in respect of the buildings which may be erected within their respective *limits* . . . .

272 U.S. at 369-80 (emphasis added). The *Euclid* Court went on to explain the purpose for zoning ordinances:

> Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional *restrictions* in respect of the use and occupation of private lands in urban communities.

Id. at 386-87 (emphasis added). Accordingly, zoning does not "grant" property "rights." The oddity of the Developer's claim is also evident from the logical extension of the claim: if property owners have a constitutionally protected property or vested right "granted" by the zoning of their property, *the government would be liable for a taking every time the government rezoned property*. The Developer's claim is absurd and collapses on its own weight.

n. The property right theory does not fit the context of takings law regarding damages

The Developer's claim that the taking of its vested right under zoning is also meaningless in the context of the law of damages for regulatory takings. A regulatory taking requires regulation that has an extreme economic effect on the property. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove,* 888 F.3d at

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451. If a government agency is found liable for a regulatory taking, the owner's damages are the difference in the value of the property before the regulation was imposed and the value after. *Id*. The values of the 35-Acre Property in the before and after condition are determined by what uses the owner could make of the property in each case. Here, the Developer claims that it had a constitutional right in the before condition to use the 35-Acre Property for housing, but that housing was precluded in the after condition housing by the City's denial of the 35-Acre Applications. But the Developer never explains the contours of the "right" it had to build housing in the before condition, and, therefore, what exactly was "taken." The Developer alleges only that it had a "right" to build "single family or multi-family residential." It does not, however, say at what density (housing units/acre), which makes *all the difference* in the value of the property in the before condition.

Accordingly, under the Developer's property rights theory, the Court would have to engage in speculation as to what density the Developer had a "right" to build in the before condition. The Court could decide that the City need only have approved one house in the 35-Acre Property. In that case, the Developer's damages would be vastly different than if the Court picked, say 200 housing units out of thin air as the Developer's "right." The Developer's torturing of property and land use law, therefore, self-destructs.

It is telling that in its "analysis" of its specific taking claims at the end of its MSJ, where the Developer attempts to apply the law to the facts, the Developer never mentions its "property right" to build housing in the Badlands. The reason is transparent – because its property right theory does not fit within the tests for liability or damages for a taking established by the Supreme Courts of the United States or Nevada, which are concerned only with whether the regulation deprives the owner of all or virtually all use or value or interferes with objective investment-backed expectations. Whether the agency has refused to allow a use that the zoning permits is not even remotely close to those tests. *See Lingle*, 544 U.S. at 538; *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

G. Even if the PR-OS designation did not apply, the City approved substantial development in, and increased the value of, the parcel as a whole, negating a taking

The Developer claims that by denying the Developer's 35-Acre Applications, the City denied

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all use of, and destroyed the value of, the 35-Acre Property. This claim lacks merit as a matter of law and logic. The Developer bought an operating golf course and drainage for $4.5 million and the City never interfered with that use. Even if the City denied redevelopment of the golf course for housing, the Developer still had use of the property for golf course and drainage under the PR-OS designation and the property was still worth $4.5 million. In the end, this case is simple: because the City did nothing to interfere with the historic use of the property for golf course and drainage, the City cannot be liable for wiping out or virtually wiping out the use or value of the 35-Acre Property and, therefore, the City should have judgment on the categorical and *Penn Central* taking claims.

Even if the Court disagrees, the City should still have summary judgment because the Developer segmented the 35-Acre Property from the "parcel as a whole." Assuming that the City had prohibited all economic uses of the 35-Acre Property as the Developer maintains (it didn't), the City did not wipe out or nearly wipe out the use or value of the parcel as a whole. To the contrary, the City allowed substantial development of the parcel as a whole, and thus cannot be liable for a taking.

1. The Nevada Supreme Court requires that courts determine the "whole parcel" before determining if the parcel has been taken

To decide whether regulation wipes out or nearly wipes out the value of property and thereby causes a taking, the Court must first determine the scope of the relevant property. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017). Because takings analysis must "focus[] . . . on the nature and extent of the interference with rights in *the parcel as a whole*," *Penn Central*, 438 U.S. at 130-31 (emphasis added), a court must delineate the whole of the claimant's property to properly evaluate the effect of the challenged regulation. "Segmentation" is a real estate developer tactic to divide the whole parcel into segments and contend that the denial of development of any segment wipes out the value of the segment, even though the agency has approved development in another segment of the parcel as a whole. Taking claims based on this trick are routinely rejected by the courts. For example, in *Penn Central*, the Supreme Court rejected segmentation of the air rights from the existing structures on the property:

> "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

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> effected a taking, this Court focuses rather . . . on the nature and extent of the interference with rights in the parcel as a whole . . . .

Id. at 130-31.

In *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327, 331 (2002), the Supreme Court held that defining the relevant parcel required consideration of the "aggregate . . . in its entirety," rejecting the notion that takings analysis could be applied only to the portion of a larger property directly burdened by a regulation. "Of course, defining the property interest taken in terms of the very regulation being challenged is circular." *Id*. at 331. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe*, 508 U.S. at 644, quoted in *Tahoe-Sierra*, 535 U.S. at 331. Thus, where a regulation affects only a portion of contiguous property, the property cannot be defined solely as the regulated portion. Nevada also rejects the tactic of segmentation of the whole parcel to manufacture takings claims. *See Kelly*, 109 Nev. 638 at 641 & n.1, 651, 855 P.2d at 1029 & n.1, 1035 (rejecting developer's segmentation of seven lots affected by regulation from the remainder of 39-lot planned unit development).

The Supreme Court recently clarified the standard for defining the relevant property, identifying a three-factor test: (1) "the treatment of the land, in particular how it is bounded or divided, under state and local law"; (2) "the physical characteristics of the landowner's property"; and (3) "the value of the property under the challenged regulation," *Murr*, 137 S. Ct. at 1945-46. The Court emphasized that the goal is to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Id*. at 1945; *see also id*. at 1950 ("Courts must . . . define the parcel in a manner that reflects reasonable expectations about the property."). "Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly." *Id*. at 1952 (Roberts, C.J., dissenting). Here, the Developer has engaged in classic segmentation of the PRMP to fabricate a takings claim. Under the test for determining the whole parcel in *Murr*, the Developer has defined the relevant parcel too narrowly.

Regarding the first *Murr* factor, a reasonable restriction that predates a landowner's acquisition

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can be an objective consideration for most landowners in forming fair expectations about their property. *Id.* at 1945. Lot lines created under state law do not define the relevant parcel in every instance. *Id*. at 1947. Courts routinely consider separate lots as a single property for takings purposes, as the Supreme Court did in *Murr*. *See id.; see also, Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1344, 1346 (Fed. Cir. 2004) (six leases in different parcels, acquired at different times, part of same property for takings purposes); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1362-63, 1365-66 (Fed. Cir. 1999) (two parcels purchased at different times capable of separate development considered part of the same property for takings purposes).

2. The PRMP is the parcel as a whole

Given that the PRMP has historically been treated as a single integrated project, it is unreasonable for the Developer to claim that only a fraction of the Badlands – itself just a fraction of the master planned area – is the relevant parcel for takings purposes. *See Forest Props.*, 177 F.3d at 1366; *see also Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991) (two parcels collectively considered the relevant property for takings purposes because plaintiff had viewed both parcels as an integrated unit for purposes of purchase and financing). In *Forest Properties*, the Federal Circuit rejected the assertion that parcels should be treated separately because they were acquired at different times and were capable of separate development, emphasizing the economic realities of the property. *Id*. at 1366. Because the entire parcel was acquired with the intent of integrated development, the regulated portion could not alone constitute the relevant parcel. *Id*. at 1365. This was the case even though a portion of the parcel had been sold off. *Id*. Several other courts have reached similar conclusions. *See, e.g., Norman v. United States*, 63 Fed. Cl. 231, 260-61 (2004); *Cane Tenn., Inc., v. United States*, 60 Fed. Cl. 694, 705 (2004); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981). Similarly, in *Ciampitti* the court ruled that denial of a wetland fill permit did not effect a taking where the plaintiff had knowledge of the restrictions applicable to the property but nevertheless agreed to purchase restricted wetlands as part of a package deal that included developable uplands. 22 Cl. Ct. at 319.

Here, the entire PRMP began as a single master planned development under one owner who intended that the Badlands would provide recreation, open space, and drainage for the other,

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developed parts of the PRMP, and thus satisfy the City's open space set-aside requirement. Ex. H at 151, 153, 159 In the 25-years before the Developer purchased the Badlands, the master planned area was developed as a single economic unit under the PRMP approved in 1990. The City's approval of a casino and hotel in the PRMP was conditioned on Peccole providing an 18-hole golf course to serve that destination resort. Ex. G at 123-24; Ex. H at 183.

Under *Murr*'s second factor, physical characteristics of a parcel include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human environment. 137 S. Ct. at 1945. In *Murr* the Court held that contiguous lots under common ownership support treatment of property as a unified parcel. *Id*. at 1948; *see also Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (concluding that the relevant parcel consists of 100 contiguous acres owned by the claimant, including 60 undevelopable acres and 40 developable acres). In the instant case, Peccole and the City designated the Badlands as golf course and drainage due to its topography – a series of washes and hills that provided natural drainage for the remainder of the PRMP. Ex. H at 151, 153. Accordingly, the physical characteristics of the master planned area dictated that the Badlands open space and the surrounding residential and commercial developments be treated as a single, integrated unit.

As to the third *Murr* factor, the value of the property subject to the regulation, a determination of whether a regulatory taking has occurred requires a comparison of "the value that has been taken from property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). *Murr* holds that while "a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty." 137 S. Ct. at 1946. The value of using property as an integrated whole can outweigh a restriction to individual lot development. *Id*. Here, Peccole and the City intended that the Badlands would provide recreation, open space, and drainage, enhancing the quality and value of the entire master planned area, *including the housing and retail the Developer built in the PRMP*. Ex. H at 151, 153. Accordingly, application of the third factor of the *Murr* test, like the first two factors, dictates that the Court treat the entire master planned area as the parcel as a whole.

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This Court already made findings in this case that support treating the PRMP as the parcel as a whole. In denying the Developer's PJR, the Court stated:

> 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. ¶ 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.

Ex. XXX at 1392-94. Judge Herndon also made findings pointing to the PRMP is the parcel as a whole:

> In 1980, the City approved William Peccole's petition to annex 2,243 acres of undeveloped land to the City. . . Mr. Peccole's intent was to develop the entire parcel as a master planned development. . . . After the annexation, the City approved an integrated plan to develop the land with a variety of uses, called the "Peccole Property Land Use Plan."

Ex. CCCC at 1484. Thus, By focusing the Court on the Badlands alone, the Developer transparently segmented the parcel as a whole to pressure the City to allow more development. The Court should reject this segmentation and instead focus on the City's regulation of the use of the parcel as a whole.

3. The City not only did not wipe out virtually all value or use of the parcel as a whole, it increased its value

The Developer cannot show that the City destroyed virtually all economic value of the PRMP as a whole. First, it is undisputed that the City permitted Peccole, other developers, *and this Developer* to construct thousands of housing units, retail, a hotel, a casino, other buildings, and a golf course in the PRMP. Ex. UU at 959; Ex VV at 960; Ex. XX at 962. This substantial development conferred significant value on the parcel as a whole, *i.e.*, the PRMP master planned area. CLV218122. As a matter of law, therefore, the Developer cannot satisfy the test for a taking. *See Murr*, 137 S. Ct. at 1946.

In *Kelly*, the Nevada Supreme Court applied the parcel-as-a-whole doctrine to facts similar to the instant case. There, the developer argued that the agency had deprived the developer's property of all value by pointing to the impact of a regulation on seven lots out of the developer's 39-lot planned unit development. 109 Nev. at 641 & n.1, 651, 855 P2d at 1029 & n.1, 1035. The Court found that the developer had segmented the property to manufacture a takings claim:

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> Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of all economic use. . . . When viewed as a whole, we conclude that Kelly has not been deprived of all economic use; only the seven Hilltop lots have been affected by TRPA's regulations, not the entire Uppaway subdivision.

Id. at 651 (citing *Penn Central*, 438 U.S. at 130) (internal citation omitted). The Nevada Supreme Court rejected the regulatory takings claim because the developer had sold the 32 lots that were not subject to development restrictions, thus "yielding him a substantial profit." *Id*.

The same result follows from the City's approval of significant residential and commercial development covering *more than a thousand acres* of the PRMP, including the Developer's own luxury condominium project. It is undisputed that the City permitted development of 84% of the PRMP with commercial and residential development (250-acres = 16% of 1,569-acre PRMP). The City's actions thus allowed the Developer and its predecessor to realize great value from development of the PRMP. The City cannot be found liable for a taking of the 35-Acre Property because the PRMP is the parcel as a whole and the City permitted substantial development of that parcel.

Even if the Court disagrees that the whole parcel is the entire PRMP, at a minimum the Badlands is the parcel as a whole. At the time the Developer bought the Badlands, the entire Badlands had been in a use for golf course and drainage for at least 23 years. As Judge Herndon pointed out, the Developer bought the entire Badlands in a single transaction for a single price from a single seller. Ex. CCCC at 1490. Assuming that the Badlands is the whole parcel rather than the PRMP, the Developer's takings claims still fail. The City allowed Peccole to develop the Badlands as a golf course and later approved 435 luxury housing units on 17 acres of the Badlands. This extensive development creates considerable value in the whole parcel – $26,228,569, as found by Judge Herndon, according to the Developer's own evidence – even if it is limited to the Badlands, and thus defeats any claim that the City has taken the 35-Acre Property. *See Concrete Pipe*, 508 U.S. at 645; *Kelly*, 109 Nev. at 651, 855 P2d at 1035.

Judge Herndon found that, at a minimum, the Badlands is the parcel as a whole, which the Developer then segmented:

> In early 2015, Peccole owned the Badlands through a company known as Fore Stars Ltd ("Fore Stars"). . . At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf

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> course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. . . . The Developer transferred 178.27 acres to 180 Land Co. LLC ("180 Land") and 70.52 acres to Seventy Acres LLC ("Seventy Acres"), leaving Fore Stars with 2.13 acres. . . . Each of these entities is controlled by the Developer's EHB Companies LLC. . . . The Developer then segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, *despite the Developer's intent to develop the entire Badlands*.

Ex. CCCC at 1490 (emphasis added).

The Developer denies segmenting the Badlands and denies its game-playing to enhance its chances of prevailing on a regulatory taking claim. Its claim that the city compelled the Developer to segment the property falls flat because there is absolutely no evidence to support it. The Developer also denies that its intent in carving up the Badlands into four parts was to manufacture taking claims, despite its professed intent to develop the entire Badlands. The fact that the Developer placed ownership of the four segments of the Badlands under four different entities controlled by the Developer belies the Developer's claim that it did not segment the Badlands in order to more easily show a taking if the City were to deny development on a single segment.

Accordingly, even if the Badlands is the relevant parcel instead of the PRMP, the City's approval of substantial development in the Badlands – providing the Developer with at least a 600 percent return on its investment in the entire 250-acre property – undercuts any claim that the 35-Acre Property has been taken.

H. Even if the 35-Acre Property is the parcel as a whole, the City's regulation merely maintained the status quo and thus did not decrease the value of the 35-Acre Property

Even if the Developer's categorical and *Penn Central* claims for a taking of the 35-Acre Property were ripe and the Court disregarded the parcel as a whole doctrine and focused only on the City's alleged regulation of the 35-Acre Property, the Developer's categorical and *Penn Central* claims still fail on the merits because the City, as a matter of logic, did not reduce the use or value of the 35-Acre Property. The Badlands have been designated PR-OS in the City's General Plan since 1992, and was so designated when the Developer acquired the property. Exs. I, L, N, O, P, Q. PR-OS does not permit residential use. *E.g.*, Ex. N at 290. Even if the City had declined to amend the General Plan to approve a housing project on the 35-Acre Property, that action could not wipe out the value of

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the 35-Acre Property: the 35-Acre Property would have the same use (golf course and drainage) and value (35 x $18,000/acre = $630,000) as it did when the Developer bought the property. The City's hypothetical action (not changing the law) would not only *not* wipe out the use or value of the 35-Acre Property, it would have *no* economic impact on the property. *See Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) ("[E]conomic impact is determined by comparing the total value of the affected property before and after the government action."). The use and value of the 35-Acre Property would be exactly the same before and after the City's alleged decision declining to lift the PR-OS designation. This Court agreed:

> 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. ¶ 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. ¶ 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.

Ex. XXX at 1392-93. Accordingly, the Developer cannot meet the categorical taking or economic impact tests of *Penn Central* as a matter of law.

I. The City did not interfere with the Developer's reasonable investment-backed expectations

The City's hypothetical disapproval of two applications to develop the 35-Acre Property also could not have interfered with the Developer's investment-backed expectations, a core factor of the *Penn Central* taking test. The Developer's expectations must be objective. *See Bridge Aina Le'a, LLC v. Land Use Commission*, 950 F.3d 610, 633-34 (9th Cir. 2020) ("[W]e must 'use 'an objective analysis to determine the reasonable investment backed expectations of the owners.'"") (citation omitted). The Developer bought a golf course and drainage property designated PR-OS in the City's General Plan at the time of purchase, which information was publicly available. *See* https://files.lasvegasnevada.gov/planning/Land-Use-Rural-Neighborhoods-Preservation-Element.pdf at 68 (Badlands shown on General Plan map in green, for "PR-OS"). The Developer acknowledged that the Badlands was designated PR-OS in its sales literature in 2016, before it applied to develop

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property in the Badlands. Ex. Y at 420. The Developer was aware that it would be required to persuade the City to change the PR-OS designation to allow the Developer to build housing in the Badlands. As this Court declared: "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)." Ex. XXX at 1392.

In each of its applications to develop the 17, 35, and 133-Acre Properties, the Developer requested a change in the PR-OS designation to a designation allowing housing. Ex. Z at 446; Ex. HH at 644; Compl. in 133-Acre case filed 6/7/2018 ¶ 37. The Developer was also on notice that the City has discretion to amend the PR-OS designation. Because the Developer bought the Badlands subject to the PR-OS designation, the City cannot be liable for a taking were it to decline to change the law, thus permitting the property to continue in its historic use as a golf course and drainage. *See Penn Cent.*, 438 U.S. at 136 (New York City law did not interfere with property owner's "primary expectation concerning the use of the parcel" where the law did not interfere with "present uses" of the property); *Bridge Aina Le'a, LLC*, 950 F.3d at 634-35 (developer could not have reasonably expected the Commission to not enforce conditions in place when it purchased 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"); *Dodd v. Hood River Cty.*, 136 F.3d 1219, 1230 (9th Cir. 1998) (*Penn Central* claim rejected where owner had no reasonable investment-backed expectation to build housing in area designated exclusively for forest use at time owner purchased property).

The facts of *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 855 P.2d 1027, are close to the instant case, and *Kelly* is directly on point. There, the Nevada Supreme Court held:

> When considering the second [*Penn Central*] factor, Kelly's reasonable investment-backed expectations have been satisfied. At the time Kelly purchased Uppaway Estates in 1966, he had adequate notice that his development plans might be frustrated. At the time of the land purchase, the Lake Tahoe Regional Planning Commission had published the Report of the Lake Tahoe Joint Study Committee, and it discussed California and Nevada's concerns over rapid growth in the Lake Tahoe Basin and the need for land-use planning regulations. Moreover, Kelly's financial expectations have also been

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> met because he purchased the original estate for $500,000.00, lived in the main house for nearly twenty years and then sold the main house alone for $1,100,000.00. Kelly also developed and sold most, if not all, of the parcels, with the exception of the seven Hilltop lots, yielding him a substantial profit.

109 Nev. at 651, 855 P.2d at 1035. Because the Developer's categorical and *Penn Central* taking claims fail on the merits, the City should have summary judgment on these claims.

J. Because regulatory takings are concerned only with the economic impact of regulation on the 35-Acre Property, the reasons for the actions and statements of individual City officials are completely irrelevant.

The Developer misleads the Court with page after page of argument that two members of the City Council acted without reasonable justification with regard to the 35-Acre Property. Given the poverty of the Developer's taking claims on the merits, the Developer resorts to arguing that certain City officials were improperly influenced by neighbors of the Badlands to make erroneous decisions affecting the 35-Acre Property, and that these poor decisions somehow "took" the 35-Acre Property. (The Developer never explains how a statement or action of an individual City employee, rather than a law enacted by the City Council, could restrict the Developer's use of its property.) Although the reasons underlying official action may be relevant in a due process case, they are wholly irrelevant to regulatory takings, which are concerned exclusively with economic impact. Accordingly, the Developer's theory of the case – in essence a due process violation – should be rejected. Indeed, the Ninth Circuit already dismissed the Developer's due process claim.

1. Because the Taking Clause presumes the validity of the City Council's decision and focuses solely on economic impact, the reasons for that decision are irrelevant

The Taking Clause does not bar arbitrary or irrational regulations. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543-44 (2005). Rather, it requires compensation "in the event of *otherwise proper interference* amounting to a taking.'" *Id.* at 543 (emphasis in original) (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987)). Accordingly, the Taking Clause "presupposes that the government has acted in pursuit of a valid public purpose." *Id.* at 543. A proper taking analysis does not probe the underlying validity of the government action, but rather considers "the actual burden imposed on property rights." *Id.*

Contrary to this fundamental principle, the Developer bases its case for a taking on a challenge

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to the *validity* of the City Council's decision. According to this reasoning, if Councilmember Seroka had poor reasons for his vote, then the decision made by the City Council as a whole was irrational and arbitrary, and ergo the City has taken the 35-Acre Property.

However, as the Supreme Court made clear in *Lingle*, this line of inquiry—and the resulting conclusion—is irrelevant and improper, because it "tells us *nothing* about the actual burden imposed on" the Developer's property rights. *Lingle*, 544 U.S. at 543 (emphasis added). Indeed, an irrational regulation "may not significantly burden property rights at all." *Id.* "The notion that such a regulation nevertheless 'takes' private property for public use" by virtue of its invalidity is therefore "untenable." *Id.* In sum, a regulatory taking claim is not viable unless the regulation in question is valid. The claimant must show that the regulation imposes an extreme economic burden on the property. A challenge to the wisdom of the regulation by the Developer is a due process claim, not a taking claim.

The Developer may argue that *Sisolak* supports the Developer's inquiry into the reasons for Councilmember Seroka's decisions. In that case, the Nevada Supreme Court found that the challenged ordinances effected a taking because they required the property owner to allow airplanes to physically invade the owner's airspace. 122 Nev. at 666, 137 P.3d at 1124. The Developer asserts that the *Sisolak* takings determination turned on statements made by a county planner, who told the landowner "not to bother" asking for a variance. Ex. A at 9:6-20; 32:6-12. While the opinion references the statements of the planner as part of the case's background facts, the statements in no way assisted the court with its takings determination, which was limited to a facial analysis of what the ordinances themselves allowed or authorized. 122 Nev. at 653, 666-67, 137 P.3d at 1116, 1124-25.

Sisolak therefore provides *no* support for the Developer's contention that the basis of either Councilmember Seroka's statements or the City Council's decision are relevant to the takings analysis. The City's defense in no way depends on Councilmember Seroka's state of mind or the reasons for his decision. The City Council as a whole made the decisions at issue, and the Taking Clause presumes that the decision was both rational and proper. *Lingle*, 544 U.S. at 543-44. The Developer's claims, and the City's defenses, must therefore turn not on the reasons of individual legislators for making that decision, but on the decision's economic impact on the Developer's property. The Nevada Supreme Court agrees:

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> And although Ad America contends that exhaustion was futile because there was a de facto moratorium on developing property within Project Neon's path, the record does not support this contention. The opinion of Ad America's political consultant, which was based on alleged statements from only one of seven City Council members, is insufficient to establish the existence of such a moratorium."

State v. Eighth Jud. Dist. Ct., 131 Nev. at 419-20, 351 P.3d at 742

The Developer admits as much. The Developer cites *Sisolak* for the proposition that the City's liability for a regulatory taking is a question of law. *Sisolak*, 122 Nev. at 661, 137 P.3d at 1121. The Developer admits that liability for a taking must be established through official government action, not from the inner thoughts of individual City Council members:

> The question of whether a taking has occurred is based on Government action and can frequently be determined solely based on government documents (the truth and authenticity of the same are rarely in question). Therefore, this Court can review the facts as presented in the City's own documents and apply the law to those facts to make the judicial determination of a taking.

Landowners' Reply In Support of Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims Etc., filed in this action on 3/21/2019 at 2. The Court may not properly consider the basis for or validity of Councilmember Seroka's vote or the City Council's decision as part of its taking analysis. Accordingly, the Court should disregard pp. 14-26 of the Developer's MSJ.

2. Even if the basis of the City Council's decision was relevant, the subjective motivations of individual Councilmembers are not

The Developer attacks the reasoning and motivation of former Councilmembers Seroka and Coffin and then improperly attributes their statements and actions to the City. Even in the limited legal contexts in which the basis of an official government decision is relevant, courts have repeatedly held that evidence of the subjective considerations and motivations of individual decision makers is irrelevant and that evaluating decisions on the basis of such motivations would be a "hazardous task." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984).

Even if the Court could properly consider the basis or validity of the City Council's actions as part of its takings analysis, it may not consider a single decision maker's statement of opinion or motives to divine legislative intent. *A-NLV-Cab Co. v. State, Taxicab Auth.*, 108 Nev. 92, 95, 825 P.2d

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585, 587 (1992). "The relevant governmental interest is determined by objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *City of Las Vegas*, 747 F.2d at 1297; *see also In re Kelly*, 841 F.2d at 912 n.3 ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."); *S.C. Educ. Ass'n*, 883 F.2d at 1262 ("[I]f motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant."). Accordingly, courts may only consider the "'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). Where a claim turns on motivation or purpose, the court's assessment must be based solely on "openly available data." *Id.* at 863. "[J]udicial psychoanalysis of a drafter's heart of hearts" is off limits. *Id.* at 862.

This is exactly what the Developer seeks to do: impugn the basis of Councilmembers Seroka and Coffin's votes, and then impute that allegedly flawed basis to the City Council as a whole. This is improper. Even if the basis of the City Council's action was relevant to the takings analysis—it isn't—the Court may not consider Councilmember Seroka or Coffin's statements as evidence of the City Council's motivations or reasoning. This Court agrees that statements and actions of individual Councilmembers are not actions of the City and are not relevant:

> The statements of individual council members are not indicative of any arbitrary or capricious decision making. The action that the Court is tasked with reviewing is the decision of the governing body, not statements made by individual council members leading up to that decision. See NRS 278.3195(4); *Nevada Contractors*, 106 Nev. at 313, 792 P.2d at 33; *see also Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. Adv. Op. 40, 419 P.3d 140, 142 (2018) (discussing when action by board is required); *City of Corpus Christi v. Bayfront Assocs., Ltd.*, 814 S.W.2d 98, 105 (Tex. Ct. App. 1991) ("A city can act by and through its governing body; statements of individual council members are not binding on the city."). "The test is not what was said before or after, but what was done at the time of the voting." *Lopez v. Imperial Cty. Sheriff's Office*, 80 Cal. Rptr. 3d 557, 560 (Cal. Ct. App. 2008). The Council's action to deny the Applications occurred with its vote, not with the prior statements made by individual council members. NRS 241.0355(1).

Ex. XXX at 1391. A regulatory taking can be effected only by regulation (a) having the force of law

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and (b) that imposes an extreme economic burden on the property. Individual Councilmembers' statements and the reasoning behind those statements are irrelevant. The Court should not be distracted from the test for liability for a taking by the Developer's attempt to turn a takings case into a due process case.

II. The City is not liable for a physical regulatory taking

In its third cause of action for a "per se regulatory taking," which is in essence a physical taking, the Developer asserts: "The City's actions exclude the Landowners from using the 65 Acres and, instead, permanently reserve the 35 Acres for a public use and the public is using the 35 Acres and that use is expected to continue into the future." Compl. ¶ 199. The Developer's attempt to state a physical takings claim is unavailing.

A physical taking requires that the public agency either physically occupy private property or restrict the owner's ability to exclude others from the property. *Loretto*, 458 U.S. at 426, 436 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."); *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321-22 ("When the government physically takes possession of an interest in property for some public purpose," it may be liable for a physical taking.); *id*. at 322 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa."); *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122 ("In determining whether a property owner has suffered a per se taking by physical invasion, a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space.") (internal citations omitted). Here, the Developer does not assert and has no evidence to show that the City has physically occupied the 35-Acre Property. *See Loretto*, 458 U.S. at 426, 436.

Lacking any evidence that the City has physically occupied the 35-Acre Property, the Developer misrepresents that Bill 2018-24, adopted in November 2018 and repealed in January 2020,

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effected a physical taking of the 35-Acre Property similar to the physical taking in *Sisolak*. The Developer alleges that Bill 2018-24 "expressly states the Landowners **must** allow "ongoing public access" and "plans to ensure that such [public] access is maintained." Dev. MSJ at 39 (emphasis original). This is pure fiction; Bill 2018-24 does nothing of the sort.

The Developer's claim to a physical taking relies primarily on the City's adoption of Bill 2018-24. The Developer contends that Bill 2018-24, enacted in November 2018 and repealed in January 2020 (Exs. LLL, MMM at 1138-50), is similar to the ordinances requiring owners to submit to public occupation of their airspace in *Sisolak*, an ordinance in *Knick v. Township of Scott, Pa.*, 139 S.Ct. 2162 (2019), and a state agency regulation in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). There is no resemblance, however, between Bill 2018-24 and the ordinances in *Sisolak*, *Knick*, and *Cedar Point*. In *Sisolak*, the ordinance automatically exacted an easement for commercial airlines flights from all property owners owning airspace within the flight path of airport runways. 122 Nev. at 665-67, 137 P.3d at 1124-25. In *Knick*, the ordinance automatically exacted an easement in favor of the public from all owners of property containing human remains. 139 S. Ct. at 2168-69. In *Cedar Point*, the regulation automatically exacted and easement in favor of labor union organizers to enter the private property of certain businesses. 141 S.Ct. at 2073, 2077. The easements in *Sisolak*, *Knick*, and *Cedar Point* were exacted the moment the ordinances/regulation were enacted. *See*, *e.g.*, *Cedar Point*, 141 S.Ct. at 2079-80. However, Bill 2018-24 (a) did not exact an easement from golf course owners, (b) imposed requirements only if certain conditions were met, and (c) did not require owners to submit to public occupation of their property, even if the conditions were met.

Bill 2018-24 did not require anything of golf course owners unless they "proposed" a re-use of a golf course. By November 2018, the Developer had filed applications to develop the 17, 35, and 133-Acre Properties, all of which the City had acted on and were no longer pending "proposals." The Developer then filed four lawsuits for takings against the City for the four development sites segmented from the Badlands. Because the Developer submitted no *proposals* to the City to re-use the Badlands during the 15-month period Bill 2018-24 was in effect, the Bill did not apply to the Badlands. Ex. DDDD at 1519-520. Even assuming that the Developer had submitted a proposal, the

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provision of Bill 2018-24 that the Developer claims required the Developer to submit to "ongoing public access" applied *only if* the City gave notice to the owner that it must submit a maintenance plan while its proposal was pending. *Id*. at 1562-63. It is undisputed that the City never gave the Developer the notice, and the Developer never submitted a maintenance plan, so the ordinance also did not apply to the Developer's property on that basis. Ex. DDDD at 1519-20.

Bill 2018-24 actually provides that an owner must merely "[p]rovide *documentation* regarding ongoing public access, access to utility easements, and plans to ensure that such access is maintained . . . . Ex. DDDD at 1563-64 (emphasis added). Bill 2018-24, therefore, did not require owners of closed golf courses to allow public access. If the owner had no plans to maintain public access, it would not have to document any public access. Moreover, the owner would not be required to document public access if the access was not "ongoing." As Judge Herndon found, the Developer voluntarily shut down the golf course in 2016, so there was no "ongoing public access" to maintain while Bill 2018-24 was in effect. Accordingly, Bill 2018-24 exacted no easement from the Developer and cannot be equated to the ordinances/regulation in *Sisolak*, *Knick*, and *Cedar Point*.

The Developer's contention that members of the public trespassed on the 35-Acre Property as a result of the enactment of Bill 2018-24 is also frivolous where the Developer's own evidence shows that members of the public trespassed on the Badlands before and after enactment of Bill 2018-24. Ex. 150 at 4669.

The Developer contends that even though the Developer never presented a proposal to redevelop the Badlands golf course while Bill 2018-24 was in effect, and the City never gave notice to the Developer that it would have to comply with the ordinance, the ordinance applied nonetheless because City staff stated that the ordinance was "retroactive." Even assuming that statements of staff are relevant to this Court's construction of legislation, Bill 2018-24, by its plain language, applies only to proposals made after the ordinance was enacted. *See Segovia v. Eighth Judicial District Court in and for County of Clark*, 133 Nev. 910, 915, 407 P.3d 783, 787 (2017) ("statutes are otherwise presumed to operate prospectively 'unless they are so strong, clear and imperative that they can have no other meaning or unless the intent of the [L]egislature cannot be otherwise satisfied.").

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Furthermore, even if Bill 2018-24 was "retroactive," the City never gave the Developer notice that it must submit a maintenance plan, whether for a past or future proposal, and the ordinance did not require the Developer to submit to public access, whether for past or future proposals. Accordingly, the Bill did not apply to the Developer, and the retroactivity argument fails.

The Developer also contends that *the City* is liable to the Developer for a physical taking because an individual member of the City Council, acting in his individual capacity, allegedly told members of the public that they could trespass on the Badlands. There is no evidence that an individual City Councilmember has the authority to permit anyone to occupy private property. The Developer has cited no authority that the City is liable for trespassers on the Badlands, regardless of what a Councilmember may have said. If the Developer was concerned about the public trespassing on its property, it had, and still has, legal remedies against the trespassers.

Failing to prove that any City regulation allowed the public to physically occupy the Badlands, the Developer argues that the City effected a physical taking by preserving the Badlands as a "viewshed" for the surrounding community. This claim is nonsense. First, the City designated the Badlands PR-OS – Parks, Recreation, and Open Space – in the General Plan in 1992 and maintained that designation through the date the Developer acquired the Badlands and up to the present (except for the 17-Acre Property, which is now designated for medium density residential). The very purpose of the PR-OS designation, like all designated open space everywhere, is to preserve land for recreation, light, air, and views *for the surrounding community*. As this Court held, the City was fully within its rights to decline an amendment to the PR-OS designation and retain the status quo. Maintaining a regulation that historically was intended to, and did, provide a viewshed for the surrounding community is not a taking under any taking test.

More to the point of the Developer's phony physical taking claim, a regulation does not effect a physical taking unless it permits the government or the public to *physically occupy* the owner's property. Simply limiting the *use* of property to protect community interests is not, by law or logic, a physical taking. *Loretto*, 458 U.S. at 426, 436; *Tahoe-Sierra*, 535 U.S. at 321; *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122.

The Developer has failed to provide any evidence to support its claim for a per se regulatory

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[physical] taking. The City is entitled to judgment on this claim.

III. The City did not effect a non-regulatory taking of the 35-Acre Property

The Developer's fourth cause of action asserts a "non-regulatory taking" under Nevada caselaw, claiming that the City's actions were "oppressive," "unreasonable," and aimed at precluding *any use* of the 17-Acre Property. Compl. ¶¶ 97- 99 (emphasis added). A non-regulatory taking can occur "if the government has 'taken steps that substantially interfere[] with [an] owner's property rights to the extent of *rendering the property unusable or valueless to the owner*.'" *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 421, 351 P.3d 736, 743 (2015) (alteration in original; emphasis added) (quoting *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed. Cir. 2013)). A non-regulatory taking occurs only in "extreme cases" involving either (a) a physical taking or (b) unreasonable actions that interfere with use or diminish the value of property after the agency has officially announced an intent to condemn the property. *Id.* For example, in describing the limited circumstances in which a non-regulatory taking claim might be possible, the Nevada Supreme Court relied on *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), a case involving extreme and unreasonable actions, including repeatedly flooding property before a planned condemnation of that property. *State*, 131 Nev. at 421, 351 P.3d at 743. The Court in *State* ultimately concluded that the alleged agency actions taken in advance of a planned condemnation in that case did not rise to the "extreme" level shown in *Richmond Elks* as required for a non-regulatory taking claim. *Id.* at 422.

There is not a scintilla of evidence that the City rendered the 35-Acre Property "useless or valueless to the owner," either through regulation or nonregulatory action. The Developer cites no evidence that the City did anything to prevent the Developer from using the 35-Acre Property for its historic use for golf course and drainage or rendered the 35-Acre Property valueless, or even diminished its value. As shown above, the City did not physically invade any part of the Badlands, nor did a City-owned improvement flood or cause physical damage to the 35-Acre Property. Finally, there is no evidence that the City condemned the 35-Acre Property or made an official announcement of an

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intent to condemn which could give rise to a nonregulatory taking claim.[22]

Indeed, there is a major disconnect between the Developer's claim that the City effected a non-regulatory taking and the City's actions that allegedly caused the nonregulatory taking. By its very name, a "nonregulatory" taking cannot be a "regulatory" taking where the government accomplishes the same ends as eminent domain through excessive regulation. The City has demonstrated above that it did not cause a regulatory taking of the 35-Acre Property. Yet the Developer's allegations purporting to support its nonregulatory taking claim are exactly the same as its regulatory taking claims. The Developer alleges:

> Nevada's nonregulatory / de facto taking standard is met here. Although the Landowners have the "right" to develop residential units, **the City has denied 100%** of the Landowners' repeated attempts to *use* the 35 Acre Property for that purpose. The City has taken action to preserve the 35 Acre Property for use by the surrounding property owners.

Dev. MSJ at 42 (bold emphasis original; italics emphasis added). Denying the Developer's "attempts to *use* the 35 Acre Property" for development would be a regulatory taking. Preserving the 35 Acre Property "for use by the surrounding property owners" as a "viewshed" by prohibiting development (a use of the property) even if a taking (it's not), would be a regulatory taking, not a nonregulatory taking.

In support of its nonregulatory taking claim, the Developer claims that "the City has mandated that the Landowners pay $205,227.22 per year in real estate taxes." Dev. MSJ at 42. Taxes obviously do not render property useless or valueless and are not a taking. *See* text, *supra*, at pp. 70-71. Moreover, if the Developer contends that its property taxes are excessive, its sole remedy is a PJR. The Developer settled with the Assessor and did not appealed its tax assessment. *Id.*

IV. The City cannot be liable for a temporary taking

The Developer's fifth cause of action for a temporary taking does not state a separate cause of

[22] The Developer claims that "the City even identified $15 million to purchase the 250 Acres for these surrounding property owners. LO Appx., Ex. 144." Dev. MSJ at 40. This evidence does not demonstrate a nonregulatory taking. The Developer's Exhibit 144 is informal notes of an unidentified person, likely former City Councilmember Seroka. One note suggests that $15 million of City funds money may be available to purchase the Badlands to preserve it for permanent open space. The note of an individual City Councilmember is not remotely the official policy of the City Council and could not possibly constitute the extreme interference with the use or value of the Badlands required for a nonregulatory taking.

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action. A temporary taking occurs when a court finds that a regulation effects a permanent taking under *Lucas*, 505 U.S. at 1014 or *Penn Central*, and the public agency thereafter rescinds the regulation to avoid paying compensation for a permanent taking. *First English*, 482 U.S. at 318-19, 321. In such a scenario, the agency must pay compensation for the period where the regulation temporarily prevented all use of the property. *Id.* at 321. A temporary taking, therefore, does not arise unless and until the court finds that a permanent regulatory taking has occurred, and the agency rescinds the regulation causing the taking. *See id.* For the reasons outlined above, the City is not liable for a permanent regulatory taking, so the temporary takings claim fails as a matter of law.

CONCLUSION

The City's Motion for Summary Judgment should be granted. The Developer's Motion to Determine Take and for Summary judgment should be denied.

DATED this 25th day of August 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 25th day of August, 2020, I caused a true and correct copy of the foregoing **CITY'S OPPOSITION TO DEVELOPER'S MOTION TO DETERMINE TAKE AND MOTION FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF AND COUNTER-MOTION FOR SUMMARY JUDGMENT** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

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Exhibit 4

RIS

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(Additional Counsel Identified on Signature Page)

Attorneys for Defendant City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X,

Defendants.

Case No. A-17-758528-J

Dept. No. XVI

CITY'S REPLY IN SUPPORT OF COUNTER-MOTION FOR SUMMARY JUDGMENT

Hearing date: September 23, 2021
Hearing time: 1:30 pm

INTRODUCTION

The Developer alleges five taking claims: (1) categorical, (2) *Penn Central* [*Transp. Co. v. City of New York*, 438 U.S. 104 (1978)], (3) regulatory per se, (4) nonregulatory, and (5) temporary.[1] The Developer's categorical and *Penn Central* claims allege that the City's regulation imposed excessive limits on the *Developer's use* of its 35-Acre Property.[2] In contrast, the regulatory per se claim alleges that the City limited the Developer's ability to *prevent the public from invading the property*, a physical taking claim.[3] Because the Developer has no chance of prevailing on its *use* taking claims (categorical and *Penn Central*) under the standards established by the United States and Nevada Supreme Courts, the Developer's strategy is to conflate the tests for the City's liability for these *use* taking claims with those for *physical* taking claims. Under well-established law, however, the test for a physical taking is very different from the test for a denial of the owner's use. The Court should reject the Developer's application of the test for physical takings to the categorical and *Penn Central* claims.

To prevail on a regulation of *use* taking claim (categorical and *Penn Central*), the City must wipe out or nearly wipe out the economic value of the 35-Acre Property or interfere with the Developer's objective investment-backed expectations as of the time the owner bought the property. In sharp contrast, to show a physical taking, the Developer must prove that a City regulation required the Developer to allow the public to physically invade the property; whether the regulation effects a physical taking is not part of the test to determine the economic impact of regulatory restrictions on the *owner's use*, and vice versa. If the Court applies the proper test to the categorical and *Penn Central* claims, the claims are unripe, and even if unripe, are without merit because the City did not wipe out

---

[1] Developer's Second Amendment and First Supplement to Complaint for Severed Alternative Verified Claims in Inverse Condemnation filed 5/15/2019 ("Compl.") ¶¶ 162-223. The Developer added a sixth claim for a judicial taking contingent on this Court's following the Crockett Order. Compl. ¶¶ 224-26. Because the Crockett Order was reversed, this cause of action is moot.

[2] Categorical claim, Compl. ¶ 165 ("As a result of the City's actions, the Landowner has been unable to develop the 35 Acre and any and all value in the 35 Acres has been entirely eliminated."); Penn Central claim, Compl. ¶177 (" The City . . . will not allow development of the Landowner's 35 Acres."); Compl. ¶ 181, 187 ("The City's actions have resulted in the loss of the Landowner's investment backed expectations in the 35 Acres").

[3] Physical taking claim, Compl. ¶ 199 ("The City's actions permanently reserve the 35 Acres for a public use and the public is using the 35 Acres . . . .").

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the value of the 35-Acre Property or interfere with reasonable investment-backed expectations, and even if the Court disagrees, the City has not taken the parcel as a whole.

The Developer also attempts a strained comparison of the City's Bill 2018-24 with the laws requiring property owners to allow the public to physically invade their property. Bill 2018-24 did nothing of the sort. The City should thus have judgment on the Developer's physical taking claim, denominated by the Developer as a "regulatory per se taking."

The Developer also alleges that the City effected a "non-regulatory taking" that rendered the 35-Acre Property "useless and valueless." Yet, the only City action the Developer cites for a non-regulatory taking is the City's *regulatory* restriction on development of housing in the 35-Acre Property, a *regulatory taking* claim that duplicates the Developer's categorical and *Penn Central* claims. The Developer fails to cite any non-regulatory action of the City that had any effect on the use or value of the 35-Acre Property.

Finally, a temporary taking requires that the Court first find the City liable for a permanent regulatory taking. If liability is established, the City would then have a choice to leave the offending regulation in place and pay the Developer for the value of the property, or rescind the regulation and pay damages for the temporary period during which the regulation was in effect. Because the Developer's permanent taking claims lack merit, the Developer cannot show a temporary taking.

ARGUMENT

I. The City should have summary judgment on the Developer's categorical and *Penn Central* taking claims

A. The categorical and *Penn Central* taking claims are not ripe

1. Rules for physical takings, where regulation forces a property owner to submit to the *public's physical occupation* of its property, do not apply to claims alleging deprivation of the *owner's use* of the property

A categorical or per se taking occurs either when a regulation results in a permanent physical invasion of property, or when a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). The majority in *Lucas* classified economic wipeouts and physical takings resulting from government regulation as "categorical" takings, while the

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dissent characterized the same test as a "per se" standard. 505 U.S. at 1015, 1052 (Blackmun, J., dissenting). A unanimous Supreme Court in *Lingle* also uses the terms interchangeably. 544 U.S. at 538. Similarly, the Nevada Supreme Court in *Sisolak* refers to physical takings interchangeably as "categorical" and "per se." 122 Nev. at 662-63, 137 P.3d at 1122-23. If the Court finds a categorical or per se taking, compensation must be paid without an analysis of the three *Penn Central* factors. *Lucas*, 505 U.S. at 1019. If the facts do not show an economic wipeout or a physical invasion, then taking claims are analyzed under *Penn Central*. *Lingle*, 544 U.S. at 538-39. Thus, the word "categorical" is used to refer to a taking that results from a regulation that causes a total economic wipeout, or from a regulation that results in a physical invasion. Here, the Developer's categorical claim refers to the first type: an alleged taking that results from a regulation that causes a total economic wipeout.

Under unanimous Nevada authority, the Developer's categorical and *Penn Central* claims require a showing that a City regulation denied the Developer's use of its property. *State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "'completely deprive an owner of all economically beneficial use of her property'") (quoting *Lingle*, 544 U.S. at 538); *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").[4] Because the Developer cannot meet the test for liability for a denial of all economically beneficial use of the 35-Acre Property under this Nevada authority, the Developer instead relies entirely on physical taking cases, primarily *Sisolak*. These cases, however, have no application to taking claims for denial of the owner's use.

[4] The Developer ignores this unanimous Nevada authority directly on point. Ironically, the Developer claims that the City improperly relies on federal cases, and then proceeds to cite a slew of federal cases, none of which are relevant to the categorical and *Penn Central* claims, however.

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In *Sisolak*, the Court found that the ordinances required Sisolak to allow the public to use his airspace, which the Court found was an "overflight easement exacted by the County," was a physical invasion of Sisolak's property. 122 Nev. at 660, 137 P.3d at 1120-21. The Court held:

> Categorical rules apply when a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property. . . The second type of per se taking, complete deprivation of value, is *not at issue in this case* because Sisolak never argued that the Ordinances completely deprived him of all beneficial use of his property.

122 Nev. 662-63, 137 P.3d at 1122 (emphasis added). The *Sisolak* Court explained the origins of the physical taking doctrine:

> In *Loretto* [*v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982)], a New York statute required landlords to permit a cable television company to install cables and junction boxes in their buildings. The Supreme Court held that the New York statute authorized a permanent physical occupation of the landowners' property that required compensation.

122 Nev. 666-67, 137 P.3d at 1124-25. The Court then found that "the Ordinances authorize a physical invasion of Sisolak's property and require Sisolak to acquiesce to a permanent physical invasion. Thus, the County has appropriated private property for public use without compensating Sisolak and has effectuated a *Loretto*-type per se regulatory taking." 122 Nev. at 667, 137 P.3d at 1125.

Sisolak is solely concerned with an owner's right to *exclude the public from the owner's property*, while categorical and *Penn Central* claims concern government regulatory restrictions on *the owner's use* of its property. An alleged government action on applications for permits allowing the owner to *use* its property is entirely different from an ordinance exacting an easement requiring owners to submit to public occupation of their airspace in *Sisolak*, an ordinance exacting an easement requiring property owners to allow the public to physically enter their property to view human remains in *Knick v. Township of Scott, Pa*., 139 S.Ct. 2162 (2019), or a state agency regulation exacting an easement requiring property owners to allow labor union organizers to physically enter their property in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). *Sisolak*, 122 Nev. 662-63, 137 P.3d at 1122 (deprivation of economically beneficial use due to denial of a use permit is "not at issue"). Moreover, the cases other than *Sisolak* on which the Developer relies, *Tien Fu Hsu v. County of Clark*, 173 P.3d 724 (Nev. 2007), *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23 (2012), and *ASAP*

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Storage v. City of Sparks, 123 Nev. 639 (2008), are physical invasion taking cases like *Sisolak* and have no bearing on the Developer's categorical and *Penn Central* claims. Judge Herndon agreed:

> The Developer also relies on *Tien Fu Hsu v. County of Clark*, 173 P.3d 724 (Nev. 2007); *Sisolak*, 137 P.3d 1110; *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23 (2012); *ASAP Storage v. City of Sparks*, 123 Nev. 639 (2008); and *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327 (9th Cir. Ct. App. 1977) for the contention that regulation that "substantially impairs" or "direct[ly] interfere[s] with or disturb[s]" the owner's property can give rise to a regulatory taking. These cases are physical takings cases (*Tien*, *Sisolak*, *Arkansas*, and *ASAP*) or precondemnation cases (*Richmond*) and are inapplicable. The Developer also contends that takings are defined more broadly in Nevada than in federal law, citing *Vacation Village, Inc. v. Clark County*, 497 F.3d 902 (9th Cir. 2007). *Vacation Village*, however, concludes only that physical takings are broader in Nevada, not regulatory takings, citing *Sisolak*. *Id*. at 915-16. The scope of agency liability for regulatory takings [meaning denial of use permit] in Nevada is identical to the federal standard. *See State*, 131 Nev. at 419, 351 P.3d at 741 (2015); *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35.

Ex. CCCC at 1503-04.[5]

2. The rules for ripeness and liability applicable to physical taking cases do not apply to regulation of use taking cases

A taking claim alleging excessive regulation of the owner's use of the property is ripe only when the landowner has filed at least one application to develop the property that is denied and a second application for a reduced density or a variance that is also denied. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985). This final decision ripeness rule applies with full force in Nevada:

> Generally, courts only consider ripe regulatory takings claims, and "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. . . .

State v. Eighth Jud. Dist. Ct., 131 Nev. at 419-20, 351 P.3d at 742 (quoting *Williamson County*, 473 U.S. at 186). Because the Nevada Supreme Court follows *Williamson County*, the courts of this state require that at least two applications be denied before finding that a regulatory takings claim is ripe. In

[5] The Developer wrongly contends that Judge Trujillo "set aside" Judge Herndon's conclusion of law that the Developer's categorical and *Penn Central* claims are unripe. Judge Trujillo has not issued any orders setting aside or modifying Judge Herndon's well-supported and well-reasoned opinion.

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granting summary judgment for the City in the 65-Acre case, Judge Herndon found that the Developer's categorical and *Penn Central* taking claims were both subject to the final decision ripeness requirement and that neither claim was ripe. Similarly, because the Developer filed and had denied only one application to develop the 35-Acre Property, rather than the two applications required by *Williamson County* and *State*, the Developer's categorical and *Penn Central* claims are not ripe.

Contrary to the Developer's argument, *Sisolak* plainly holds that the final decision ripeness requirement applies to categorical and *Penn Central* claims where the owner seeks a discretionary permit to develop their property. Because physical taking claims do not involve a governmental decision to grant or deny a permit application, the final decision ripeness requirement, as a matter of unanimous law and logic, does not apply to physical taking claims. Once the government adopts a law requiring that the owner submit to a physical occupation, there is no discretion left to exercise. The taking is final at the time the easement is exacted by the legislation. *Sisolak*, 122 Nev. at 664, 137 P.3d at 1123 (final decision requirement applies to taking claims regarding denial of the owner's use, where the Court "[insists] on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." [internal quotes and cites omitted]); *id*. (final decision ripeness does not apply to "cases involving a physical occupation of private property"). The Developer argues that a dissenting Justice in *Sisolak* found that final decision ripeness does not apply to categorical taking claims based on denial of the owner's use. Wrong. The dissenting Justice agreed with the majority that the ripeness doctrine applies to such claims. 122 Nev. at 684, 137 P.3d at 1136 (Maupin, J., dissenting).

The Developer attempts to confuse the Court by exploiting the fact that regulation of the owner's use and physical taking claims are both classified as "categorical" and "per se" taking claims. The Developer's argument goes like this: because (a) a physical taking is a "categorical" or "per se" taking, (b) a regulation of *use* that wipes out of value is also a "categorical" or "per se" taking, and (c) final decision ripeness does not apply to categorical *physical* takings, the ripeness rule therefore does not apply to categorical *use* taking claims. The argument is a classic fallacy and ignores the clear distinction made in *Sisolak* between the two different types of categorical taking claims and the different application of the ripeness doctrine to the two claims. The Court should reject this wordplay

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and apply *State*, which held that *Williamson County* final decision ripeness applies to any claim alleging a deprivation of economically beneficial use.[6]

Judge Herndon also rejected the Developer's specious argument that the categorical claim is ripe because takings are "self-executing":

> The Developer also argues that the final decision ripeness requirement adopted in *State* and *Kelly* has been eliminated because takings are "self-executing," citing *Knick* and *Alper v. Clark County*, *Knick* had nothing to do with final-decision ripeness, nor would it because the claimant in *Knick* alleged a physical taking. A physical taking is not subject to final-decision ripeness. . . [T]he "self-executing" nature of the taking clauses means only that the taking clauses do not need to be implemented by statute. Being self-executing does not mean, as the Developer asserts, that payment of just compensation is automatically due without first satisfying the requirement to obtain a final agency decision.

Ex. CCCC at 1509.

3. The final decision ripeness requirement of *Williamson County* and *State* applies to both categorical and *Penn Central* claims

The Developer contends that the *Williamson County* final decision requirement as adopted by the Nevada Supreme Court in *State* applies only to its *Penn Central* claim and not to its categorical taking claim.[7] Judge Herndon correctly found that the final decision requirement applies to both the Developer's categorical and *Penn Central* claims and granted summary judgment to the City. Ex. CCCC at 1504-15. Moreover, it is illogical to suggest that the final decision requirement of *Williamson County* applies to *Penn Central* claims (near wipe-outs) but not categorical claims (total wipe-outs). In both instances, if a property owner rests its claim on only one government denial of an application for development, doubt will remain as to whether the government might permit some lesser—but still economically beneficial—use of the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19 (2001). Indeed, even where an initial government decision arguably denies the owner all economically beneficial use of its property, unless the owner takes "reasonable and necessary steps" to allow the government to "exercise [its] full discretion in considering development plans for

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[6] Doubling down on its attempt to confuse and obfuscate its claims and the applicable standard of judicial review, the Developer uses the redundant term "categorical per se taking," which is the equivalent of saying "wipe out wipe out taking" or "physical physical taking."

[7] In one of many straw man arguments, the Developer contends that the City contends that the ripeness requirement applies to the Developer's physical and non-regulatory taking claims. The City makes no such contention.

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the property, including the opportunity to grant variances or waivers . . . the extent of the restriction on [the] property is not known." *Id.* at 620-21.

In *Palazzolo*, the Court applied the *Williamson County* ripeness analysis to a categorical claim, in which the landowner alleged that the government's denial of a development proposal "deprived him of 'economically, beneficial use' of his property […], resulting in a total taking requiring compensation" under *Lucas*. 533 U.S. at 616, 618-26. The court held:

> 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, *see Lucas*, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, *see Penn Central*. These matters cannot be resolved in definitive terms until a court knows the extent of permitted development on the land in question.

Id. at 618 (internal quotations and citations omitted); *see also*, *Barlow & Haun, Inc. v. U.S.*, 805 F.3d 1049, 1057-59 (Fed. Cir. 2015) (applying *Williamson County* to claim alleging categorical taking of oil and gas leasing rights); *Seiber v. U.S.*, 364 F.3d 1356, 1365-66, 1368 (Fed. Cir. 2004) (same to claim alleging that denial of logging permit effected temporary categorical taking of landowner's property).

4. The Developer filed only one application to develop the 35-Acre Property, not four

The Developer falsely claims that the City has denied four applications to develop the 35-Acre Property. The City denied only the 35-Acre Applications. The Developer argues that the Major Development Agreement ("MDA") was a second application to develop the 35-Acre Property. Judge Herndon rejected the same argument in the 65-Acre case, finding that the MDA did not constitute an application to develop the 65-Acre Property for purposes of final decision ripeness because that application was for property other than the 65-Acre Property standing alone, the MDA was not the site specific, detailed application required by the City's UDC to test the City Council's discretion, the MDA conflicted with other of the Developer's applications, and the MDA was too vague and uncertain for the City Council to know what it was voting on. Ex. CCCC at 1507, 1509-12.

The Developer further claims that the City denied the third and fourth applications for access and fencing. In fact, the Developer failed to file complete appropriate applications for access or

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fencing, so there was nothing for the City to deny. Ex. DDDD at 1518-19. Although the Developer contends that the City wrongly required the applications, the statute of limitations to challenge the City's decision to require the applications is 25 days and has long since expired. NRS 278.0235. Moreover, the Badlands had street access when the Developer bought the property. *See* Ex. DDDD at 1518. Even if the City had denied the non-existent applications for additional access and fencing, the hypothetical applications were apparently unconnected to any applications to develop housing on the 35-Acre Property as required by the UDC. *Id*. at 1518-19. Accordingly, denial of the hypothetical applications for access and fencing would tell the Court nothing about the density of housing development the City would allow on the 35-Acre Property and thus would not ripen a taking claim requiring the Developer to show denial of all beneficial economic use of the property.

The Developer further contends that "the City" would only consider an MDA application covering the entire Badlands before it would allow any development in the Badlands. The Developer contends that after the City Council denied the MDA, further application to develop the 35-Acre Property would be futile, citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Judge Herndon rejected the same argument in the 65-Acre case:

> The Developer contends that this case is similar to *Del Monte Dunes* because the Developer conducted detailed and lengthy negotiations over the terms of the MDA with City staff and made many concessions and changes to the MDA requested by the staff before the MDA was presented to the City Council with the staff's recommendation of approval. Concessions and changes to the MDA requested by staff and a staff recommendation of approval, however, do not count for ripeness. The City Council, not the staff, is the decision-maker for purposes of a regulatory taking. An application must be made to the City Council, and if denied, at least a second application to the City Council must be made and denied before a takings claim is ripe.

Ex. CCCC at 1512-13.

Judge Herndon further concluded that the City's adoption of Bills 2018-05 and 2018-24 do not show futility:

> [T]he Developer's reliance on Bills 2018-5 and 2018-24 in support of its claim of futility is misplaced. The bills imposed new requirements that a developer discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City and other requirements for the application to develop property. They were designed to increase public participation and did not impose substantive requirements for the development project, and did not prevent the Developer from applying to redevelop the 65-Acre Property. Moreover, the second bill was adopted in the Fall of 2018 after the Developer filed this action

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> for a taking, so could have had no effect on the 65-Acre Property. The bill could not have taken property that was allegedly already taken. Both bills were repealed in January 2020, and are therefore inapplicable to show futility.

Ex. CCCC at 1513.

Judge Herndon found that before the Developer can sue the City for a taking of the 35-Acre Property, it is incumbent on the Developer to file and have denied at least two applications to develop *the individual 35-Acre Property*. Judge Herndon held: "The Developer has failed to meet its burden to show that its regulatory takings claims are ripe. The Nevada Supreme Court requires that a regulatory takings claimant file at least two applications to develop "the property at issue." *State*, 131 Nev. at 419-20, 351 P.3d." Ex. CCCC at 1506; *id*. at 1505 ("A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). *The property owner* bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id*." [emphasis added]). Like the 65-Acre case, the Developer clearly has not met that burden.

B. Even if the categorical and *Penn Central* claims were ripe, the City took no action that diminished the value of the 35-Acre Property

1. By simply maintaining the status quo when the Developer bought the Badlands, the City cannot be liable for a taking

The Developer cannot meet either the categorical or *Penn Central* tests because the Badlands has been designated PR-OS in the City's General Plan since 1992, including when the Developer bought the Badlands in 2015. Exs. I, L, N, O, P, Q. The PR-OS designation does not permit residential use. *E.g*., Ex. N at 290. Even if the City had declined to lift the PR-OS designation in denying two applications to build housing on the 35-Acre Property, that action could not have wiped out the value of the 35-Acre Property. The 35-Acre Property would have the same use (golf course and drainage) and value as when the Developer bought the property. The City's hypothetical action (not changing the law, thereby maintaining the status quo) would have no economic impact on the property. Thus, the Developer cannot show the economic impact required to show a categorical or *Penn Central* taking.

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Nor could the City's hypothetical refusal to amend the PR-OS designation in response to two applications interfere with the Developer's investment-backed expectations as required for a *Penn Central* claim. The Developer bought a golf course and drainage property designated PR-OS in the City's General Plan at the time of purchase, meaning the Developer acquired property whose legal use was limited. Having bought the Badlands subject to the PR-OS designation, the Developer cannot allege a taking where the City merely declined to change the law and permitted the property to continue in its historic use as a golf course and drainage. *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"); *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"). There is no evidence that the City's denial of the Developer's applications to build houses destroyed the value of the property for continued use as a golf course and drainage serving the surrounding properties. The PR-OS designation is thus fatal to the Developer's categorical and *Penn Central* claims.[8]

2. The PR-OS designation is valid

The Developer attempts to salvage its taking claims by arguing that the PR-OS designation is invalid. This contention, however, is contrary to all evidence and authority, and has been rejected by every court that has adjudicated the issue, except Judge Jones.[9] In its Order of Reversal in the 17-Acre case, the Nevada Supreme Court confirmed that the Developer is required to obtain an amendment of

[8] The Developer relies on its appraisal to contend that the 35-Acre Property was worth $35 million when the Developer bought it based on its potential for development of housing, and following the City's denial of an application to develop housing on the property, the City rendered the property worthless. The Developer's appraisal, however, fails to mention that the 35-Acre Property was subject to the PR-OS designation at the time the Developer bought the property, which does not allow housing development, or that the Developer paid only $4.5 million for the entire Badlands ($630,000 for the 35-Acre portion), reflecting that fact that it could not be developed with housing. The appraiser's conclusion that the Developer bought property worth $35 million for only $630,000 is not credible.

[9] In a recent order granting the Developer's Motion to Determine Property Interest, Judge Jones found that the PR-OS designation was not valid, which finding is contradicted by the evidence and by all courts, including the Nevada Supreme Court. In making this finding, Judge Jones was simply led into error by the Developer.

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the PR-OS designation to build housing in the Badlands: "The governing ordinances require the City to make specific findings *to approve a general plan amendment*, LVMC 19.16.030(1), a rezoning application, LVMC 19.16.090(L), and a site development plan amendment, LVMC 19.16.100(E)." Ex. DDD at 1014 (emphasis added). This Court follows the Supreme Court:

> 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. . . . 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." . . . [T]the City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development.

Judge Williams FFCL Denying Developer's PJR, Ex. XXX at 1392-94. Judge Herndon also agreed with the Nevada Supreme Court:

> Since 1992, the City's General Plan has designated the Badlands for parks, recreation, and open space, a designation that does not permit residential development. . . . Each ordinance of the City Council updating the Land Use Element of the General Plan since 2005 has approved the designation of the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged.

Ex. CCCC at 1485-86. Judge Sturman held the same: "The open space designation for the Badlands Property sought by the Developer's predecessor and approved by the City in 1990 was subsequently incorporated into the City's General Plan starting in 1992. The Badlands Property is identified in the City's General Plan as Parks, Recreation, and Open Space ("PR-OS")." Findings of Fact and Conclusions of Law Etc. filed 7/29/21 in 133-Acre case No. A-18-775804-J at 3.

Undaunted by the law and facts, the Developer contends that the PR-OS designation of the 35-Acre Property is invalid. The difficulty with the Developer's arguments for the invalidity of the PR-OS designation is that any challenge to the legislation adopting the PR-OS designation would have to have been brought within 25 days after the adoption of the legislation. NRS 278.0235; *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977), overruled on other grounds by *Cty. of Clark v. Doumani*, 114 Nev. 46, 952 P.2d 113 (1998). It is simply too late to challenge the PR-OS designation. The City refuted each of the Developer's other attacks on the PR-OS designation in the City's opening brief supporting this motion, filed 8/25/21, at pp. 50-60.

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If the Court were to find that the PR-OS designation is invalid, however, the categorical and *Penn Central* taking claims, which request damages, would still lack merit and the City should be awarded summary judgment. A taking claim assumes that the challenged regulation is valid. Because the regulation goes too far and wipes out the value of the property, compensation is owed. *Lingle*, 544 U.S. at 543. If the regulation in question is invalid, however, the remedy is not compensation for a taking, but rather an order in equity under a due process theory that the regulation is unenforceable. *Id*.

3. The Developer cites no authority that zoning confers a constitutional right to build whatever the Developer desires, and all authority is to the contrary

The Developer also contends that even if the PR-OS designation is valid, the R-PD7 zoning of the 35-Acre Property grants the Developer a constitutionally protected property or vested right to build whatever it wants as long as the use is a "permitted" use in an R-PD7 zone, and regardless of the PR-OS designation. This claim is contrary to unanimous authority. The Developer fails to cite any state or Las Vegas statute or any court decision that even remotely supports its zoning rights theory. Nor could it. Zoning *limits* the use of property to protect the community; it does not confer rights on property owners. Property rights, such as the right to be free of a regulatory wipe out of value under the Takings Clause, arise from simply *owning* the property, in this case a fee simple interest.[10]

Under regulatory powers delegated by the state, Nevada cities are *required* to exercise discretion in adopting, amending, and applying General Plans and zoning ordinances. NRS 278.150, NRS 278.250. The R-PD7 zoning ordinance that the Developer falsely claims confers a "right" to develop housing is in fact infused with discretion that is inconsistent with the alleged "right to develop":

> The R-PD District has been to provide 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*

[10] The Developer misrepresents *Sisolak* as holding that zoning confers vested rights on property owners to use their airspace. The *Sisolak* Court held that Sisolak has a right to use his airspace simply because he owns the underlying land; i.e., title to the airspace was "vested" in Sisolak. 122 Nev. 658, 137 P.3d at 1119.

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> *necessary to ensure the proper amenities and to assure that the proposed development will be compatible with surrounding existing and proposed land uses.*

Las Vegas Municipal Code (Unified Development Code ["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). This broad discretion to approve development generally and in particular in an R-PD-7 zone is not compatible with a constitutional right to build whatever the owner wants to build. If the Developer were correct, this vast body of state and local land use regulations conferring discretion on the City would be rendered a nullity. The Nevada Supreme Court has repeatedly rejected the Developer's theory. *Stratosphere Gaming*, 120 Nev. 523, 527, 96 P.3d 756, 759-60 (2004); *City of Reno v. Harris*, 111 Nev. 672, 679, 895 P.2d 663, 667 (1995); *Boulder City v. Cinnamon Hills Associates*, 110 Nev. 238, 246, 871 P.2d 320, 325 (1994); *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); *Bd. of Cty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983).

The Developer claims that the above authority is irrelevant in light of this Court's Findings of Fact and Conclusions of Law Regarding Plaintiff Landowner's Motion to Determine "Property Interest" filed 10/12/20 at 4-5, where this Court found:

> 15. [T]this Court has previously held that: 1) "it would be improper to apply the Court's ruling from the Landowners' petition for judicial review to the Landowners' inverse condemnation claims;" and, 2) "[a]ny determination of whether the Landowners have a 'property interest' or the vested right to use the 35 Acre Property must be based on eminent domain law, rather than the land use law."
>
> 16. Therefore, the Court bases its property interest decision on eminent domain law.
>
> 17. Nevada eminent domain law provides that zoning must be relied upon to determine a landowners' property interest in an eminent domain case. City of Las Vegas v. C. Bustos, 119 Nev. 360 (2003); Clark County v. Alper, 100 Nev. 382 (1984).
>
> 20. Therefore, the Landowners' Motion to Determine Property Interest is **GRANTED** in its entirety and it is hereby **ORDERED** that:
>
> 1) the 35 Acre Property is hard zoned R-PD7 at all relevant times herein; and,

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> 2) the permitted uses by right of the 35 Acre Property are single-family and multi-family residential.

This Order, prepared by the Developer, leads the Court into error in several respects. First, this Court held in denying the Developer's Petition for Judicial Review ("PJR") that zoning does not grant any rights to property owners, no less a "property" or "vested" right to approval of a permit application, because the state has delegated to cities broad discretion in determining whether to approve building permit applications:

> The decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. . . . A zoning designation does not give the developer a vested right to have its development applications approved. . . *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60 [(2004)] (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). . . . In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, ***no matter the zoning designation***. ¶ 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. . . . The Court rejects the Developer's argument that the RPD-7 zoning designation on the Badlands Property somehow required the Council to approve its Applications. ¶ Statements from planning staff or the City Attorney that the Badlands Property has an RPD-7 zoning designation do not alter this conclusion.

Ex. XXX at 1385-86, 1391-92 (emphasis added).

Insofar as the Court rejects the application of the above analysis to the Developer's regulatory taking claims because the Court's conclusions were rendered in the context of a PJR rather than a complaint for a taking, the City respectfully requests that the Court revisit this determination because it is contrary to all law. While PJRs and taking actions provide two different processes and remedies for allegedly excessive government action, they are based on the same underlying Nevada law of property and land use regulation. A PJR is simply a procedure and remedy. *There is no substantive law of PJRs*. Surely, the state cannot maintain two parallel systems of property and land use regulatory

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law depending on the procedure and remedy chosen by the aggrieved property owner. The Developer thus proposes an absurd rule that the City Council has discretion over development applications if the owner then sues by PJR, but has no discretion if the owner then sues for a taking.

Adding to the difficulty of the Developer's argument, if property owners have a constitutional right to build whatever they choose as long as it is a permitted use under the applicable zoning, there would be no need to apply for a permit because the government would have no discretion to deny it, thus rendering meaningless thousands of state statutes and local ordinances regulating the issuance of building permits, subdivision maps, etc. Moreover, under the Developer's theory, Nevada cities and counties would be liable for taking damages to every property owner in a zone where the agency changes the zoning ordinance to limit any "rights" under the prior ordinance. In one fell swoop, Nevada local agencies would either be liable for massive taking damages, or be forced to forego zoning altogether.

Moreover, *Boulder City*, like this case, was a *constitutional* challenge to regulation, *not a PJR*. There, the Court held: "The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest." 110 Nev. at 246, 871 P.2d at 325. Also, in a decision that is binding on this Court under issue preclusion, the Ninth Circuit held in *180 Land Co. LLC v. City of Las Vegas* ("*180 Land Co*."), involving the same parties, the same issue, and a final decision, that zoning does not confer property rights under Nevada property and land use law. Ex. III. That *Boulder City* and *180 Land Co.* involved due process claims rather than taking claims is irrelevant. Both cases were decided based on Nevada's substantive law of property and land use. Under Nevada law, an owner has no constitutional rights under zoning, whether the owner challenges a government action by PJR, due process, or regulatory taking.

Second, the Court's conclusion that "Nevada eminent domain law provides that zoning must be relied upon to determine a landowners' property interest in an eminent domain case," citing *City of Las Vegas v. C. Bustos*, 119 Nev. 360 (2003) and *Clark County v. Alper*, 100 Nev. 382 (1984), is also contrary to law. As Judge Herndon explained, inverse condemnation and eminent domain actions are very different:

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> The Developer conflates eminent domain and inverse condemnation. The two doctrines have little in common. In eminent domain, the government's liability for the taking is established by the filing of the action. The only issue remaining is the valuation of the property taken. In inverse condemnation, by contrast, the government's liability is in dispute and is decided by the court. If the courts finds liability, then a judge or jury determines the amount of compensation.

Ex. CCCC at 1499. Thus, in eminent domain cases, the only issue is the *value* of the condemned property. Eminent domain cases cannot, as a matter of logic, have any bearing on the question in the instant case, which is whether the City has taken the Developer's property by regulation; i.e., whether the City is liable for a taking. Each of the eminent domain cases the Developer cites recognizes that zoning is a limitation on the use of property and that in *valuing* property in eminent domain, an appraiser may not give an opinion of value assuming a use that is not permitted by the zoning. *E.g.*, *Bustos*, 119 Nev. at 362.

The Developer also cites language from *Clark County v. Alper*, 100 Nev. 382, 685 P.2d 943(1984) for the nonsensical proposition that eminent domain caselaw provides the test for government liability for a regulatory taking. The Developer misrepresents the context of the following passage from *Alper*: "Inverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." 100 Nev. at 391, 685 P.2d at 949. The passage in question concerns the date for determining the *value* of property in an inverse condemnation case *after* the court found that the government was liable for a taking. *Id*. There is no reason that the rules for *valuation* of property would be different as between direct condemnation and inverse condemnation actions. As indicated above, because liability for a taking is not at issue in eminent cases, those cases cannot possibly provide the standard of liability for regulatory takings.

Finally, the Developer cites no authority that the denial of a property "right" can constitute a categorical or *Penn Central* taking. The City is liable for a categorical (wipe out) or *Penn Central* taking in Nevada only if a City regulation "completely deprive[s] an owner of all economically beneficial use of her property." *State*, 131 Nev. at 419, 351 P.3d at 741; *see also Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034 (same); *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35 (1994) (same). A taking, therefore, must be of "property," not a "right." If the City takes property by eminent domain,

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it acquires the fee simple interest. Similarly, if the City is required to pay compensation to the Developer for a regulatory taking, it would be forced to buy a fee simple interest. In contrast, there is no authority that a City can "take" a "right to develop." Rather, it can *deny* a "right to develop." The remedy for that denial is a PJR, not a regulatory taking claim.

C. Even if the categorical and *Penn Central* claims are ripe and the City destroyed the value of the 35-Acre Property, the City did not destroy the value of the parcel as a whole, negating a taking

1. The City allowed substantial development of the PRMP, including development by the Developer

A regulatory taking analysis focuses on development of the parcel as a whole, not on a portion of the property left over after the parcel as a whole has been substantially developed. *Kelly*, 109 Nev. at 641 & n.1, 651, 855 P2d at 1029 & n.1, 1035; *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327, 331 (2002); *Penn Central*, 438 U.S. at 130-31. Here, the City demonstrated that the entire 1,596 acre Peccole Ranch Master Plan ("PRMP") began as a single master planned development under one owner who intended that the Badlands would provide recreation, open space, and drainage for the other, developed parts of the PRMP, and thus satisfy the City's open space set-aside requirement. Ex. H at 151, 153, 159. In the 25-years before the Developer purchased the Badlands, the master planned area was developed as a single economic unit under the PRMP approved in 1990. The City's approval of a casino and hotel in the PRMP was conditioned on Peccole providing an 18-hole golf course to serve that destination resort. Ex. G at 123-24; Ex. H at 183. The PRMP was developed with thousands of housing units, a hotel, a casino, and retail. In all, 84% of the land area of the PRMP has been developed, including *the Developer's* 219-unit Queensridge Towers, one of the most luxurious condominium buildings in Las Vegas, and the Tivoli Village retail complex. The Badlands is merely a part of the PRMP.

Accordingly, even if the City had made a final decision to deny development of the Badlands for housing (it hasn't), and even if that denial had destroyed all value of the Badlands (it wouldn't), the City could not have taken the Badlands because the City has already allowed development of 84% of the parcel as a whole. In its opposition to this motion, the Developer fails to cite any authority that the

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City has taken the PRMP (the parcel as a whole), or to present any argument on this issue. Because it is undisputed that the City has not destroyed the value of the parcel as a whole, the City should have judgment on the categorical and *Penn Central* taking claims.

2. Even if the Badlands is deemed the parcel as a whole, the City has permitted substantial development, negating a taking of the 35-Acre Property

In its opening brief, the City proved that even if the Badlands is treated as the parcel as a whole instead of the PRMP, because the City approved development of 435 luxury housing units in the Badlands, the City could not have "taken" another part of the Badlands, such as the 35-Acre Property. It is clear that the Developer segmented the Badlands and cannot now claim that the 35-Acre Property is the parcel as a whole. As Judge Herndon concluded:

> **The Developer's acquisition and segmentation of the Badlands**
>
> . . . At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. The Developer transferred 178.27 acres to 180 Land Co. LLC ("180 Land") and 70.52 acres to Seventy Acres LLC ("Seventy Acres"), leaving Fore Stars with 2.13 acres. . . . Each of these entities is controlled by the Developer's EHB Companies LLC. . . The Developer then segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands.

Ex. CCCC at 1490.

Rather than address the *Murr* test to determine the parcel as a whole, the Developer relies on a declaration by Yohan Lowie that "Fore Stars re-drew the boundaries of the various parcels that comprised the 250 Acre Residentially Zoned Land pursuant to the City's request and direction. The City required the filing of parcel maps to separate the land for every area of development." Ex. 34 at 736.[11] Even if true (it isn't), the determination of the parcel as a whole does not turn on who decided to segment the whole parcel, but rather on application of the *Murr* factors and whether the property owner is claiming compensation for the taking of a segment rather than the parcel as a whole. The

[11] The Developer cites no evidence, oral or written, to support this claim, nor could it because the City is not a developer and is not responsible for formulating proposals to develop property. Indeed, after creating four development sites, the Developer then created new entities under its control to take title to each different development site, which is classic segmentation. *See* CCCC at 1490; Ex. 34 at 736.

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Developer segmented the Badlands when it filed four separate actions for a taking of each individual segment, rather than the parcel as a whole. Because the parcel as a whole is, at a minimum, the Badlands, and the City permitted the construction of 435 luxury housing units in the Badlands, the Developer's claim for a taking of the 35-Acre property fails.

Nor is the fact that the four segments of the Badlands each consists of separate assessor's parcels controlling. Application of the *Murr* factors determines the parcel as a whole, and the configuration of the tax parcels constituting the property do not govern the outcome. Indeed, in *Murr*, the Supreme Court disregarded the tax parcel boundaries designated by the assessor to find that two separate tax parcels together constituted the parcel as a whole. 137 S.Ct. 1947-48.

II. Bill 2018-24 did not effect a physical taking of the 35-Acre Property

The Developer contends that Bill 2018-24 exacts an easement in favor of the public to physically invade the 35-Acre Property similar to the easements exacted in *Sisolak*, *Knick*, and *Cedar Point*. The Developer's opposition fails to recognize that Bill 2018-24, which was in effect from November 2018 to January 2020, (a) only applied to "proposals" to redevelop golf courses, and the Developer did not propose to redevelop the 35-Acre Property during that period, (b) requires an owner proposing to redevelop a golf course to "document" "ongoing public access" *only if* the City gives the Developer notice that it must do so, and the City did not give any such notice to the Developer, (c) requires an owner merely to "document" public access rather than requiring the owner to allow such access, and (d) requires an owner to document only "ongoing public access," but the Developer voluntarily shut down the golf course in 2016 so there was no public access to maintain. Accordingly, Bill 2018-24 did not apply to the Developer, and it certainly did not exact a permanent easement for the public to physically occupy the 35-Acre Property.[12]

. . .

. . .

[12] The Developer contends that Bill 2018-24 was enacted solely to prevent development of the Badlands, calling it the "Lowie Bill." The facts are otherwise. Those calling it the "Lowie Bill" were either the Developer's own lawyers or a member of the City Council and citizens who supported the Developer. Moreover, the City cannot have "targeted" the Badlands by adopting the Bill where the City never even applied the Bill to the Badlands.

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The Developer disingenuously attempts to compare Bill 2018-24 to *Knick*, where, the Developer contends, the Township of Scott suspended the ordinance (which the Developer misnames as a "bill" to make it appear similar to the legislation at issue here) and "never applied it" to the property owner. The ordinance at issue in *Knick*, however, exacted an easement in favor of the public from the owner the moment it was enacted, and, moreover, did not apply only if the Township gave notice to the owner. In contrast, Bill 2018-24 did not exact an easement on its face and did not even apply to any property unless the City gave notice. Thus, the comparison with *Knick* is unfair.

The Developer argues, without authority, that Bill 2018-24 is "retroactive" and therefore applies to the Badlands. There is no evidence to support this claim. The ordinance expressly states that it applies to "proposals" to repurpose golf courses. Ex. DDDD-9 at 1554. That language rules out proposals that are no longer pending or approved applications, neither of which are "proposals." Under Nevada law, "statutes are otherwise presumed to operate prospectively 'unless they are so strong, clear and imperative that they can have no other meaning or unless the intent of the [L]egislature cannot be otherwise satisfied.'" *Segovia v. Eighth Judicial District Court in and for County of Clark*, 133 Nev. 910, 915, 407 P.3d 783, 787 (2017). Statements of City staff that Bill 2018-24 is retroactive are thus irrelevant. The City Council decides whether an ordinance is to be retroactive. Here, it adopted an ordinance that was clearly not retroactive.

The Developer's contention that the City is liable for a physical taking because a member of the City Council told members of the public that they could walk on the Badlands is frivolous. Individual legislators or City staff have no legal authority to give such permission, and such conduct would not constitute a regulatory taking, which requires valid regulation by the City Council with the force of law.

The Developer next contends that the City effected a physical taking of the 35-Acre Property because the City is preserving the property as a viewshed for the community. This claim is nonsense. First, the City designated the 35-Acre Property PR-OS in the General Plan in 1992 and maintained that designation through the date the Developer acquired the Badlands and up to the present. The purpose of the PR-OS designation, like all designated open space everywhere, is to preserve land for recreation, light, air, and views *for the surrounding community*. As this Court held, the City was fully

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within its rights to decline an amendment to the PR-OS designation and retain the status quo. *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 the Commission to not enforce conditions in place when it purchased the property); *Guggenheim*, 638 F.3d at 1120-21 (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"). Maintaining a regulation that historically was intended to, and did, provide a viewshed for the surrounding community is not a taking under any test.

A regulation does not effect a physical taking unless it permits the government or the public to *physically occupy* the owner's property. Simply limiting the *use* of property to protect community interests is not, by law or logic, a physical taking. *Loretto*, 458 U.S. at 426, 436; *Tahoe-Sierra*, 535 U.S. at 321-22; *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122.

III. The Developer fails to cite any evidence of a non-regulatory taking

A non-regulatory taking can occur "if the government has 'taken steps that substantially interfere[] with [an] owner's property rights to the extent of *rendering the property unusable or valueless to the owner*.'" *State*, 131 Nev. at 421, 351 P.3d at 743 (alteration in original; emphasis added) (quoting *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed. Cir. 2013)). A non-regulatory taking occurs only in "extreme cases" involving either (a) a physical taking or (b) unreasonable actions that interfere with use or diminish the value of property after the agency has officially announced an intent to condemn the property. *See id.*at 421-23.

The Developer fails to cite a scintilla of evidence that the City rendered the 35-Acre Property "useless or valueless to the owner," either through regulation or nonregulatory action. The Developer cites no evidence that the City did anything to prevent the Developer from using the 35-Acre Property for its historic use for golf course and drainage or rendered the 35-Acre Property valueless, or even diminished the value. There is no evidence that the City physically invaded any part of the Badlands. Nor is there any evidence that the City condemned the 35-Acre Property or made an official announcement of an intent to condemn which could give rise to a nonregulatory taking claim.

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Indeed, there is a major disconnect between the Developer's claim that the City effected a non-regulatory taking and the City's actions that allegedly caused the nonregulatory taking. By its very name, a "nonregulatory" taking cannot be a "regulatory" taking where the government accomplishes the same ends as eminent domain through excessive regulation. The City has demonstrated above that it did not cause a regulatory taking of the 35-Acre Property. Yet the Developer's allegations purporting to support its nonregulatory taking claim are exactly the same as its regulatory taking claims. Denying the Developer's "*use* of their 35 Acres" is a claim for a regulatory taking. Further, the Developer argues that a non-regulatory taking does not encompass a physical taking, but then cites physical taking cases such as *Sisolak* as authority for its non-regulatory taking claim. In sum, the Developer never states what a non-regulatory taking is, and it never presents evidence of a City non-regulatory action that interfered with its property.

IV. The City cannot be liable for a temporary taking

A temporary taking occurs when a court finds that a regulation effects a permanent taking under *Lucas* or *Penn Central*, and the public agency thereafter rescinds the regulation to avoid paying compensation for a permanent taking. *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 318-19, 321 (1987). A temporary taking, therefore, does not arise unless and until the court finds that a permanent regulatory taking has occurred, and the agency rescinds the regulation causing the taking. *See id.* For the reasons outlined above, the City is not liable for a permanent regulatory taking, so the temporary takings claim fails as a matter of law.

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CONCLUSION

The City's Countermotion for Summary Judgment should be granted. The Developer's Motion to Determine Take and for Summary Judgment should be denied.

DATED this 21st day of September 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 21st day of September, 2021, I caused a true and correct copy of the foregoing **CITY'S REPLY IN SUPPORT OF COUNTER-MOTION FOR SUMMARY JUDGMENT** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

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Exhibit 5

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Attorneys for Defendant City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD, SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X,

Plaintiffs,

v.

CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entities I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendants.

Case No. A-18-773268-C
Dept. No. XXII

CITY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hearing Date: May 18, 2021
Hearing Time: 8:30 am

INTRODUCTION

It is hard to conceive of an easier case. Regulation of land use can amount to a regulatory taking only where it severely restricts the economic use of property. Here, the City approved the Developer's applications to build 435 luxury housing units on the 17-Acre Property, allowing the Developer to start construction at any time. The City's regulation, accordingly, cannot possibly have taken the Property. The Court should put an end to this farce and grant summary judgment to the City.

Undeterred by the overwhelming facts and law against it, the Developer resorts to the bad faith claim that the City nullified its approval of the 435-unit project. The Developer asks the Court to ignore that the Nevada Supreme Court held that the City's approval of the 435-unit project is valid: "The City correctly interpreted its land use ordinances and substantial evidence supports its decision to approve Seventy Acres's three applications." Ex. DDD at 1015.[1] The Supreme Court issued its remittitur in September 2020, reinstating the 17-Acre approvals. The City notified the Developer that its approvals were reinstated and the Developer could immediately proceed with its project:

> [T]he City Council's February 2017 action approving all discretionary entitlements required for your client's 435-unit project on the 17-acre portion of the Badlands are now valid and will remain so for two years after the date of the remittitur [. . .]. Now that there are no more discretionary entitlements required to develop your client's project, the City will accept applications for any ministerial permits required to begin construction [. . .].

Ex. GGG at 1021. Accordingly, there is no basis to argue that the City nullified its approvals. Indeed, Judge Herndon found the Developer's claim to be "frivolous." Ex. CCCC at 1508.

It is not often that a litigant's misrepresentations of fact are so easily exposed. The context of this case and the other three lawsuits the Developer filed against the City help to illuminate why the Developer found it necessary to make such a bizarre claim.

Although the March 2015 Purchase and Sale Agreement by which the Developer acquired the 250-acre Badlands lists the purchase price as $7.5 million, documents the Developer produced after the City filed this Motion for Summary Judgment ("MSJ") in response to the City's motion to compel show that

[1] References to lettered exhibits are to the City's Appendix of Exhibits. References to numbered exhibits are to the Developer's Appendix of Exhibits.

the Developer paid less than $4.5 million for the Badlands.[2] In February of 2017, the City approved the 435-unit project. By the Developer's own evidence, that approval increased the value of just the 17-Acre portion of the Badlands to $26,228,569, nearly six times the Developer's investment in the entire 250 acres, and the Developer still has 233 acres left for use as golf course and drainage or potential development.[3] Despite the City's approval of substantial development in the Badlands, the Developer now claims that the City has effected a "taking" of the entire Badlands and demands $386 million in damages – an 8,500 percent profit, without actually developing any part of the Badlands.[4]

This background makes transparent the reason for the Developer's outlandish contention that the 17-Acre approvals do not exist. Although the City's approvals for 435 housing units were reinstated in September 2020, the Developer has failed to move forward with that development and indicates that it has no intention of actually building anything in the Badlands. If the Developer were to proceed with the 435-unit project, it would be admitting that the approvals for that project are valid. Whether it ultimately builds the 435-unit project or not, the Developer cannot escape from its own evidence indicating that it has already multiplied its investment in the Badlands by a factor of six, and still has 233 acres for use for recreation and open space or development. It would thus be unable to show a taking in any of the four lawsuits and would not be able to soak the taxpayers for $386 million, or any money at all.[5]

---

[2] Declaration of Chris Molina in Support of City's Motion for Summary Judgment Ex. FFFF at 1591-95. The Developer's claim that it paid $45 million for the Badlands is patently false. *Id*. at 1595-97.

[3] *See* Developer's Rule 16.1 Disclosures, City's Appendix in Support of Motion for Summary Judgment. Ex. JJJ at 1135-36 and Ex. VVV at 1319. 17 acres x $1,542,857/acre (Developer's figure) = $26,228,569. These figures come directly from the Herndon Judgment, which is, in turn, based squarely on the Developer's own Disclosures. Ex. CCCC at 1495.

[4] 250 acres x $1,542,857/acre = $386,000,000.

[5] Because the Developer purchased the Badlands in a single transaction from a single owner for a single price and the entire 250-acres had been used continuously for golf course and drainage for the previous 23 years, the regulatory takings doctrine treats the entire Badlands, at a minimum, as the parcel as a whole. *See*, *e.g.*, *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 650-51, 855 P.2d 1027, 1034-35 (1993). The Developer's segmentation of the Badlands into four development sites is a common trick employed by developers – and prohibited by the courts – to claim that the economic impact of the City's regulation has had a severe economic impact on the segment, even though the economic impact of the City's regulation on the whole parcel was to increase its value. Accordingly, the Court must consider the economic impact of the City's regulation on, at minimum, the Badlands as a whole. Where the Developer has multiplied its investment by obtaining approval for construction on any part of the parcel as a whole, no segment of the parcel as a whole cannot be "taken." *Id*. at 651 ("Uppaway must be viewed as a whole, not as thirty-nine individual lots" when assessing whether the developer had been deprived of all economic use.).

Recognizing that it has no chance on its categorical and *Penn Central* claims for excessive regulation of the use of the 17-Acre Property, the Developer resorts to the implausible claim that the City has effected a physical regulatory taking of the 17-Acre Property. Developer's Opposition to City's Motion for Summary Judgment ("Opposition" or "Dev. Opp.") filed 3/10/21 at 14-17. This claim is based on the City's adopting an ordinance, Bill 2018-24, allegedly requiring the Developer to allow the public to occupy the Badlands. *Id.* This claim is without the slightest merit. On its face, Bill 2018-24 never applied to the 17-Acre Property.

The Developer also purports to state a nonregulatory taking claim. That claim, however, "only applies in extreme cases" involving either (a) a physical taking by the government, where the government physically occupies the property or a public improvement fails and causes physical damage to the property, or (b) unreasonable precondemnation conduct. *See State v. Eighth Judicial Dist. Ct.* 131 Nev. 411, 421-23, 351 P.3d 736, 743-44 (2015). A nonregulatory taking must render the property "*unusable or valueless*." *Id.* (emphasis added). Here, the nonregulatory taking claim fails because there is no evidence that: the City physically occupied the 17-Acre Property, a City improvement damaged the 17-Acre Property, the City condemned or indicated an intent to condemn the 17-Acre Property, or the City took any other nonregulatory action that rendered the 17-Acre Property unusable or valueless. To the contrary, the City's only official action affecting the 17-Acre Property—approving 435 luxury units on it—increased its value, and the City never stood in the way of the Developer's continuation of the historic golf course and drainage use of the 17-Acre Property.

The Developer also ignores the Ninth Circuit ruling against it on its due process claim and fails to present any argument as to why the City should not have summary judgment on that claim and the Developer's claim for a judicial taking. Indeed, the Developer does not even mention these claims in its Opposition and provides no basis for avoiding summary judgment.

Faced with all legal authority against it, the Developer claims that the Court cannot grant the MSJ because the Developer needs discovery of the statements, actions, and motivations of an individual member of the Las Vegas City Council and City staff. Dev. Opp. at 8-11. The Developer is wrong. Because the City's approval of the 435-unit project is in the public record and cannot be disputed, the categorical and *Penn Central* takings claims fail as a matter of law. No discovery could alter this result.

Moreover, in its physical taking claim, the Developer alleges that Bill 2018-24 required the Developer to allow the public to occupy the 17-Acre Property. Interpretation of an ordinance is a question of law for the Court and does not require discovery. Finally, because a nonregulatory taking occurs only if the City renders the 17-Acre Property unusable and valueless, the approval of 435 luxury housing units on the 17-Acre Property obviously undercuts that claim. No discovery could alter that result.

In its Opposition, the Developer fails to counter the City's argument that the Developer's Motion to Determine Property Interest is moot. The Developer claims that it has a property or vested interest in the R-PD7 zoning of the 17-Acre Property to build housing, and that the City's alleged prevention of residential development on the 17-Acre Property violates those rights. The contention that zoning confers property or vested rights is against all authority and would turn Nevada's entire body of land use law upside down. However, the Court need not reach this issue. The City approved the Developer's application to rezone the 17-Acre Property to a higher density and lifted the PR-OS designation, replacing it with a designation that allows the housing development the Developer proposed. The City, therefore, could not logically have violated the Developer's rights, whatever they are.

ARGUMENT

The Developer asserts nine claims: (1) declaratory relief, (2) injunctive relief, (3) categorical taking, (4) *Penn Central* taking, (5) physical taking, (6) non-regulatory taking, (7) judicial taking, (8) temporary taking, and (9) due process. Compl. ¶¶ 58-117. In its Opposition, the Developer fails to present any valid or relevant authority to support its claims, virtually conceding that the City is entitled to summary judgment. This is understandable, because the City approved the Developer's proposed development project for the 17-Acre Property. A finding that the City has effected a taking under these circumstances would defy not only unanimous authority, but also plain logic. Instead of reliance on any law to support its claims, the Developer makes two specious arguments to attempt to postpone defeat: (1) the Court should not reach the merits because there are disputed issues of fact requiring discovery, and (2) Judge Herndon's Judgment in the 65-Acre case ("Herndon Judgment") is not final and therefore not binding on this Court. Opp. at 2-3.

The Developer's arguments lack merit. As discussed below, in a brief in another Badlands case, the Developer agreed that all material evidence in a taking case is in the public record and is not subject

to dispute. This makes sense because only laws adopted in a public process can affect the use or value of property; statements of City Council members or staff people do not have the effect of law and cannot cause a taking. The City demonstrates below that there are no triable issues of fact relevant to any of the Developer's nine claims.

Regarding to the Developer's argument that the Herndon Judgment is not final, the Judgment is final with respect to the issues in common with this case. Even if it were not, the MSJ in this case does not depend on the Herndon Judgment. This case is exceedingly simple: the Developer received everything it asked the City for regarding the 17-Acre Property. It has no injury, none of its rights were violated, and nothing was taken. Accordingly, even if the Herndon Judgment were disregarded in its entirety, the City should have summary judgment on all of the Developer's claims.

I. There are no disputed issues of fact relevant to any of the Developer's claims and thus discovery is not warranted

The Developer claims that the Court cannot award summary judgment to the City because there are triable issues of fact as to which the Developer needs discovery. Opp. at 3, 8-11. Wrong. None of the Developer's claims raises a single triable issue of *material* fact. The evidence the Developer proposes to obtain in discovery is not remotely relevant to the issues raised in the Developer's Complaint.

A. The City's answer does not raise a triable issue of fact

The City filed its answer on March 20, 2021, after the Developer filed its Opposition. In its Opposition, the Developer claimed that because the City had not yet answered the Complaint at the time, there must be a triable issue of fact. Dev. Opp. at 7-8. The Developer's contention is disingenuous because in a regulatory takings case, the government regulation that allegedly has taken the property is, by definition, the adoption of legislation or a quasi-adjudicatory decision by the City Council at public hearings that have the force of law. These laws and decisions are then posted on the City's website. The Developer's contention that it needs discovery to determine what laws the City Council has adopted or official actions the City Council has taken contradicts its prior allegation that the only relevant evidence in a regulatory taking case is the public agency's official actions:

> [L]iability for a taking in inverse condemnation is always a judicial determination. *McCarran v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006) ("[w]hether the government has inversely condemned private property is a question of law that we

> review de novo." *Id*. at 1121.) The question of whether a taking has occurred is based on Government action and can frequently be determined solely based on government documents (the truth and authenticity of the same are rarely in question). Therefore, this Court can review the facts as presented in the City's own documents and apply the law to those facts to make the judicial determination of a taking.

Ex. GGGG at 2169 (Landowners' Reply In Support of Countermotion for Judicial Determination of Liability Etc. filed 3/21/19 in *180 Land Company, LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J ["Reply re Judicial Determination"]). Thus, all documentation of the City's official actions with regard to the 17-Acre Property was before the Court when the City filed this MSJ.

Moreover, the City demonstrates below that the Developer's claims for relief raise no triable issues of fact, only issues of law. The Developer also fails to alert the Court that (a) the City long ago answered the complaints in the other three Badlands cases where the Developer alleges the same or similar facts and claims for relief, and (b) the parties have filed dozens of motions in the four actions, including a motion to dismiss in this case, where the City stated its position on all relevant facts and issues. Accordingly, at the time the City filed this MSJ it was clear where the City agrees and disagrees with the Developer's allegations of fact and law. The City's Answer, filed after the Developer's Opposition, further reinforces that there are no triable issues of fact in this case.

B. There is no triable issue of fact regarding the validity of the PR-OS General Plan Designation of the 17-Acre Property

In its first and second claims for relief, the Developer requests a declaration that the PR-OS General Plan (also referred to as Master Plan) designation of the Badlands is invalid and an injunction preventing the City from relying on the PR-OS designation to deny development of housing on the 17-Acre Property. Compl. ¶¶ 45-57. The Court does not need to reach this issue because in February 2017, the City Council approved the Developer's 17-Acre Applications for 435 luxury housing units and approved a rezoning from R-PD7 to R-3, along with a General Plan Amendment to change the land use designation from PR-OS to Medium Density Residential. Ex. DD at 586, 587-89, 591-97; Ex. SSS. Because the City removed the PR-OS designation from the 17-Acre Property to allow the Developer to build 435 residential units, the Developer's claim that the PR-OS designation is invalid or inapplicable is moot and no discovery on this issue is necessary.

Even if the Court were to reach this issue, no discovery would be required. The validity of the Badlands' PR-OS designation is not open to factual question or dispute because it was imposed by ordinance of the City Council. Exs. I, K, L, N, O, P, Q. The validity of an ordinance raises issues of law, not fact. Moreover, the City Council imposed the PR-OS designation on the Badlands in 1992. Ex. I at 195-204, 212-18, 246, 248. This lawsuit challenging the PR-OS designation was filed in 2017, 25 years too late. *See* NRS 278.0235 (25-day statute of limitations for challenge of final action of City Council).

The Developer also contends that the PR-OS designation is not applicable because the zoning of the 17-Acre Property granted the Developer a property right to put housing on the property. *See* Opp. at 10-11; Reply in Support of Plaintiff Landowners' Motion to Determine "Property Interest" ("Property Interest Reply") filed 3/10/21 at 18-20. This claim does not require discovery for the further reason that it is based on an egregious misrepresentation of fact and law. In its Property Interest Reply, filed after the City filed this MSJ, the Developer submitted false information to the Court in an attempt to show that the PR-OS General Plan designation of the 17-Acre Property is inapplicable.

In particular, at pp. 21-22 of the Property Interest Reply, the Developer states:

- [T]he City's own code and Las Vegas 2020 Master Plan cited by the City Attorney plainly state that "POST-ZONING" the "LAND USE HEIRARCHY" is the "ZONING DESIGNATION" and "MASTER DEVELOPMENT PLANS/SPECIAL AREA PLANS" such as the PRMP, the "LAND USE DESIGNATION" such as the PR-OS, the "LAND USE ELEMENT" and "LAS VEGAS 2020 MASTER PLAN" i.e. the General Plan are "N/A [not applicable]." Mot. Exhibit 25, inserted below.

In the text and diagram above, the Developer represents to this Court that the City's "code" and 2020 Master Plan "plainly state" that after property is zoned, the PR-OS land use designation in the Land Use Element of the Las Vegas 2020 Master Plan is "N/A [not applicable].'" Property Interest Reply at 21-22. The Developer represents that the diagram following this statement is part of the City's 2020 Master Plan, stating that the General Plan designation of property is "N/A" [not applicable] after the property has been zoned. *Id.* The Developer submitted this evidence and argument in support of its claim that because the 17-Acre Property is zoned R-PD7, the City's General Plan designation of the property is not applicable and the Developer has a constitutional right to the City's approval of its plan to develop housing on the 17-Acre Property. The Developer's evidence, however, is a fabrication.

The two-pyramid diagram that the Developer represents as contained in the City's 2020 Master Plan is, in fact, a diagram created *by the Developer* that the Developer's attorney Jim Jimmerson submitted to the City's Planning Commission at the hearing on the Developer's 17-Acre applications to support the Developer's contention that the PR-OS General Plan designation of the 17-Acre Property did not apply. Ex. DDDD at 1521-22. The second pyramid stating that the General Plan designation is "N/A" was *not* created by the City and appears in *no* City document. *Id*. The City's General Plan contains only the pyramid on the left, which shows that the General Plan is the foundation for land use regulation in the City, and that zoning, at the top of the pyramid, implements the General Plan, as follows:

LAND USE HIERARCHY

The land use hierarchy of the city of Las Vegas is designed to progress from broad to specific. In descending order, the land use hierarchy progresses in the following order: 2020 Master Plan; Land Use Element; Master Plan Land Use Designation; Master Development Plan Areas; and Zoning Designation. The following is a brief explanation of the role assumed by each level of the land use hierarchy.

Ex. AAAA at 1434.

Moreover, the Developer's contention that the 2020 Master Plan "plainly states" that after property is zoned, the PR-OS designation is "N/A" is a deliberate misrepresentation. The Master Plan actually states that zoning must conform to the Master Plan as required by state and Las Vegas law:

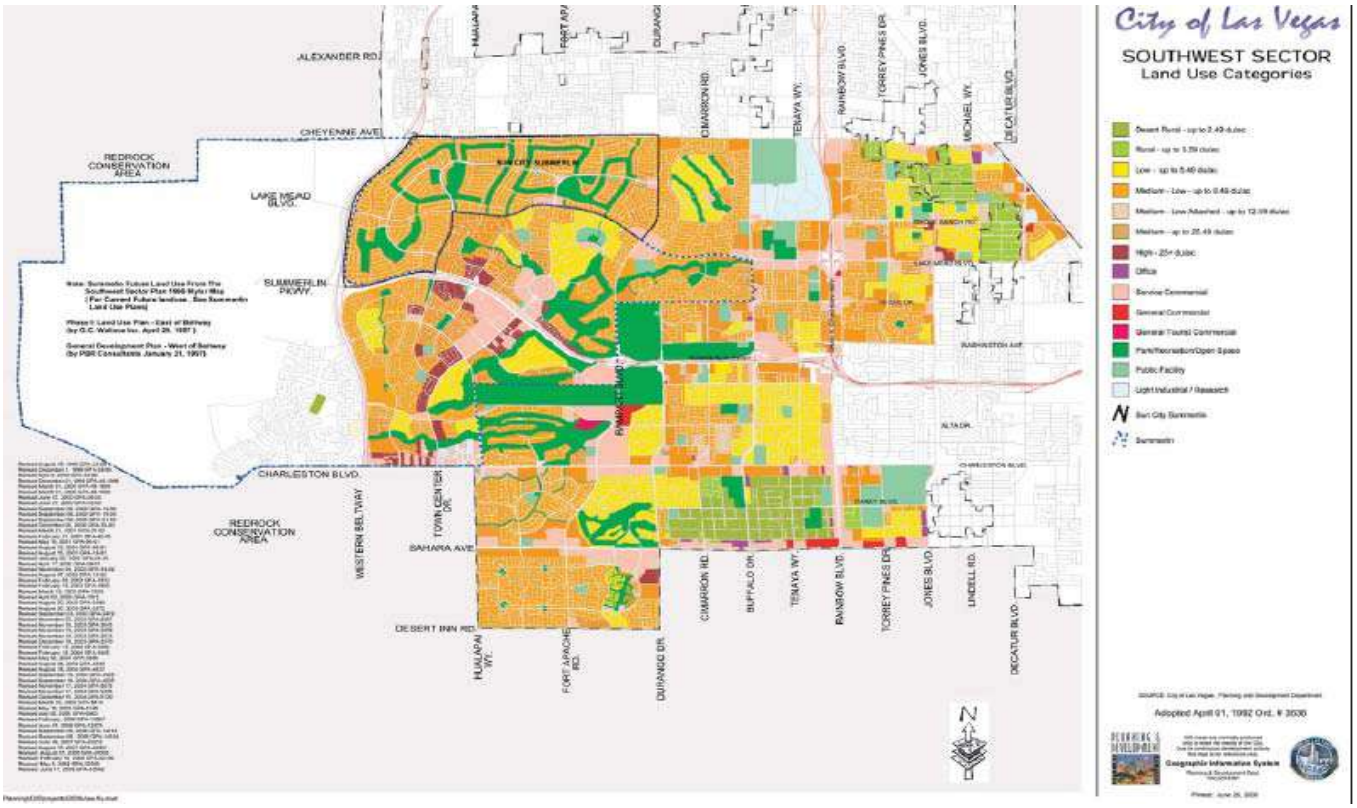
ZONING

Zoning is the major implementation tool of the Master Plan. The use of land as well as the intensity, height, setbacks, and associated parking needs of a development are regulated by zoning district requirements. Each Master Plan designation has specific zoning categories that are compatible, and any zoning or rezoning request must be in substantial agreement with the Master Plan as required by Nevada Revised Statutes 278.250 and Title 19.00 of the Las Vegas Municipal Code. The land use tables within the Future Land Use section of this element depict the allowable zoning districts for each Master Plan designation.

Ex. AAAA at 1435 (highlighting added); *see also City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 267, 236 P.3d 10, 13 (2010) (zoning must conform to Master Plan). The Master Plan does not allow residential use on property designated PR-OS:

> **PR-OS (Parks/Recreation/Open Space)** – The Parks/Recreation/Open Space category allows large public parks and recreation areas such as public and private golf courses, trails, easements, drainage ways, detention basins, and any other large areas or permanent open land.

See, *e.g.*, Ex. P at 316; Ex. Q at 331. Finally, the 2020 Master Plan shows the 17-Acre Property (and the entire Badlands) designated PR-OS (green area in middle directly north of Charleston Blvd. with fingers extending west):



Ex. P at 332.

The Developer has thus substituted an altered diagram for the true diagram in the City's Master Plan; represented that its diagram is the true diagram; and represented that the Master Plan provides that once the 17-Acre Property was zoned, the General Plan designation of the property was "not applicable" to the 17-Acre Property, when, in fact, the General Plan provides the opposite; i.e., zoning is subordinate to the General Plan designation. Because the 17-Acre Property was designated PR-OS in the General Plan when the Developer purchased the Badlands, the Developer was required to obtain the City Council's approval of an amendment to the General Plan designation to build housing on the 17-Acre Property,

regardless of the zoning of the property. The Developer could not have had a "property right" to build housing on the 17-Acre Property.[6]

C. There is no triable issue of fact regarding the Developer's categorical and *Penn Central* taking claims

In its third and fourth claims for categorical and *Penn Central* takings, the Developer alleges that the City's regulation prevented any use of the 17-Acre Property. Compl. ¶¶ 58-86. A categorical taking by excessive regulation of the *use* of property occurs when a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). If a regulation does not completely wipe out all economically beneficial use, a property owner may still allege a *Penn Central* taking. Liability for a *Penn Central* taking is determined based on review of several factors; "[p]rimary" among them is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id*. at 538-39 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). The Supreme Court made clear, however, that even a *Penn Central* claim requires a near wipeout. *Id.* at 539-40. Thus, under *both* the categorical and *Penn Central* takings tests, the only regulatory actions that cause takings are those "that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id*. at 539.

The Nevada Supreme Court has adopted the same test, requiring an extreme economic burden to find liability for a regulatory taking. *State*, 131 Nev. at 419, 351 P.3d at 741 (to effect a regulatory taking, the regulation must "'completely deprive[] an owner of all economically beneficial use of her property'") (quoting *Lingle*, 544 U.S. at 538); *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034 (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

[6] The Developer claims that Judge Williams found that the Developer has a property right to build housing in the Badlands. As explained in the City's Opposition to Developer's Motion to Determine Property Interest filed 2/24/21 at 21-24, Judge Williams made no such finding.

development property").

To be the functional equivalent of eminent domain, the challenged regulatory action must cause a truly "severe economic deprivation" to the plaintiff. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007); *see also MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient to show a taking); *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing cases in which diminutions of 75% and 92.5% insufficient to show a taking); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (95% diminution not a taking); *Brace v. United States*, 72 Fed. Cl. 337, 357 (2006) ("diminutions well in excess of 85 percent" required to show a taking).

The only documents relevant to the Developer's categorical and *Penn Central* claims are matters of public record and subject to judicial notice: the City's approvals of the 435-unit project (Ex. SSS at 1282-87), the Supreme Court's Order of Reversal reinstating the City's approvals after Judge Crockett had invalidated them (Ex. DDD at 1010-16), and the City's two letters notifying the Developer that the approvals are valid and extending the time to start construction by two years (Ex. FFF at 1019; Ex. GGG at 1021). NRS 47.130, 47.140, and 47.150 (standards for taking judicial notice). No evidence that could be obtained in discovery can alter these facts. As demonstrated above, the Developer agrees: "The question of whether a taking has occurred is based on Government action and can frequently be determined solely based on government documents (the truth and authenticity of the same are rarely in question)." Ex. GGGG at 2169 (Reply re Judicial Determination).

Documentation of the City's official actions affecting the 17-Acre Property demonstrate that the City's regulation did not diminish the value of the 17-Acre Property, but rather the City approved the Developer's housing project and increased the property's value. Accordingly, the Developer's categorical and *Penn Central* regulatory taking claims are without merit as a matter of law. Discovery of the statements and actions of City officials, employees, or citizens that the Developer claims it needs at pp. 8-11 of its Opposition cannot alter that result.

For example, the Developer contends that the statements of City staff are relevant to its categorical and *Penn Central* claims because "the Nevada Supreme Court relied on . . . staff comments

in finding a taking in the *Sisolak* case." Dev. Opp. at 8. Wrong. A comment by City staff before or after the City approved the Developer's applications to develop 435 luxury housing units on the 17-Acre Property has no relevance to the validity of those approvals or the impact on the use or value of the 17-Acre Property. Contrary to the Developer's contention, the *Sisolak* Court did not find that a staff member's telling the landowner "not to bother" asking for a variance was relevant to its determination whether a physical taking had occurred. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 653-54, 137 P.3d 1110, 1116 (2006) ("*Sisolak*"). The Court found that the challenged ordinances effected a physical taking because they required the property owner to allow airplanes to fly in the owner's airspace. 122 Nev. at 666, 137 P.3d at 1124. While the opinion references the statements of the staff member as part of the case's background facts, the statements in no way assisted the court with its takings determination, which was limited to a facial analysis of what the ordinances themselves authorized. 122 Nev. at 653, 666-67, 137 P.3d at 1116, 1124-25. *Sisolak* therefore provides no support for the Developer's contention that the statements of individual members of the City Council or City staff are relevant to the takings analysis.

As a second example, the Developer claims that it needs discovery to determine why it "t[ook] the City nearly a month to write the Landowners to allegedly reissue the approvals after the Crockett Order was overturned by the Nevada Supreme Court." Dev. Opp. at 9-10. The Developer fails to explain how this alleged fact could be relevant to whether the City's approvals of the 435-unit project on the 17-Acre Property are valid. As the appellant, the Developer received a copy of the Nevada Supreme Court's March 5, 2020 Order of Reversal reinstating its approvals. *See* Ex. DDD. The Developer did not *need* notice from the City to understand that its approvals would be reinstated as soon as the Supreme Court issued its remittitur. That the City gave the Developer the *courtesy* of notifying it on March 26, 2020 (three weeks after the Supreme Court decision, not a month) that its permits would be reinstated in the future when the Supreme Court issued its remittitur, and that when the Court issued its remittitur the City would extend its time to start construction by two years to account for the appeal of the Crockett Order (Ex. FFF at 1019), does not indicate that the City was "clawing back" the 17-Acre approvals. It indicates the opposite.

The Developer contends that it needs discovery to determine "what happened during [the] three-

year period" between the City's "February 2017 approvals of the 17 Acre Applications and its alleged 2020 reissuance of the 17 Acre Applications." Dev. Opp. at 9. The Developer contends that "the City Council drastically changed its position towards the 250 Acres" after the June 2017 election. *Id.* at 10. It further contends that "the Landowners need to conduct discovery to assess why the City held one position prior to the elections and an entirely opposite position after the election and then an entirely different position after Seroka resigned." *Id.* at 11.

The Developer fails to explain why any of this evidence would have any bearing on this case, where the Developer cannot genuinely dispute public records showing that the City approved the Developer's 17-Acre applications, Judge Crockett voided the approvals, the Nevada Supreme Court reinstated the approvals, and the City notified the Developer that the approvals have been reinstated (not "reissued" as the Developer claims). None of the City's actions after it approved the Developer's 17-Acre applications and before the Supreme Court reinstated the approvals, *during which period the City's approval was void under the Crockett Order*, has any relevance to the Developer's taking claims. The City Council's actions regarding other properties the Developer segmented from the Badlands, e.g., the 35-Acre Property, also have no relevance to the 17-Acre approvals. The City approved the 17-Acre applications and the approvals have been validated and reinstated. On this basis, the Developer's taking claims fail.

The Developer also contends that it needs to conduct discovery of City staff because one staff member asked other members to direct any permits for "grading or clear and grub of the Badlands" to her. Dev. Opp. at 17. Again, the Developer fails to explain why this information is material to this case. The evidence cannot be relevant because it would have no impact on the Developer's ability to use the 17-Acre Property. All official acts of the City affecting the use or value of the Badlands are in the public record and cannot genuinely be disputed.

Judge Herndon confirmed that there is no triable issue of fact as to whether the City "clawed back" the 17-Acre approvals:

> The Developer's contention that the City "nullified' the 435-unit approve is without any support in the evidence. The Developer's contention that the City's declining to extend the 17-Acre approvals after Judge Crockett invalidated the approvals means that the City "nullified" the approvals is frivolous. The City supported Developer and opposed Judge Crockett's Order at the trial court level and in the

> Nevada Supreme Court, where the City filed an amicus brief requesting that the Supreme Court reverse the Crockett Order and reinstate the 17-Acre Property approvals. . . ¶ Prior to the Supreme Court's Order of Reversal, the 17-Acre approvals were legally void and there was nothing to extend. If the City had attempted to extend the approvals, the City could arguably have been in contempt of Judge Crockett's Order. *See* NRS 22.010(3) (disobedience or resistance to any lawful writ or order issued by the court shall be deemed contempt); *see also Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007) (a judgment has preclusive effect even when it is on appeal), *abrogated on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008). After the Supreme Court reinstated the approvals, the City had no power to nullify the approvals even if it had intended to do so. To the contrary, upon reinstatement, the City twice wrote to the Developer extending the approvals for two years after the date of the remittitur. Ex. FFF at 1019; Ex. GGG at 1021. The Court accordingly rejects the Developer's argument that the City "nullified" the City's approval of 435 luxury housing units on the 17-Acre Property.

Ex. CCCC at 1507-08.[7] This finding has issue preclusive effect in this case. *See Five Star Capital Corp.*, 124 Nev. at 1055, 194 P.3d at 713.

D. There is no triable issue of fact, and no discovery is necessary or allowed, regarding the Developer's physical taking claim

In its fifth cause of action for a physical taking (Compl. ¶¶ 87-94), which the Developer identifies as a "regulatory per se taking," the Developer alleges that the City's Bill 2018-24 prevented the Developer from excluding the public from the 17-Acre Property (Dev. Opp. at 13), and that other City regulation prevented development of the 17-Acre Property with housing, preserving the property as a "viewshed" for the surrounding community. Dev. Opp. at 16. These claims present questions of law, not facts. Accordingly, no discovery is warranted on them.

1. No discovery is necessary regarding Bill 2018-24 because that legislation did not apply to the 17-Acre Property

The Developer misrepresents that a City ordinance, Bill 2018-24, adopted in November 2018,

[7] At the hearing on the Developer's motion for a new trial and reconsideration of the Herndon Judgment in the 65-Acre case, Judge Trujillo questioned certain legal conclusions of the Judgment, specifically whether the final decision ripeness requirement applies to the Developer's categorical taking claim. Ex. JJJJ at 2263-65. That legal issue is not relevant to this 17-Acre case, where the Developer applied to develop the Property and the City approved the applications. The application of the final decision ripeness doctrine is a question of law, not fact. Judge Trujillo did not question the parts of the Herndon Judgment relevant here, including any of Judge Herndon's Findings of Fact or his Conclusion of Law that the Developer's claim that the City "clawed back" the 17-Acre approvals is "frivolous." *See id*. at 2265. These findings and conclusions remain final.

effected a physical taking of the 17-Acre Property similar to the physical taking in *Sisolak*. The Developer alleges that Bill 2018-24 "expressly states the Landowners **must** allow 'ongoing public access' and 'plans to ensure that such [public] access is maintained.'" Dev. Opp. at 13 (emphasis original). This is pure fiction; Bill 2018-24 does nothing of the sort.

Bill 2018-24, repealed by the City Council in January 2020 (Exs. LLL, MMM at 1138-50), did not apply to the Badlands. The Bill plainly stated that it applied to "any *proposal* by or on behalf of a property owner to repurpose a golf course . . ." Ex. DDDD-9 at 1554-55 (emphasis added). That language rules out application of the ordinance to *approved applications* like the 17-Acre applications, which was no longer a "proposal" but rather an approved project.

Even if Bill 2018-24 applied, there is no resemblance between Bill 2018-24 and the ordinances at issue in *Sisolak*. The *Sisolak* ordinances on their face required the property owner to allow commercial airplanes to physically occupy his airspace. 122 Nev. at 651-52, 666, 137 P.3d at 1114-15, 1124. In contrast, as Judge Herndon found, Bill 2018-24:

> [I]mposed new requirements that a developer discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City and other requirements for the application to develop property. They were designed to increase public participation and did not impose substantive requirements for the development project [. . .].

Ex. CCCC at 1513. The provision in Bill 2018-24 regarding "ongoing public access" actually states:

> **G. Closure Maintenance Plan.** At any time after the Department becomes aware that a golf course that would be subject to this Section if repurposed has ceased operation or will be ceasing operation, the Department *may notify* the property owner of the requirement to comply with this Section. Similarly, at any time after the Department becomes aware that an open space that would be subject to this Section if repurposed has been withdrawn from use or will be withdrawn from use, the Department *may notify* the property owner of the requirement to comply with this Section. Any such notification shall be by means of certified mail and by posting at the subject site.
>
> * * *
>
> 2. Maintenance Plan Requirements. [. . .] [T]he maintenance plan must, at a minimum and with respect to the property:
>
> * * *
>
> d. Provide *documentation* regarding ongoing public access, access to utility easements, and plans to ensure that such access is maintained [. . .].

Ex. DDDD-9 at 1563-64 (emphasis added). Thus, the ordinance did not require a property owner to

"maintain" "ongoing public access," but merely to document its "plans" "to ensure that such access is maintained." *Id.* at 1564. Assuming that an owner were subject to the ordinance, which the Developer was not, it would not have been required to maintain ongoing public access, only to document any plans to do so, if any.

Bill 2018-24 did not apply to the 17-Acre Property for the further reason that the ordinance required a property owner subject to the ordinance to submit a "maintenance plan" "document[ing] ongoing public access" *only if* the City notified the property owner that it was required to submit one. Ex. DDDD-9 at 1563-64. If the City had notified the Developer that it needed to submit a maintenance plan "document[ing] ongoing public access," the Developer would have that notice in its possession and would not require discovery. The Developer cannot present such evidence because *the City never notified the Developer that it should submit a maintenance plan under Bill 2018-24*. *Id.* at 1519-20. The City Council repealed Bill 2018-24 in early 2020. During the time Bill 2018-24 was in effect, the Developer never submitted a maintenance plan. *Id*.[8] Bill 2018-24, therefore, did not apply.

Bill 2018-24 also does not apply because it required a property owner who submits a "proposal" to repurpose a golf course to submit a "maintenance plan" "document[ing] ongoing public access." DDDD-9 at 1554-55, 1564. Here, the Developer voluntarily shut down the entire Badlands golf course in 2016, so by the time the City Council adopted Bill 2018-24 in November 2018, and during the 15-month period the legislation was in effect, there was no "ongoing public access" to "document." The Developer may contend that "ongoing public access" was intended to include members of the public who had been trespassing on the Badlands since the Developer closed the golf course and up to the present. Dev. Opp. at 16; Ex. KKKK at 2267-68 . The Developer, however, concedes that those accessing the property from 2016 to the present were trespassers. *Id*. at 2267-68. The City has no responsibility for preventing trespassing on private property. It is plain from the language and context

[8] The Developer contends that Bill 2018-24 was enacted solely to prevent development of the Badlands, calling it the "Lowie Bill." Although this fact, even if true, would be irrelevant, the facts are otherwise. The Bill applies to all golf courses in the City. *See* Ex. DDDD-9 at 1554-55. The Developer bases its contention on statements of one City Council member who supported the Developer and the Developer's own lawyers, rather than on objective indicia that the Bill was targeted to the Developer. Finally, the Developer's claim is belied by the fact that the City never notified the Developer that it had to comply with the Bill. *See* Ex. DDDD-9 at 1563.

of Bill 2018-24 that "ongoing public access" meant public patrons invited onto the property by the owner of a golf course business, not trespassers. The Court should not interpret an ordinance in a manner that would achieve an absurd result. *J.E. Dunn Northwest, Inc. v. Corus Const. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (If a statute is ambiguous, the court must interpret the statute in such a way as to "avoid absurd results.") (quoting *Westpark Owners' Ass'n v. Dist. Ct.*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007)).

The Developer further concedes that the trespassers claimed that they had been informed that the trespassers owned the Badlands at a meeting of their homeowners association, not that they had been so informed by the City. Ex. KKKK at 2267. Even if there were evidence that a City Councilmember or City staff told members of the public that the 17-Acre Property "belonged" to them or that they could walk on the Badlands, individual legislators or City staff have no legal authority to decide who owns property or to give such permission, and that conduct would not constitute a regulatory taking, which requires valid regulation adopted by the entire City Council; *i.e*, regulation that has the force of law. Finally, the fact that the trespassing occurred long before and after the 15-month period in which Bill 2018-24 was in effect (*id*. at 2269; Ex. FFFF at 1599) further shows that Bill 2018-24 had nothing to do with trespassing on the Badlands.

Failing to prove that any City regulation allowed the public to physically occupy the Badlands, the Developer argues that the City effected a physical taking by preserving the Badlands as a "viewshed" for the surrounding community. Dev. Opp. at 11. This claim is nonsense. First, the City designated the Badlands as PR-OS in the General Plan in 1992 and maintained that designation through the date the Developer acquired the Badlands and up to the present (except for the 17-Acre Property, which is now designated for medium density residential, as the Developer requested). The purpose of the PR-OS designation, like all designated open space, is to preserve land for recreation, light, air, and views *for the surrounding community*. The City was fully within its rights to decline to amend the PR-OS designation and, in so doing, to retain the status quo. *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 the Commission to not enforce

conditions in place when it purchased 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"). Maintaining a regulation that historically was intended to, and had for many years, provided a viewshed for the surrounding community is not a taking under any taking test.

2. Discovery from legislators is prohibited

Even if Bill 2018-24 applied to the 17-Acre Property, and even if the statements of individual City Councilmembers were relevant to determine whether Bill 2018-24 applied, the law clearly prohibits the Developer's proposed discovery from Councilmember Seroka. Dev. Opp. 16-17.

Even in the limited legal contexts in which the basis of a decision-making body's action is relevant, courts have repeatedly held that evidence of the subjective considerations and motivations of individual decision-makers is irrelevant and that evaluating decisions on the basis of such motivations would be a "hazardous task." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984). Courts have therefore recognized a privilege against discovery and introduction of evidence of decision-makers' motives or reasons for their vote on legislation. Councilmember Seroka's subjective motives are completely irrelevant and protected from discovery by privilege.

a. Evidence of a single decision-maker's motivations may not be imputed to the City Council as a whole

Even if the Court could properly consider the basis or validity of the City Council's actions in passing Bill 2018-24 as part of its takings analysis, it may not consider a single decision-maker's statement of opinion or motives to divine legislative intent. *A-NLV-Cab Co. v. State, Taxicab Auth.*, 108 Nev. 92, 95, 825 P.2d 585, 587 (1992). "The relevant governmental interest is determined by objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *City of Las Vegas*, 747 F.2d at 1297; *see also In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) ("[I]f motivation is pertinent, it is the motivation

of the entire legislature, not the motivation of a handful of voluble members, that is relevant."). Accordingly, courts may only consider the "'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). Where a claim turns on motivation or purpose, the court's assessment must be based solely on "openly available data." *Id.* at 863. "[J]udicial psychoanalysis of a drafter's heart of hearts" is off limits. *Id.* at 862.

This, however, is exactly what the Developer seeks to do: discover the basis for Councilmember Seroka's vote to adopt Bill 2018-24. Even if the basis of the City Council's action in adopting Bill 2018-24 were relevant to the takings analysis (it isn't), the Court may not consider Councilmember Seroka's statements, including information about the basis of those statements, as evidence of the City Council's motivations or reasoning. Because the admitted purpose of the proposed discovery is to impute Councilmember Seroka's alleged motivations to the City Council as a whole, they are irrelevant and improper. Actions of individual City Councilmembers that are not endorsed by a vote of a majority of the City Council are not actions of the City. As such, they do not have the force of law and cannot "directly and substantially interfere with [an] owner's property rights." *State*, 131 Nev. at 421, 351 P.3d at 743. They are therefore irrelevant to the takings analysis.

Instead, the only relevant actions for determining whether the government is liable for a physical regulatory taking are government regulatory actions that have the force of law. *See Williamson Cty. Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), overruled on other grounds by *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019). A physical regulatory taking by its very nature requires the application of a *regulation* that prevents the owner from excluding others from the property. *See*, *e.g.*, NRS 278.3195(4); *Nevada Contractors v. Washoe County*, 106 Nev. 301, 313, 792 P.2d 31, 33 (1990); *Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. Adv. Op. 40, 307, 419 P.3d 140, 142 (2018) (An "action" by a public body is a "decision, commitment, or vote 'made by a majority of the members present . . . during a meeting of a public body.'") (quoting NRS 241.015(1)). Under Nevada's Open Meeting Law, the City can adopt regulations only through the City Council at a properly noticed public meeting that meets all statutory requirements. *See* NRS 241.015, .020, .035, .036; *see also Pac. Tel. & Tel. Co. v. City of Seattle*, 14 F.2d 877, 880 (W.D. Wash. 1926) (A

"city can speak only through its council."). A public body that must be 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). Absent compliance with all statutory requirements, the City's action is void and therefore irrelevant to the taking analysis. NRS 241.036.

Accordingly, any statements by Councilmember Seroka regarding the intent of Bill 2018-24 outside the City Council hearing where the ordinance was considered, or contending that the Badlands "belonged to the neighbors" and purporting to give the neighbors permission to walk on the Badlands (Dev. Opp. at 16) are irrelevant to the Court's inquiry, which is necessarily limited to the effect of the City Council's legislative action that allegedly affected the Developer's property.

b. The subjective considerations and motives of individual decision-makers are privileged

Under well-established law, discovery from Councilmember Seroka is prohibited. The irrelevance of legislators' and quasi-adjudicative decision-makers' subjective motivations has compelled the courts to recognize a "mental process privilege," which prohibits discovery of public agency decision makers' subjective motivations for or considerations in reaching a challenged decision. *See N. Pacifica LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (citing, among other cases, *United States v. Morgan*, 313 U.S. 409 (1941), *City of Las Vegas*, 747 F.2d 1294 (9th Cir. 1984), and *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966)); *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 2d 136, 139 (D. Mass. 2001) (holding that "inquiry into each Selectman's personal motivation generally is not appropriate") (citing *City of Las Vegas*); *Miles-UN-Ltd. v. Town of New Shoreham*, 917 F. Supp. 91, 98 (D.N.H. 1996) (denying motion to compel testimony about local officials' motives for amending ordinance); *Searingtown Corp. v. N. Hills*, 575 F. Supp. 1295, 1299 (E.D.N.Y. 1981) (refusing motion to compel local legislators to testify about their motives in rezoning property).

Courts have also recognized a "deliberative process privilege," the purpose of which is to "allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Assembly of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). This privilege precludes the taking of testimony about policy and decision-makers' deliberations,

including their pre-decisional "opinions, recommendations, or advice about . . . policies" as well as facts that are "so interwoven with the deliberative material that [they] are not severable." *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see also National Wildlife Fed'n v. U.S. Forest Service*, 861 F.2d 1114, 1119 (9th Cir. 1988) (deliberative process privilege protects facts that are "inextricably intertwined with policy-making processes") (citing *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980); *Lead Industries Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d. Cir. 1979); *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971)).

The mental and deliberative process privileges stem from the separation of powers between the legislative/executive branches of government and the judicial branch. *See*, *e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-99 (1937) (judicial restraint respects the separation of powers because it requires that courts refrain from replacing the policy judgments of lawmakers and regulators with their own with regard to non-fundamental constitutional rights). Nevada's Constitution expressly prohibits one branch of government from impinging on the functions of another. *Secretary of State v. Nevada State Legislature,* 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Nevada Constitution provides that the state government "shall be divided into three separate departments" and prohibits any person authorized to exercise the powers belonging to one department to "exercise any functions, appertaining to either of the others" except where expressly permitted by the Constitution. Nev. Const. art. 3 § 1.

Separation of powers "is probably the most important single principle of government declaring and guaranteeing the liberties of the people." *N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) (internal citation and quotation marks omitted); *see also Blackjack Bonding v. Las Vegas Mun. Ct.,* 116 Nev. 1213, 1219, 14 P.3d 1275, 1279 (2000) ("It is fundamental . . . that powers separately vested in the executive, legislative, and judicial departments be exercised without intrusion."). Within this framework, Nevada has delegated broad authority to city legislative bodies to regulate land use for the public good. *See, e.g.*, NRS 268.001(6), (6)(a); 268.003(2)(b); *see also* NRS 278.020(1); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 254, 439 P.2d 219, 222 (1968). Under the separation of powers doctrine, courts are not authorized to second-guess land use legislation by conducting discovery of the reasons for the legislative acts.

The Developer may contend that its discovery would seek "facts," not mental impressions, and

is therefore not barred by either privilege. But the requested information – the *basis* of Councilmember Seroka's vote on Bill 2018-24 or alleged statement that the Badlands "belonged to the neighbors and the neighbors had the right to use the Landowners' Property" (Dev. Opp. at 16) – necessarily reflect Councilmember Seroka's *reasons* for voting the way he did on Bill 2018-24 or for allegedly granting such permission. As demonstrated above, Seroka's statements to the neighbors are not the official policy of the City Council and are not relevant. But if the Developer contends that the statements *are* relevant because they are the official policy of the City, then the Developer would plainly be seeking to probe Seroka's subjective motivations and considerations, which is absolutely forbidden. Under the mental process and deliberative process privileges, therefore, which are derived from the separation of powers, the Developer is prohibited from inquiring into the motivations, mental impressions, or reasons for a legislator's actions. The Developer's claim that it needs to conduct discovery from Councilmember Seroka is not grounds to deny the City summary judgment.

3. Even if the City had prevented development of the 17-Acre Property to preserve it as a viewshed for neighboring property owners (it didn't), that action would not constitute a physical taking

The Developer contends that the City has effected a physical taking by requiring the Developer to leave the 17-Acre Property vacant as a "viewshed" for neighboring property owners. Dev. Opp. at 11, 15. This claim fails, and discovery thereon is accordingly neither required or justified, because the City did not prevent development of the 17-Acre Property. But even if the Court were to indulge the Developer's charade that the 17-Acre approvals have disappeared into thin air, the Developer's claim that prevention of development can effect a physical taking is contrary to all authority and is illogical.

The Developer confuses a physical taking with a taking based on excessive regulation of the *use* of property by the owner. The latter are categorical and *Penn Central* claims. A physical taking requires that the public agency either *physically* occupy private property or restrict the owner's ability to prevent others from *physically occupying* the property. *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 426, 436 (1982) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") (quoting *Penn Central*, 438 U.S. at 124); *Tahoe-Sierra Pres. Council Inc. v. Tahoe Regional Planning*

Agency, 535 U.S. 302, 321-22 (2002) ("When the government physically takes possession of an interest in property for some public purpose," it may be liable for a physical taking.). Here, the Developer does not assert and has no evidence to show that the City has physically occupied the 17-Acre Property. *See Loretto*, 458 U.S. at 426, 436.

Simply limiting the *use* of property to protect community interests, such as a viewshed, is not, by law or logic, a physical taking. *Loretto*, 458 U.S. at 426, 436; *Tahoe-Sierra*, 535 U.S. at 321-22; *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122. Allegations of protecting a "viewshed" by restricting development of property would constitute a categorical or *Penn Central* taking claim, in which the claimant alleges excessive regulation of the *use* of property. *See 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; *see also Sisolak*, 122 Nev. at 662, 137 P.3d at 1122 ("In determining whether a property owner has suffered a per se taking by physical invasion, a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private *uses* of the space.") (internal citations omitted; emphasis added). The City has demonstrated above that no discovery is warranted for the Developer's categorical and *Penn Central* claims. Likewise, it is not necessary for the Court to adjudicate the Developer's categorical and *Penn Central* claim under the guise of a physical taking claim.

E. The Developer does not need discovery on its non-regulatory taking claim

The Developer's sixth cause of action asserts a "nonregulatory taking" under Nevada caselaw, claiming that the City's actions were "oppressive," "unreasonable," and aimed at precluding "any use of the 17 Acres." Compl. ¶¶ 95-102 (emphasis added). A non-regulatory taking can occur "if the government has 'taken steps that substantially interfere[] with [an] owner's property rights to the extent of *rendering the property unusable or valueless to the owner*.'" *State*, 131 Nev. at 421, 351 P.3d at 743 (alteration in original; emphasis added) (quoting *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed. Cir. 2013)). A non-regulatory taking occurs only in "extreme cases" involving either (a) a physical taking or (b) unreasonable actions that interfere with use or diminish the value of property after the agency has officially announced an intent to condemn the property. *See id.* at 421-23. For example, in describing the limited circumstances in which a non-regulatory taking claim might be

possible, the Nevada Supreme Court relied on *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), a case involving extreme and unreasonable actions, including repeatedly flooding property before a planned condemnation of that property. *State*, 131 Nev. at 421-23, 351 P.3d at 743. The Court in *State* ultimately concluded that the alleged agency actions taken in advance of a planned condemnation in that case did not rise to the "extrem[e]" level shown in *Richmond Elks* as required for a non-regulatory taking claim. *Id.* at 422, 743.

The City could not have rendered the 17-Acre Property "useless or valueless to the owner," either through regulation or nonregulatory action because the City approved the construction of 435 luxury housing units on the property. The Developer cites no evidence that the City did anything to prevent the Developer from using the 17-Acre Property for construction of the 435-unit housing project the Developer proposed for the property or for its historic use for golf course and drainage. As shown above, the City did not physically invade any part of the Badlands or purport to give permission to the public to physically occupy the 17-Acre Property. Nor does the Developer allege that the City condemned the 17-Acre Property or made an official announcement of an intent to condemn which could give rise to a nonregulatory taking claim.[9] There is thus no triable issue of fact on the nonregulatory taking claim. The Developer does not require discovery, and the City should have summary judgment on the nonregulatory taking claim.

F. The Developer's judicial taking claim is moot

The Nevada Supreme Court reversed the Crockett Order on which the Developer's judicial taking claim was based. Compl. ¶¶ 104-111. Accordingly, the claim is moot and the Developer does not need discovery on this claim.

G. The Developer does not need discovery for its temporary taking claim

The Developer's eighth claim for a temporary taking does not state a separate cause of action.

[9] In other Badlands cases, the Developer claims that the City identified "$15 million of potential City funds to purchase the 250 Acres." 65-Acre case Ex. 144. This evidence does not demonstrate a nonregulatory taking. The Developer's Exhibit 144 is informal notes of an unidentified person, likely former City Councilmember Seroka. The note of an individual City Councilmember is not remotely the official policy of the City Council and could not constitute the extreme interference with the use or value of the Badlands required for a nonregulatory taking. There is no evidence of any official action indicating that the City intended to acquire the Badlands.

Compl. ¶¶ 112-117. A temporary taking occurs when a court finds that a regulation effects a permanent taking under *Lucas* or *Penn Central*, and the public agency thereafter rescinds the regulation to avoid paying compensation for a permanent taking. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318-19, 321 (1987). In that scenario, the agency must pay compensation for the period during which the regulation temporarily prevented all use of the property. *Id.* at 321-22. A temporary taking, therefore, does not arise unless and until the court finds that a permanent regulatory taking has occurred, and the agency rescinds the regulation causing the taking. *See id.* For the reasons outlined above, the City is not liable for a permanent regulatory taking, so the temporary taking claim fails as a matter of law.

H. The Developer does not need discovery to support its due process claim

In its ninth claim for relief for a violation of due process, the Developer contends that by not "allowing development of the 17 Acres," the City violated the Developer's "vested and property rights." Compl. ¶¶ 118-125. This claim is based on the Developer's claim that the R-PD7 zoning of the Badlands conferred a constitutional right on the Developer to build housing in the 17-Acre Property. Because the City approved the 17-Acre applications, however, the premise for the claim is false and the claim fails. No discovery is necessary to determine whether the City prevented development of the 17-Acre Property.

Moreover, as demonstrated in the MSJ at 20-22, the Ninth Circuit rejected the Developer's due process claim and that decision is an issue preclusion bar to the claim in this case. Ex. HHH at 1037; Ex. TTT at 1290; Ex. III at 1125-26; *Five Star Capital Corp.*, 124 Nev. at 1055, 194 P.3d at 713. The Ninth Circuit decision is consistent with overwhelming Nevada authority that zoning limits the use of property; it does not confer property or vested rights. *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004) (project proponent did not have vested right to site development plan despite fact that its proposed development was consistent with the existing zoning); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992) ("[I]t is clear that compatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) ("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 . . . ."); *Bd. of Cty. Comm'rs*

v. CMC of Nev., Inc., 99 Nev. 739, 747, 670 P.2d 102, 107 (1983) (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."). Accordingly, even if the City had prevented development of the 17-Acre Property, the due process claim fails as a matter of law and no discovery would be justified.

II. The Herndon Judgment remains final as to the issues of law and fact pertinent to this case

The Developer claims that the MSJ should be denied because the City relied on the Herndon Judgment in the 65-Acre case. The Developer claims that the Herndon Judgment is not final and did not address the Developer's claims in this 17-Acre case. Dev. Opp. at 3-7. The City cites the Herndon Judgment only for factual background and to support its position on four points of law: (a) the legal standard for summary judgment; (b) the tests for regulatory takings liability, (c) the Developer's claim that the City "clawed back" the 17-Acre approvals, and (d) the increased value of the Badlands due to the City's approval. The Findings of Fact and Conclusions of Law set forth in the Herndon Judgment were based on undisputed documentary evidence and overwhelming authority submitted by the City in the 65-Acre case – the same evidence and authorities the City has submitted in this 17-Acre case in support of the MSJ.

In its Opposition, the Developer relies on the simplistic argument that the MSJ should be denied because the Herndon Judgment is not binding, but then fails to cite any relevant evidence or authority to rebut the evidence and authorities submitted by the City in support of the MSJ *or* on which Judge Herndon relied in his Judgment. On this basis, the Developer has failed to carry its burden as the non-moving party to show that there is a triable issue of fact in this case or that its claims have a valid legal basis. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992) (The non-moving party must "set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him."); *see also Larcom v. Law Offices of Patenaude & Feliz, A.P.C.*, 2007 WL 9728771, at *2 (D. Nev. 2007) ("Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the moving party.") (citing FRCP 50(a)). The Court, therefore, should grant summary judgment to the City even if the Court disregards the Herndon Judgment.

Although the Herndon Judgment is not necessary for the City to prove its case, the parts of the

Herndon Judgment cited by the City in this MSJ remain final and binding. At the hearing on the Developer's motion for a new trial and reconsideration of the Herndon Judgment in the 65-Acre case, Judge Trujillo questioned only three legal conclusions of the Judgment, specifically whether the final decision ripeness requirement of *Williamson County*, 473 U.S. 172, applies to the Developer's categorical taking claim and whether the Herndon Judgment addressed the Developer's physical and nonregulatory taking claims. Ex. JJJJ at 2263-65. Judge Trujillo indicated no concern with the Herndon Judgment's Findings of Fact and Conclusions of Law supporting summary judgment for the City on the Developer's *Penn Central* claim. The final decision requirement is not relevant to this 17-Acre case, where the Developer not only applied to develop the Property in question but also the City approved the application. Although Judge Trujillo has yet to rule on the Developer's motion for a new trial and has set the matter for a further hearing, Judge Trujillo made no indication that those parts of the Herndon Judgment cited by the City will be altered.

In its Opposition, the Developer contends that because the Herndon Judgment found that the categorical and *Penn Central* taking claims were unripe, the Herndon Judgment did not resolve any factual or legal issue relevant to this 17-Acre case. Dev. Opp. at 4-6. The Developer is incorrect. The Herndon Judgment made numerous Findings of Fact and Conclusions of Law that were essential to the conclusion that the *Penn Central* claim is unripe, including the tests for liability for a regulatory taking and the Conclusion of Law that the Developer's argument that the City "nullified" the 17-Acre approvals is frivolous. *See* Ex. CCCC at 1499-1504, 1507-08. The Developer, however, confuses claims and issues. The City does not contend that the Herndon Judgment precludes any of the Developer's claims with regard to the 17-Acre Property, only issues, such as whether the City has "clawed back" the 17-Acre approvals, which was an essential finding supporting Judge Herndon's judgment for the City on the Developer's *Penn Central* claim. *See id*. at 1507-08.

Even if the Court disagrees, the Herndon Judgment's Findings of Fact and Conclusions of Law are well-supported, thorough, and sound, and provide useful guidance to the Court.

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. . .

CONCLUSION

The City's Motion for Summary Judgment should be granted. The Developer's Motion to Determine Property Interest should be denied as moot.

Dated this 11th day of May, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 11th day of May, 2021, I caused a true and correct copy of the foregoing **CITY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

Exhibit 6

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, Ltd., SEVENTY ACRES, LLC, a Nevada Limited Liability Company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X,

Plaintiffs,

vs.

CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendants.

Case No.: A-18-775804-J

Dept No.: XXVI

CITY OF LAS VEGAS' MOTION TO REMAND 133-ACRE APPLICATIONS TO THE LAS VEGAS CITY COUNCIL

Hearing Date: TBD
Hearing Time: TBD

HEARING REQUESTED

Pursuant to NRS Chapter 233B and NRCP Rule 7(b), the City of Las Vegas ("City") submits this Motion to Remand 133-Acre Applications to the Las Vegas City Council.

The City Council was bound by the Crockett Order when the Developer's 133-Acre Applications came before it on May 16, 2018, so the City Council could not consider the merits of those applications. This Court recognized the preclusive effect of the Crockett Order in ruling on the Developer's petition for judicial review, concluding "the City Council properly struck the Developer's 133-Acre Applications", and denying the Developer's petition "without prejudice should Judge Crockett's Order be overturned on appeal". Now that the Nevada Supreme Court has overturned the Crockett Order, the 133-Acre Applications should be remanded to the Las Vegas City Council for review on the merits.

This Motion is made and based on the existing record in this action, the following Memorandum of Points and Authorities and exhibits attached thereto, and any oral argument that the Court may entertain at the time of the hearing on this Motion.

DATED this 9th day of August 2021.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 5, 2018 the Honorable James Crockett of the Eighth Judicial District Court entered an order ("Crockett Order") in a related lawsuit, ruling that the Las Vegas City Code requires the approval of a major modification of the Peccole Ranch Master Plan before the City may approve land use applications to develop the Badlands Golf Course.[1] In compliance with the Crockett Order, on May 16, 2018, the Las Vegas City Council struck the Developer's applications to build housing on a 133-acre portion of the Badlands Golf Course ("133-Acre Applications") because the Developer did not file a major modification application ("MMA") with those applications. In striking the 133-Acre Applications, *the City Council did not consider the 133-Acre Applications on the merits*.

This Court upheld the City Council's decision, finding that the City Council and the Court were bound by the Crockett Order.[2] Without an MMA, the 133-Acre Applications could not be considered on the merits. Consequently, this Court (i) concluded "the City Council properly struck the Developer's 133-Acre Applications", (ii) granted the City's Motion to Dismiss "as to the Petition for Judicial Review on the grounds of issue preclusion" and (iii) denied the Petition for Judicial Review "without prejudice should Judge Crockett's Order be overturned on appeal." *See* 133-Acre FFCL (Exhibit B) at 10.

Now that the Nevada Supreme Court has reversed the Crockett Order,[3] the City Council is no longer constrained from considering the 133-Acre Applications on the merits. Consistent with denial of the Petition for Judicial Review "without prejudice should Judge Crockett's Order be

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[1] A true and correct copy of the Crockett Order is attached hereto as **Exhibit A**.

[2] A true and correct copy of this Court's Findings of Fact, Conclusions of Law and Order Regarding Motion to Dismiss and Countermotion to Allow More Definite Statement if Necessary and Countermotion to Stay Litigation of Inverse Condemnation Claims Until Resolution of the Petition for Judicial Review and Countermotion for NRCP Rule 56(F) Continuance ("133-Acre FFCL") is attached hereto as **Exhibit B**.

[3] A true and correct copy of the Nevada Supreme Court's March 5, 2020 Order of Reversal is attached hereto as **Exhibit C**.

overturned on appeal", and in accordance with NRS 233B.135(3), this Court should remand the 133-Acre Applications for consideration by the City Council. If the City Council denies the 133-Acre Applications on the merits, the Developer can file another petition for judicial review, this time challenging the City Council's decision on the merits.

On July 22, 2021, the Developer filed a Motion to Determine Property Interest. On August 6, 2021, the City filed its Countermotion for Summary Judgment and Opposition to Motion to Determine Property Interest. After remanding the 133-Acre Applications to the City Council, the Court should remove the Developer's Motion and the City's Countermotion from the Court's calendar because the remand would render both motions moot – a taking claim is unripe unless the owner has filed at least two applications for development of the specific property at issue and the agency has denied both *on the merits*. Because the City Council has not acted on the merits of the 133-Acre Applications, the City cannot as a matter of law have taken Developer's property.

As an aside, the City is concurrently filing a motion to dismiss the inverse condemnation complaint based on the Nevada Supreme Court's recent ruling that civil actions (such as complaints for inverse condemnation) cannot be joined with petitions for judicial review. *See City of Henderson v. Eighth Judicial Dist. Ct.*, 137 Nev. Adv. Op. 26, 489 P.3d 908 (June 24, 2021).

II. FACTUAL AND LEGAL BACKGROUND

The relevant facts and law are set forth in the Court's 133-Acre FFCL (Exhibit B).

"On March 4, 2015, Fore Stars, Ltd. was acquired (through various entities and family limited partnerships) by the same principals who own EHB Companies LLC, Paul Dehart, Vicki Dehart, Yohan Lowie and Frank Pankratz." 133-Acre FFCL at 3. "[T]he Developer began applying for land use approvals to convert the Badlands golf course into residential and commercial development." *Id*. "On March 5, 2018, Judge Crockett granted the homeowners' petition for judicial review in Case No. A-17-752344-J [the 17-Acre case], ruling as a matter of law that Title 19.10.040 of the City's Unified Development Code required the Council to first approve a major modification to the Peccole Ranch Master Development Plan before any other

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development applications could be approved ("Judge Crockett's Order")." *Id*. at 4. "The Developer appealed Judge Crockett's Order." *Id*. at 5.[4]

"In October 2017, the Developer filed applications to develop a 133-acre portion of the Badlands Golf Course. The applications sought waivers of the City's development requirements, site development plan review, tentative map applications and a general plan amendment ("the 133-Acre Applications"). . . . The 133-Acre Applications came before the City Council for consideration on May16, 2018. . . . The City Council voted to strike the 133-Acre Applications for two reasons. . . . First, the 133-Acre Applications did not include an application for a major modification, as Judge Crockett's Order required. Second, the application for a general plan amendment violated the City's Unified Development Code §19.1 6.030(D) because it was duplicative of one that had been filed within the previous 12-month period. The Developer then filed this action." *Id*.

"Based on the doctrine of issue preclusion, Judge Crockett's Order has preclusive effect on this case." *Id*. at 7. "Because Judge Crockett's Order requires that the Developer get approval of a major modification, and no such approval was obtained before the Developer submitted its 133-Acre Applications, the City Council properly struck the Developer's 133-Acre Applications, and the Petition for Judicial Review must be denied. However, the Developer's alternative claims for inverse condemnation may proceed in the ordinary course." *Id*. at 10. "The Petition for Judicial Review is **DENIED** without prejudice should Judge Crockett's Order be overturned on appeal." *Id*.[5]

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[4] The Developer paid less than $4.5 million for the entire 250-acre Badlands Golf Course; yet, the Developer filed four separate actions against the City – one for each of the four parcels into which the Developer segmented the 250-acre property – and demands a total of $386 million in damages. In the 17-Acre inverse condemnation action, the Developer is suing the City for $26 million, even though the City *approved* the Developer's applications to build 435 luxury housing units. With the 17-Acre approvals, the Developer multiplied its investment in the 250-acre property by a factor of six, and still has 233 acres left for potential development or use for golf course. Accordingly, the four lawsuits have absolutely no merit – they are nothing more than an attempt to weaponize the courts to extort hundreds of millions of dollars from the taxpayers.

[5] It was unnecessary for this Court to address the second ground for the City Council's action – the filing of a second application for a General Plan amendment for the same property within one year – in its decision denying the Petition for Judicial Review because the preclusive effect

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On March 5, 2020, the Nevada Supreme Court reversed Judge Crockett, concluding "the City Council properly interpreted the City's land use ordinances in determining that Seventy Acres was not required to obtain a major modification of the Peccole Ranch Master Plan before it could develop the parcel", and finding "[t]he City correctly interpreted its land use ordinances and substantial evidence supports its decision to approve Seventy Acres's [*sic*] three applications." *See* Order of Reversal (Exhibit C) at 4, 6.

III. ARGUMENT

A. The Court Should Remand the 133-Acre Applications to the City Council.

In denying the Developer's Petition for Judicial Review without prejudice, this Court correctly anticipated that it would need to order further proceedings in the event the Crockett Order was reversed. The Nevada Supreme Court subsequently determined that the City's approval of the Developer's 17-Acre applications was proper, and reversed the Crockett Order. Therefore, in accordance with NRS 233B.135, this Court should remand the 133-Acre Applications to the City Council for consideration on the merits.[6] The City Council never had the opportunity to consider the merits of the 133-Acre Applications – it could not have done so without violating the Crockett Order and risking being held in contempt. Accordingly, the 133-Acre Applications should be remanded to the City Council, which must be directed to consider the applications on the merits.

In adjudicating a petition for judicial review of a public agency decision, courts have statutory authority to remand to the government agency for further consideration or action consistent with the court's decision. For instance, in *American West Development, Inc. v. City of Henderson*, 111 Nev. 804, 810, 898 P.2d 110, 114 (1995), the city refused to consider a zoning application until the developer submitted a new master plan. 111 Nev. at 806, 898 P.2d at 111. In

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of the Crockett Order was sufficient to support denial. As this Court held, however, the second ground was also valid and would have been sufficient by itself to require denial. *See* 133-Acre FFCL at 5.

[6] "The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is . . . (d) Affected by other error of law". NRS 233B.135(3).

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its petition for judicial review, the developer argued it was subject to a previously approved master plan and was, therefore, not required to submit a new one. *Id.* The Nevada Supreme Court found that the previously approved plan was still valid, and remanded to the district court with instructions "to order [the city] to process [the developer's] zoning application in a manner consistent with the dictates of this opinion." 111 Nev. at 810, 898 P.2d at 114.

American West Development is directly on point, and provides guidance as to the appropriate resolution here. Because the City Council's decision to strike the 133-Acre Applications in compliance with the Crockett Order was affected by an error of law (i.e., the legally flawed Crockett Order that was subsequently reversed), this Court should remand the 133-Acre Applications to the City Council for consideration on the merits. *See* NRS 233B.135(3); *American West Development, Inc. v. City of Henderson*, 111 Nev. at 810, 898 P.2d at 114.

B. Remand of the 133-Acre Applications to the City Council would not be futile.

The Developer may contend that it would be futile to remand the 133-Acre Applications because the City Council, by its prior actions, has indicated that it will not approve the applications. That contention is wholly without merit. In its recently filed amended pleading, the Developer alleges that Councilmembers Seroka and Coffin drove the decision of the City Council to strike the 133-Acre Applications and deny the 35-Acre Applications and a Master Development Agreement. *See* Petition for Judicial Review, Complaint for Declaratory Relief and Injunctive Relief, and First Amendment / Supplement to Alternative Verified Claims in Inverse Condemnation at ¶¶ 47, 51-77, 215-16, 222-34.

In all its arguments regarding futility, the Developer conveniently omits the fact that the City Council *approved* all of the Developer's land use applications for the 17-Acre parcel, approving construction of 435 luxury housing units on the property. *See* 133-Acre FFCL (Exhibit B) at 4. As Judge Herndon found in granting summary judgment in favor of the City in the 65-Acre case, filing an application to develop the 65-Acre Property would not be futile for a variety of compelling reasons, including but not limited to the fact that Councilmembers Coffin and Seroka are no longer members of the City Council. *See* Findings of Fact and Conclusions of Law Granting City of Las Vegas' Motion for Summary Judgment ("65-Acre FFCL") attached hereto

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as **Exhibit D**, at ¶ 44.[7] In fact, it is not possible to predict how the current City Council would vote on the 133-Acre Applications.

Key findings by Judge Herndon that mandate this result are as follows:

- A regulatory takings claim is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is also denied. *Id*. at 24-25.

- A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." . . . The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id*. at 25.

- The Nevada Supreme Court requires that a regulatory takings claimant file at least two applications to develop "the property at issue." *Id*. at 26.

- The Developer has submitted no evidence that it has filed any application, much less two or more, to redevelop the individual 65-Acre Property, and obviously, no subsequent application for a variance, reduced density, or alternate project. As such, Developer has provided City with no individual 65-Acre Property application to consider and the City cannot be said to have reached a "clear, complete, and unambiguous" decision that the City has "drawn the line, clearly and emphatically, as to the sole use to which [the 65-Acre Property] may ever be put." *Id*.

- The application for the 133-Acre Property was deemed incomplete because of the then controlling Crockett Order and it was never resubmitted. *Id*.

- This court holds that any argument that proffering a development proposal for the 65-Acre Property would be futile is without merit as the City approved fifty percent (50%) of the individual applications it received, and felt it had legal authority to consider. This court would be engaging in inappropriate speculation were it to try and guess at what type of proposal Developer would have made for the 65-Acre Property and what type of response the City would have provided. *Id*. at 27.

- Prior to the Supreme Court's Order of Reversal, the 17-Acre approvals were legally void and there was nothing to extend. If the City had attempted to extend the approvals, the City could arguably have been in contempt of Judge Crockett's Order. *Id*. at 28.

- The Developer asserts that its *Penn Central* regulatory taking claim is ripe because the City disapproved the Developer's [Master Development Agreement, "MDA"] for the entire Badlands. The MDA, while it included parts of the 65-Acre Property, covered the entire 250-acre Badlands outside of the 17-Acre Property, development on which the City

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[7] After Judge Herndon was seated on the Nevada Supreme Court, Judge Trujillo assumed the 65-Acre case. Based on misleading arguments asserted by the Developer (contrary to the Developer's assertions, the law is clear Judge Herndon ruled correctly), Judge Trujillo questioned Judge Herndon's conclusion on a single issue of law – whether final decision ripeness applies to categorical wipeout taking claims – and whether Judge Herndon had ruled on all of the Developer's claims. Judge Trujillo did not question or "set aside" any other aspect of the 65-Acre FFCL, including the finding that the 65-Acre inverse condemnation claims were unripe because the Developer failed to obtain the City Council's denial of two separate applications to develop the 65-Acre parcel standing alone and on the merits.

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had already approved. . . . It did not constitute an application to develop the 65-Acre Property standing alone, which is "the property at issue." . . . The City's denial of the MDA, therefore, is not considered an application to develop the 65-Acre Property for purposes of ripeness. Even assuming that it was an application to develop the 65-Acre Property standing alone, the Developer's regulatory takings claim would not be ripe until the Developer files at least one additional application. The Developer has presented no evidence that it has done so. *Id*. at 29-30.

- The Court also does not consider the MDA to constitute an initial application to develop the 65-Acre Property for purposes of a final decision because the MDA was not the specific and detailed application required for the City to take final action on a development project. *Id*. at 30.

- Given the uncertainty in the MDA as to what might be developed on the 65-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 65-Acre Property. This once again places the court in the untenable position of having to speculate about what the City might have done, said speculation being improper. *Id*. at 31.

- The Developer contends that following the City's denial of the MDA, it would have been futile to file the UDC Applications to develop the 65-Acre Property. . . . [T]he court finds Developer's position here to be unpersuasive. The Developer cites no evidence for its statement that the City insisted that the MDA was the only application it would accept to develop the 65 Acre Property was the MDA. The Developer previously acknowledged that City Councilmembers expressed a preference for a holistic plan addressing the entire Badlands. . . . Such a preference does not indicate a refusal to consider other options. Indeed, the City did consider—and approve—significant development on the 17-Acre Property within the Badlands, indicating that the City is open to considering development of this area. *Id*. at 32.

- Furthermore, the Developer's reliance on Bills 2018-5 and 2018-24 in support of its claim of futility is misplaced. *Id*. at 33.

- At the City Council hearing on the MDA, no Councilmember indicated that he/she would not approve development of the Badlands at a reduced density if the Developer submitted a revised development agreement. . . . The vote to deny the development agreement was 4-3 . . . Therefore, had a modified proposal been made regarding the MDA, it was only necessary for one of the four members who voted to deny the application to become satisfied with the proposed changes, for it to be approved. And it must be noted that two of the four City Councilmembers who voted against the MDA are no longer members. Indeed, four of the seven members of the City Council that heard the MDA are no longer on the Council. *Id*.

Judge Herndon's decision indicates clearly and emphatically that remand of the 133-Acre Applications to the City Council for a determination on the merits would not be futile. Rather, it would be the only appropriate action because, as Judge Herndon concluded, the City was previously constrained by "the then controlling Crockett Order" to strike the 133-Acre Applications. *See* 65-Acre FFCL (Exhibit D) at 26. The City cannot be sued for taking an action it was bound by law to take or for a completely speculative yet-to-be-taken action on the merits

of the 133-Acre Applications. Remand of the 133-Acre Applications to the City Council is therefore the only lawful and logical result.

IV. CONCLUSION

The City respectfully requests that the Court remand the 133-Applications to the Las Vegas City Council to allow the Council to consider the merits of those applications for the first time.

Respectfully submitted this 9th day of August, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 9th day of August, 2021, a true and correct copy of the foregoing **CITY OF LAS VEGAS' MOTION TO REMAND 133-ACRE APPLICATIONS TO CITY COUNCIL** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
Jelena Jovanovic

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EXHIBIT “A”

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DISTRICT COURT

CLARK COUNTY, NEVADA

JACK B. BINION, an individual; DUNCAN R. and IRENE LEE, individuals and Trustees of the LEE FAMILY TRUST; FRANK A. SCHRECK, an individual; TURNER INVESTMENTS, LTD., a Nevada Limited Liability Company; ROGER P. and CAROLYN G. WAGNER, individuals and Trustees of the WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC.; JASON AND SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE AND KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE KENNETH J. SULLIVAN FAMILY TRUST, AND DR. GREGORY BIGLOR AND SALLY BIGLER,

Plaintiffs,

v.

THE CITY OF LAS VEGAS; and SEVENTY ACRES, LLC, a Nevada Limited Liability Company,

Defendants.

Case No.: A-17-752344-J

Dept. No.: XXIV

ORDER GRANTING PLAINTIFFS' PETITION FOR JUDICIAL REVIEW

☐ Voluntary Dismissal	☒ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ Judgment of Arbitration

On January 11, 2018, Plaintiffs[1] Petition for Judicial Review came before the Court for a hearing. Todd L. Bice, Esq. and Dustun H. Holmes, Esq. of the law firm PISANELLI BICE PLLC appeared on behalf of Plaintiffs, Christopher Kaempfer, Esq., James Smyth, Esq., Stephanie Allen, Esq appeared on behalf of Defendant Seventy Acres, LLC ("Seventy Acres"), and Philip T. Byrnes, Esq., with the LAS VEGAS CITY ATTORNEY'S OFFICE appeared on behalf of the Defendant City of Las Vegas ("City").The Court, having reviewed Plaintiffs' Memorandum in Support of the Petition for Judicial Review, the City's Answering Brief, Seventy Acres' Opposition Brief, Plaintiffs' Reply Brief, the Record for Review, and considered the matter and being fully advised, and good cause appearing makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

A. FINDINGS OF FACT

1. Plaintiffs challenge the City's actions and the final decision entered on February 16, 2017 regarding the approval of Seventy Acres' applications GPA-62387 for a General Plan Amendment from parks/recreation/open space (PR-OS) to medium density (M), ZON-62392 for rezoning from residential planned development – 7 units per acre (R-PD7) to medium density residential (R-3), and SDR-62393 site development plan related to GPA-62387 and ZON-62392 (collectively the "Applications") on 17.49 acres at the southwest corner of Alta Drive and

[1] Jack B. Binion, Duncan R. and Irene Lee, individuals and trustees of the Lee Family Trust, Frank A. Schreck, Turner Investments, LTD, Rover P. and Carolyn G. Wagner, individuals and trustees of the Wagner Family Trust, Betty Englestad as trustee of the Betty Englestad Trust, Pyramid Lake Holdings, LLC, Jason and Shereen Awad as trustees of the Awad Asset Protection Trust, Thomas Love as trustee of the Zena Trust, Steve and Karen Thomas as trustees of the Steve and Karen Thomas Trust, Susan Sullivan as trustee of the Kenneth J. Sullivan Family Trust, and Dr. Gregory Bigler and Sally Bigler

[2] Any findings of fact which are more properly considered conclusions of law shall be treated as such, and any conclusions of law which are more properly considered findings of fact shall be treated as such.

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Rampart Boulevard, more particularly described as Assessor's Parcel Number 138-32-301-005 (the "Property").[3]

2. The Property at issue in the Applications is a portion of land which was previously known as Badlands Golf Course and is part of the Peccole Ranch Master Plan.

3. In 1986, the William Peccole Family presented their initial Master Planned Development under the name Venetian Foothills to the City ("Peccole Ranch"). ROR002620-2639.

4. The original Master Plan contemplated two 18-hole golf courses, which would become known as Canyon Gate in Phase I of Peccole Ranch and Badlands in Phase II of Peccole Ranch. Both golf courses were designed to be in a major flood zone and were designated as flood drainage and open space. ROR002634. The City mandated these designations so as to address the natural flood problem and the open space necessary for master plan development. ROR002595—2604.

5. The William Peccole Family developed the area from W. Sahara north to W. Charleston Blvd. within the boundaries of Hualapai Way on the west and Durango Dr. on the east ("Phase I"). In 1989, the Peccole family submitted what was known as the Peccole Ranch Master Plan, which was principally focused on what was then commonly known as Phase I.

6. In 1990 the William Peccole Family presented their Phase II Master Plan under the name Peccole Ranch Master Plan Phase II (the "Phase II Master Plan") and it encompassed the land located from W Charleston Blvd. north to Alta Dr. west to Hualapai Way and east to Durango Dr. ("Phase II"). Queensridge was included as part of this plan and covered W.

[3] The Applications as originally submitted were for a General Plan Amendment from parks/recreation/open space (PR-OS) to high density residential (H), for rezoning from residential planned development – 7 units per acre (R-PD7) to high density residential (R-4). At the February 15, 2017 City Council meeting, Seventy Acres indicated that it was amending its Applications from 720 units on the Property to 435 units. The corresponding effect was an amendment to its General Plan Amendment from PR-OS to medium density (M) and rezoning from R-PD7 to medium density residential (R-3).

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Charleston Blvd. north to Alta Dr., west to Hualapai Way and east to Rampart Blvd. ROR002641-2670.

7. Phase II of the Peccole Ranch Master Plan was approved by the City Council of the City of Las Vegas on April 4, 1990 in Case No. Z-17-90. ROR007612, ROR007702-7704. The Phase II Master Plan specifically defined the Badlands 18 hole Golf Course as flood drainage/golf course in addition to satisfying the required open space necessitated by the City for Master Planned Development. ROR002658-2660.

8. The Phase II golf course open space designation was for 211.6 acres and specifically was presented as zero net density and zero net units. (ROR002666). The William Peccole Family knew that residential development would not be feasible in the flood zone, but as a golf course could be used to enhance the value of the surrounding residential lots. As the Master Plan for Phase II submitted to the City outlines:

> A focal point of Peccole Ranch Phase Two is the 199.8 acre golf course and open space drainage way system which traverses the site along the natural wash system. All residential parcels within Phase Two, except one, have exposure to the golf course and open space areas . . . The close proximity to Angel Park along with the extensive golf course and open space network were determining factors in the decision not to integrate a public park in the proposed Plan."

ROR002658-2660.

9. The Phase II Master Plan amplifies that it is a planned development, incorporating a multitude of permitted land uses as well as special emphasis the open space and:

> Incorporates office, neighborhood commercial, a nursing home, and a mixed-use village center around a strong residential base in a cohesive manner. A destination resort-casino, commercial/office and commercial center have been proposed in the most northern portion of the project area. Special attention has been given to the compatibility of neighboring uses for smooth transitioning, circulation patterns, convenience and aesthetics. An extensive 253 acre golf course and linear open space system winding throughout the community provides a positive focal point while creating a mechanism to handle drainage flows.

ROR00264-2669.

10. As the Plan for Phase II outlined, there would be up to 2,807 single-family residential units on 401 acres, 1,440 multi-family units on 60 acres and open space/golf

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course/drainage on approximately 211 acres. ROR002666-2667. For the single-family units which would border the proposed golf course/open space, the zoning sought was for R-PD7, which equates to a maximum of seven (7) single-family units per acre on average. ROR002666-2667. Such a zoning approval for a planned development like Peccole Ranch Phase II and its proposed golf course/open space/drainage is common as confirmed by the City's own code at the time because R-PD zoning category was specifically designed to encourage and facilitate the extensive use of open space within a planned development, such as that being proposed by the Peccole Family. ROR02716-2717.

11. Both the Planning Commission and the City Council approved this 1990 Amendment for the Phase II Plan (the "Plan"). ROR007612, ROR007702-7704.

12. The City confirmed the Phase II Plan in subsequent amendments and re-adoption of its own General Plan, both in 1992 and again in 1999. ROR002735-2736.

13. On the maps of the City's General Plan, the land for the golf course/open space/drainage is expressly designated as PR-OS, meaning Parks/Recreation/Open Space. ROR002735-2736. There are no residential units permitted in an area designated as PR-OS.

14. The City's 2020 Master Plan specifically lists Peccole Ranch as a Master Development Plan in the Southwest Sector.

15. In early 2015, the land was acquired by a developer and as a representative of the developer, Yohan Lowie, would testify at the November 16, 2016 City Council meeting that before purchasing the property he had conversations with the City Council members from which he inferred that he would be able to secure approvals to redevelop the golf course/open space of this master planned community with housing units. ROR001327-1328; ROR007364-7365. The purchaser elected to take on the risk of acquiring the property and did not provide for typical contingencies, such as a condition of land use approvals prior to closing.

16. Instead, it was after acquiring the land that one of the developer's entities, Seventy Acres, filed the Applications with the City in November 2015.

17. When the Applications were initially submitted they were set to be heard in front of the City's Planning Commission on January 12, 2016. ROR017362-17377. The Staff Report

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prepared in advance of this meeting states that the City's Planning Department had no recommendation at the time because the City's code required an application for a major modification of the Peccole Ranch Master Plan prior to the approval of the Applications. ROR017365. Specifically, the Staff Report states:

> The site is part of the Peccole Ranch Master Plan. The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outline in Title 19.10.040. As this request has not been submitted, staff recommends that the [Applications] be held in abeyance has no recommendation on these items at the time.
> (*Id.*)

18. Indeed, a critical issue noted by the City pertaining to the Applications was that "[t]he proposed development requires a Major Modification of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90. As such, staff is recommending that these items be held in abeyance." (*Id.*)

19. Following staff's recommendation, the Applications were held over to the March 8, 2016 Planning Commission meeting.

20. Again, the Staff Report prepared in advance of the meeting states, "[t]he site is part of the Peccole Ranch Master Plan. The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outline in Title 19.10.040." ROR017445-17538. As no Major Modification had been submitted the City's staff had no recommendation on the Applications at the time. *Id.*

21. As a result, the Applications were held over to the April 12, 2016 Planning Commission meeting.

22. Consistent with the City's requirements, the developer subsequently filed an application MOD-63600 for a Major Modification of the Peccole Ranch Master Plan to amend the number of allowable units, to change the land use designation of parcel, and to provide standards for redevelopment.

23. As the Staff Report prepared in advance of an April 12, 2016 Planning Commission meeting states, "[p]ursuant to 19.10.040, a request has been submitted for a modification to the Peccole Ranch Master Plan to authorize removal of the golf course, change

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the designated land uses on those parcels to single family and multi-family residential and allow for additional residential units." ROR017550-17566.

24. The Staff Report goes on to state that "[i]t is the determination of the Department of Planning that any proposed development not in conformance with the approved Peccole Ranch Master Plan would be required to pursue a Major Modification of the Plan prior to or concurrently with any new entitlements. *Id.* Such an application (MOD-63600) was filed with the City of Las Vegas on 02/25/16 along with a Development Agreement (DIR-63602) for redevelopment of the golf course parcels." *Id.*

25. As the Staff Report indicates, "[a]n additional set of applications were submitted concurrently with the Major Modification that apply to the whole of the 250.92-acre golf course property." These applications were submitted by entities – 180 Land Co LLC and Fore Stars, Ltd-controlled and related to the developer submitting the Applications at issue here. *Id.*

26. As with the previous Staff Reports, the Staff emphasized that "[t]he proposed development requires a Major Modification of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." *Id.* However, the City's Staff was now recommending the Applications be held in abeyance as additional time was needed for "review of the Major Modification and related development agreement." *Id.*

27. Over the next several months the Applications were held in abeyance at the request of Seventy Acres and/or the City. Specifically, the Staff Reports prepared in advance of every meeting continuously noted that approval of the Applications was dependent upon an approval of a Major Modification of the Peccole Ranch Master Plan.

28. For example, the May 10, 2016 Staff Report provides "[t]he proposed development requires a Major Modification (MOD-6300) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." ROR018033-18150. The Staff findings likewise provide the Applications "would result in the modification of the Peccole Ranch Master Plan. Without the approval of a Major Modification to said plan, no finding can be reached at this time." *Id.*

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29. In the July 12, 2016 Staff Report, staff states "[t]he Peccole Ranch Master Plan must be modified to change the land use designations from Golf Course/Drainage to Multi-Family Residential and Single Family Residential prior to approval of the proposed" Applications. ROR018732-18749. ROR0198882-

30. Less than two months later, in an August 9, 2016 Staff Report, the City's Staff reiterated that "[t]he proposed development requires a Major Modification (MOD-6300) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." ROR0198882-19895.

31. Ultimately, the Applications came before a special Planning Commission meeting on October 18, 2016. ROR000725-870. The Applications were heard along with other applications from the developer, including application for a Major Modification of the Peccole Ranch Master Plan. (MOD-63600).

32. The City's Planning Commission denied all other applications, including MOD-63600, except for the Applications at issue in this case by a five-to-two margin. ROR00865-870. In other words, the Planning Commission approved certain applications notwithstanding that it had expressly denied the Major Modification (MOD-63600) that the City's Staff recognized as a required prerequisite to any applications moving forward.

33. The Applications, along with all other applications from the developer, were then scheduled to be heard in front of the City Council on November 16, 2016.

34. Prior to the City Council Meeting the developer requested that the City permit it to withdraw without prejudice all other applications, including the Major Modification (MOD-63600), leaving the Applications at issue relating to the 720 multifamily residential buildings on 17.49 acres located on Alta/Rampart southwest corner. ROR001081-1135.

35. But again, the City's Staff Report prepared in advance of the City Council meeting confirmed that one of the conditions for approving these Applications was that there be a Major Modification of the Peccole Ranch Master Plan. ROR002421-2441. As the City's staff explains, the Applications "are dependent on action taken on the Major Modification and the related Development Agreement between the application and the City for the development of the golf

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course property." ROR002425. This point is reiterated in the report that "[t]he proposed development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan." (*Id.*).

36. Yet, as the City's Staff Report confirms, the developer had submitted no request for a Major Modification to the 1990 Peccole Ranch Master Development Plan Phase II to authorize modification for the 17.49 acres of golf course/drainage/open space land use to change the designated land uses, and increase in net units, density, and maximum units per acre. Rather, the application for a Major Modification was submitted on February 25, 2016, relating to the entirety of the Badlands Golf Course, along with an application for a development agreement, and the developer had now withdrawn any request for a major modification.

37. The City Council voted to hold the matter in abeyance. ROR001342.

38. Subsequently, the Applications came back before the City Council on February 15, 2017.

39. The Staff Report again provided that "[p]ursuant to Title 19.10.040, a request has been submitted for a Modification to the 1990 Peccole Ranch Master Plan to authorize removal of the golf course, change the designated land uses on those parcels to single-family and multi-family residential and allow for additional residential units." The City's Staff maintained that Applications "are dependent on action taken on the Major Modification," and that the "the proposed development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan." ROR011240.

40. There is no question that the City's own Staff had long recognized that these Applications were dependent upon a Major Modification of the Peccole Ranch Master Plan.

41. At the February 15, 2017 City Council meeting, Seventy Acres announced that it was amending its Applications by reducing the units from 720 to 435 units on 17.49 acres located on Alta/Rampart southwest corner. ROR017237-17358. The corresponding effect was an amendment to its application for a general plan amendment PR-OS to medium density, application for rezoning from R-PD7 to medium density residential, and application for SDR-62393 site development plan subject to certain conditions. *Id.*

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42. Despite no Major Modification as the City had long recognized as required, the City Council by a four-to-three vote proceeded anyway and approved the Applications.

43. On or about February 16, 2017, a Notice of Final Action was issued.

44. On March 10, 2017, Plaintiffs timely filed this Petition seeking judicial review of the City's decision.

B. CONCLUSIONS OF LAW

1. The City's decision to approve the Applications is reviewed by the district court for abuse of discretion. *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). "A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal." *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* Yet, on issue of law, the district court conducts an independent review with no deference to the agency's determination. *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993).

2. Although the City's interpretation of its land use laws is cloaked with a presumption of validity absent manifest abuse of discretion, questions of law, including Municipal Codes, are ultimately for the Court's determination. *See Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1994); *City of N. Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 1197, 1208, 147 P.3d 1109, 1116 (2006).

3. Here, while the City says that this Court should defer to its interpretation, the Court must note that what the City is now claiming as its interpretation of its own Code appears to have been developed purely as a litigation strategy. Before the homeowners filed this suit, the City and its Planning Director had consistently interpreted the Code as requiring a major modification as a precondition for any application to change the terms of the Peccole Ranch Master Plan. Indeed, it was not until oral argument on this Petition for Judicial Review that the City Attorneys' office suggested that the terms of LVMC 19.10.040(G) only applied to property that is technically zoned for "Planned Development" as opposed to property that is zoned R-PD which is "Residential-Planned Development." This position is completely at odds with the City's

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own longstanding interpretation of its own Code and that its own Director of Development had long determined that a major modification was required and that the terms of LVMC 19.10.040(G) applied here. Respectfully, interpretations that are developed by legal counsel, as part of a litigation strategy, are not entitled to any form of deference by the judiciary. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012)(no deference is provided when the agency's interpretation is nothing more than a "convenient litigating position."). What is most revealing is the City's interpretation of its own Code before it felt compelled to adopt a different interpretation as a defense strategy to this litigation.

4. The Court finds the City's pre-litigation interpretation and enforcement of its own Code – that a major modification to the Peccole Ranch Master Plan is required to proceed with these Applications – to be highly revealing and consistent with the Code's actual terms.

5. LVMC 19.10.040(G) is entitled "Modification of Master Development Plan and Development Standards." It provides, in relevant part, that:

> The development of property within the Planned Development District may proceed only in strict accordance with the approved Master Development Plan and Development Standards. Any request by or on behalf of the property owner, or any proposal by the City, to modify the approved Master Development Plan or Development Standards shall be filed with the Department. In accordance with Paragraphs (1) and (2) of this Subsection, the Director shall determine if the proposed modification is "minor" or "major," and the request or proposal shall be processed accordingly.

See LVMC 19.10.040(G).

6. Accordingly, under the Code, "[a]ny request by or on behalf of the property owner, or any proposal by the City, to modify the approved Master Development Plan or Development Standards shall be filed with the Department." LVMC 19.10.040(G). It is the City's Planning Department who "shall determine if the proposed modification is minor or major, and the request or proposal shall be processed accordingly." *Id.*

7. There is no dispute that the Peccole Ranch Master Plan is a Master Development Plan recognized by the City and listed in the City's 2020 Master Plan accordingly.

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8. Likewise, there is no dispute that throughout the application process, the City's Planning Department continually emphasized that approval of the Applications was dependent upon approval of a major modification of the Peccole Ranch Master Plan. For example, the record contains the following representations from the City:

- "The site is part of the 1,569-acre Peccole Ranch Master Plan. Pursuant to Title 19.10.040, a request has been submitted for a Modification to the 1990 Peccole Ranch Master Plan to authorize removal of the golf course, change the designated land uses on those parcels to single family and multi-family residential and allow for additional residential units."
- "The site is part of the Peccole Ranch Master Plan. The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outline in Title 19.10.040..."
- "The current General Plan Amendment, Rezoning and Site Development Plan Review requests are dependent upon on action taken on the Major Modification..."
- "The proposed Development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan...."
- "The Department of Planning has determined that any proposed development not in conformance with the approved (1990) Peccole Ranch Master Plan would be required to pursue a Major Modification..."
- "The Peccole Ranch Master Plan must be modified to change the land use designations from Golf Course/Drainage to Multi-Family prior to approval of the proposed General Plan Amendment..."
- "In order to redevelop the Property as anything other than a golf course or open space, the applicant has proposed a Major Modification of the 1990 Peccole Master Plan."
- "In order to address all previous entitlements on this property, to clarify intended future development relative to existing development, and because of the acreage of

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the proposed for development, staff has required a modification to the conceptual plan adopted in 1989 and revised in 1990."

ROR000001-27; ROR002425-2428; ROR006480-6490; ROR017362-17377.

9. The City's failure to require or approve of a major modification, without getting into the question of substantial evidence, is legally fatal to the City's approval of the Applications because under the City's Code, as confirmed by the City's Planning Department, the City was required to first approve of a major modification of the Peccole Ranch Master Plan, which was never done. That, by itself, shows the City abused its discretion in approving the Applications.

10. Instead of following the law and the recommendations from the City's Planning Department, over the course of many months there was a gradual retreat from talking about a major modification and all of a sudden that discussion and the need for following Staff's recommendation just went out the window.

11. The City is not permitted to change the rules and follow something other than the law in place. The Staff made it clear that a major modification was mandatory. The record indicates that the City Council chose to just ignore and move past this requirement and did what the developer wanted, without justification for it, other than the developer's will that it be done.

12. In light of the foregoing, the Court finds that the City abused its discretion in approving the Applications. The Court interprets the City's Code, just as the City itself had long interpreted it, as requiring a major modification of the Peccole Ranch Master Plan. Since the City failed to approve of a major modification prior to the approval of these Applications the City abused its discretion and acted in contravention of the law.

Based upon the Findings and Facts and Conclusions of Law above:

IT IS HEREBY ORDERED that Plaintiffs' Petition for Judicial Review is **GRANTED**.

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IT IS FURTHER ORDERED that the approval of the applications GPA-62387, ZON-62392, and SDR-62393 are hereby vacated, set aside, and shall be void, and judgment shall be entered against Defendant City of Las Vegas and Seventy Acres, LLC in favor of Plaintiffs accordingly.

DATED: March 1, 2018

THE HONORABLE JIM CROCKETT
EIGHTH JUDICIAL DISTRICT COURT

Submitted by:

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EXHIBIT “B”

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Plaintiffs/Petitioners, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants/Respondents.	CASE NO.: A-18-775804-J DEPT. NO.: 26 **[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING** **MOTION TO DISMISS** **AND** **COUNTERMOTION TO ALLOW MORE DEFINITE STATEMENT IF NECESSARY AND COUNTERMOTION TO STAY LITIGATION OF INVERSE CONDEMNATION CLAIMS UNTIL RESOLUTION OF THE PETITION FOR JUDICIAL REVIEW AND COUNTERMOTION FOR NRCP RULE 56(F) CONTINUANCE**

Plaintiff/Petitioner 180 Land Company, LLC filed its Petition for Judicial Review, Complaint for Declaratory Relief, and Alternative Verified Claims in Inverse Condemnation (the "Complaint") to challenge the decision by the City of Las Vegas ("City") to strike its applications to redevelop a portion of the former Badlands Golf Course consisting of 132.92 acres (the "133-Acre Applications").

On August 27, 2018, the City filed a motion to dismiss the Complaint (the "Motion"). Plaintiff/Petitioner opposed the Motion and filed a Countermotion To Allow More Definite Statement If Necessary And Countermotion To Stay Litigation Of Inverse Condemnation Claims Until Resolution Of The Petition For Judicial Review And Countermotion For NRCP Rule 56(f) Continuance (collectively, "the Countermotions"). Having reviewed the briefs submitted in support of and in opposition to the Motion and Countermotions, conducted a hearing on January 15, 2019, considered the written and oral arguments presented, and being fully informed in the premises, the Court makes the following findings of facts and conclusions of law.

I. FINDINGS OF FACT

A. The Badlands Golf Course and Peccole Ranch Master Development Plan

1. This is one of several cases concerning efforts by Plaintiff/Petitioner and its affiliates, Seventy Acres LLC, and Fore Stars Ltd., (collectively, the "Developer") to redevelop the former Badlands Golf Course (the "Badlands Property") into a housing development.

2. The Badlands Property consists of 250.92 acres located between Alta Drive (to the north), Charleston Boulevard (to the south), Rampart Boulevard (to the east), and Hualapai Way (to the west). Complaint ¶ 7, 31.

3. In 1989, the original master plan applicant, William Peccole/Western Devcor, Inc. sought approval of a master development plan for 1,716.30 acres referred to as Peccole Ranch Master Development Plan. Ex. 2 (020-038).[1]

[1] All references to exhibits herein are to the exhibits attached to the City's Motion. Pursuant to NRS 47.130 and 47.150, the Court takes judicial notice of the publicly available documents submitted as exhibits to the City's Motion as well as the dockets in Case No. A-17-758528-J Case No. A-17-752344-J and Nevada Supreme Court Case No. 75481.

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4. On February 15, 1989, the City Council approved the Peccole Ranch Master Plan and a related application to rezone 448.8 acres in Phase I. Ex. 2 (020) at p.1.

5. On April 4, 1990, the City Council approved an amendment to the 1989 Peccole Ranch Master Plan and a related application to rezone 996.4 acres in Phase II. Ex. 2 (020-038).

6. To satisfy the City's open space requirements, the master plan applicant was required to set aside 212 acres of land in Phase II for a golf course, thereby providing the overall Peccole Ranch Master Plan with 253.07 net acres for golf course, open space and drainage. Ex. 2(027, 029, 035) at pp. 10, 12, 18.

7. Pursuant to the Peccole Ranch Master Plan, the Developer's predecessor built the golf course on approximately 250 acres, and the golf course operated until it came under the Developer's ownership. Ex. 4(046-051).

8. Through a number of successive conveyances, Peccole Ranch Partnership's interest in the Badlands Property was transferred to an entity called Fore Stars, Ltd. Ex. 9(135).

9. On March 4, 2015, Fore Stars, Ltd. was acquired (through various entities and family limited partnerships) by the same principals who own EHB Companies LLC, Paul Dehart, Vicki Dehart, Yohan Lowie and Frank Pankratz. *Id.*

10. On June 18, 2015, Fore Stars, Ltd. transferred 178.27 acres to 180 Land Company, LLC and 70.52 acres to Seventy Acres, LLC, while retaining 2.13 acres. *Id.*

11. Subsequently, the Developer began applying for land use approvals to convert the Badlands golf course into residential and commercial development.

B. The Open Space General Plan Designation for the Badlands Property

12. The open space designation for the Badlands Property sought by the Developer's predecessor and approved by the City in 1990 was subsequently incorporated into the City's General Plan starting in 1992. The Badlands Property is identified in the City's General Plan as Parks, Recreation, and Open Space ("PR-OS"). Ex. 3(040-044).

13. The Developer's predecessors built the Badlands Property as golf course and open space.

14. On November 15, 2015, the Developer filed applications for a General Plan

Amendment (GPA-62387), Re-Zoning (ZON-62392), and Site Development Plan Review (SDR-62393) seeking to develop a 17.49-acre portion of the golf course property. The General Plan Amendment application sought to change the General Plan designation from PR-OS to high density residential (GPA-62387). Ex. 7. The Developer's application acknowledged the PR-OS designation for the Badlands Property, and nowhere in the application did the Developer contend that the PR-OS designation was improper. Ex. 7(109).

15. Similarly, in February 2016, the Developer filed an application for a general plan amendment applicable to the entire Badlands Property (GPA-63599). Motion Ex. 8. The Developer's application materials again recognized the existing PR-OS designation, and the Developer did not object to that designation. Ex. 8(127-130).

16. In conjunction with GPA-63599, the Developer filed an application for a major modification of the Peccole Ranch Master Development Plan (MOD-63600), which the Developer named the "2016 Peccole Ranch Master Plan." Ex. 9.

17. The Developer subsequently requested to withdraw its major modification application without prejudice, which the City Council approved. Ex. 1(009-011).

18. On February 15, 2017, the City Council approved the 17-Acre Applications.

19. Certain nearby homeowners filed a petition for judicial review regarding the Council's decision to approve the 17-Acre Applications. *See Jack B. Binion, et al v. The City of Las Vegas, et al.*, Eighth Judicial District Court, Case No. A-17-752344-J, which was assigned to the Honorable James Crockett.

20. On March 5, 2018, Judge Crockett granted the homeowners' petition for judicial review in Case No. A-17-752344-J, ruling as a matter of law that Title 19.10.040 of the City's Unified Development Code required the Council to first approve a major modification to the Peccole Ranch Master Development Plan before any other development applications could be approved ("Judge Crockett's Order"). Ex. 1.

21. As relevant here, Judge Crockett's Order contained the following findings of fact and conclusions of law:

. . .

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- On the maps of the City's General Plan, the land for the golf course/open space drainage is expressly designated as PR-OS, meaning Parks/Recreation/Open Space. *See* Ex. 1(006) at 5:13-14.
- There are no residential units permitted in an area designated as PR-OS. *Id.*
- The City's failure to require or approve a major modification of the Peccole Ranch Master Plan was legally fatal to the City's approval of the applications at issue because, under the City's Code, the City was required to first approve a major modification, which was never done. Ex. 1(014) at 13:4-8.

22. The Developer appealed Judge Crockett's Order. The City did not. The Developer's appeal is pending before the Nevada Supreme Court as Case No. 75481.

C. The 133-Acres Applications at Issue in this Petition for Judicial Review

23. In October 2017, the Developer filed applications to develop a 133-acre portion of the Badlands Golf Course. The applications sought waivers of the City's development requirements, site development plan review, tentative map applications and a general plan amendment ("the 133-Acre Applications"). Compl. ¶¶7, 35.

24. The 133-Acre Applications came before the City Council for consideration on May 16, 2018. Ex. 11.

25. The City Council voted to strike the 133-Acre Applications as incomplete for two reasons. Ex. 11

26. First, the 133-Acre Applications did not include an application for a major modification, as Judge Crockett's Order required. Compl. ¶64.

27. Second, the application for a general plan amendment violated the City's Unified Development Code §19.16.030(D) because it was duplicative of one that had been filed within the previous 12-month period. Compl. ¶¶7, 56.

28. The Developer then filed this action. In response, the City filed the Motion.

29. The City's Motion sought dismissal of the petition for judicial review and the alternative claims for relief ~~on the following grounds~~:

a. ~~The Court lacks~~ subject matter jurisdiction ~~because the Developer's~~ claims are not ripe ~~until the Developer gives the Council the opportunity~~ to consider and

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decide a major modification application, as required by Judge's Crockett Order, and Judge Crockett's Order has preclusive effect on this case.

b. The Developer's claims for relief are time barred because the Developer's predecessor sought and obtained the parks, recreation and open space designation in the City's General Plan and Peccole Ranch Master Development Plan, which has existed since at least 1992, and then built the golf course to satisfy the City's parks requirement.

c. The Developer waived any challenge to the requirement for a General Plan Amendment or major modification to the Peccole Ranch Master Development Plan because its predecessor failed to challenge the restrictions imposed by the City when it approved the Peccole Ranch development.

d. The Developer's constitutional claims fail as a matter of law because the Developer has no vested rights to have its redevelopment applications approved for the following reasons:

i. The Council retains discretion to deny redevelopment applications.

ii. Compatible zoning does not deprive the Council of its discretion to deny redevelopment applications.

iii. NRS 278.349(e) does not confer any vested rights.

iv. Absent a vested right to have its redevelopment applications approved, the Developer cannot state a cognizable constitutional claim.

e. The Council's decision to comply with Judge Crockett's Order, as a matter of law, cannot be deemed arbitrary and capricious.

f. Injunctive relief is a remedy, not a cause of action.

30. The Developer filed its opposition to the Motion and filed the Countermotions.

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II. CONCLUSIONS OF LAW

Without reaching any other issues raised by the parties, the Court makes the following conclusions of law:

1. Based on the doctrine of issue preclusion, Judge Crockett's Order has preclusive effect on this case.

2. Issue preclusion applies when the following elements are satisfied: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008).

3. Having taken judicial notice of Judge Crockett's Order, the Court concludes that the issue of whether a major modification of the Peccole Ranch Master Development Plan is a prerequisite to the Council's consideration of the 133-Acre Applications is identical to the issue Judge Crockett decided in *Jack B. Binion, et al v. The City of Las Vegas, et al,* A-17-752344-J.

4. Judge Crockett's Order requires the Developer to seek and obtain a major modification of the Master Plan before submitting applications to redevelop the Badlands Property.

5. The Court rejects Petitioner's argument that the issue here is not the same because it involves a different set of applications from those before Judge Crockett; that is a distinction without a difference. "Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 259, 321 P.3d 912, 916–17 (2014).

6. Judge Crockett's Order in Case No. A-17-752344-J was on the merits and has become final for purposes of issue preclusion. A judgment is final for purposes of issue preclusion if it is "sufficiently firm" and "procedurally definite" in resolving an issue. *See Kirsch v. Traber,* 134 Nev., Adv. Op. 22, 414 P.3d 818, 822–23 (Nev. 2018) (citing Restatement (Second) of

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Judgments § 13 & cmt. g). "Factors indicating finality include (a) that the parties were fully heard, (b) that the court supported its decision with a reasoned opinion, and (c) that the decision was subject to appeal." *Id.* at 822-823 (citations and punctuation omitted). The Developer's appeal of Judge Crockett's Order (NSC Case No. 75481) confirms that it was a final decision on the merits.

7. The Developer was a party to the action in which Judge Crockett's Order issued and/or in privity with those parties. The Complaint indicates that the Plaintiff/Petitioner here (i.e. 180 Land Company, LLC) and the named defendant in Case No. A-17-752344-J, Seventy Acres, LLC ("Seventy Acres"), are affiliates under common ownership and control, such that issue preclusion would apply to both. Compl. ¶46.

8. For purposes of preclusion doctrines, a "party" is one who is "directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment." *See Paradise Palms Cmty. Ass'n v. Paradise Homes*, 89 Nev. 27, 30, 505 P.2d 596, 598 (1973), *citing Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n*, 122 P.2d 892 (Cal. 1942).

9. Additionally, in numerous public proceedings, the Developer represented that 180 Land Company, LLC, Seventy Acres LLC, and Fore Stars Ltd. are affiliates under common ownership and control. In matters before the City Council, the Developer represented that the 250.92 Badlands Property was acquired by Fore Stars, Ltd., whose stock was then "acquired (through various entities and family limited partnerships) by the same principals as EHB Companies LLC." Ex. 9(135). Fore Stars then transferred most of the 250.92 acres to two affiliates: 180 Land Co., LLC (178.27 acres) and Seventy Acres, LLC (70.52 acres) and retained the remaining 2.13 acres. (*Id.*).

10. The three affiliated entities – 180 Land Company, LLC; Seventy Acres LLC; and Fore Stars, Ltd. – are all managed by EHB Companies, LLC, which, in turn, is managed by Yohan Lowie. Ex. 9.

11. Based on the Developer's representations, for purposes of determining issue preclusion, 180 Land Co., LLC; Seventy Acres LLC; and Fore Stars, Ltd. should be deemed parties to Case No. A-17-752344-J. *See Paradise Palms*, 89 Nev. at 30, 505 P.2d at 598.

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12. Even if the Plaintiff/Petitioner here were not deemed a "party" to Case No. A-17-752344-J, it is in privity with Seventy Acres under an adequate representation analysis. In *Mendenhall v. Tassinari*, 133 Nev. Adv. Op. 78, 403 P.3d 364, 369 (2017), the Supreme Court found that privity existed between certain entities and its corporate parent because of a "substantial identity" between them. This is consistent with the Restatement (Second) of Judgments §59(3), which looks at common ownership among entities for the purpose of evaluating whether a judgment as to one entity is conclusive on another.

13. With identical ownership and management, the interests of Seventy Acres and 180 Land Company were completely aligned with respect to the subject matter of Case No. A-17-752344-J, and Seventy Acres therefore adequately represented 180 Land Company's interests there. Moreover, in each of the pending court cases relating to the development of the Badlands Property in which both 180 Land Company and Seventy Acres are named parties, and of which the Court has taken judicial notice, the two entities have never filed separate pleadings or motions and have always been represented together by the same counsel to advance their collective interests. As a result, privity exists between Seventy Acres and 180 Land Company for purposes of issue preclusion.

14. The issue of whether a major modification is required for redevelopment of the Badlands Property was actually and necessarily litigated in Case No. A-17-752344-J. "When an issue is properly raised and is submitted for determination, the issue is actually litigated." *Alcantara*, 130 Nev. at 262, 321 P.3d at 918 (internal punctuation and quotations omitted) (citing *Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013)). "Whether an issue was necessarily litigated turns on 'whether the common issue was necessary to the judgment in the earlier suit.'" *Id.* (citing *Tarkanian v. State Indus. Ins. Sys.*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994)). Since Judge Crockett's Order was entirely dependent on the issue of whether a major modification of the Peccole Ranch Master Development Plan was a prerequisite to redevelopment of the golf course into houses, the issue was necessarily litigated.

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12. Given the substantial identity of interest among 180 Land Company, LLC and Seventy Acres, LLC, it would be improper to permit 180 Land Company, LLC to circumvent Judge Crockett's Order with respect to the issues that were fully adjudicated.

13. Because Judge Crockett's Order has preclusive effect here, the Developer must submit a major modification application for the Las Vegas City Council's consideration and approval before the City Council may consider any redevelopment applications for the Badlands golf course.

14. Because Judge Crockett's Order requires that the Developer get approval of a major modification, and no such approval was obtained before the Developer submitted its 133-Acre Applications, the City Council properly struck the Developer's 133-Acre Applications, and the Petition for Judicial Review must be denied. However, the Developer's alternative claims for inverse condemnation may proceed in the ordinary course.

15. The Court declines to address any other issues raised by the parties.

ORDER

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that:

1. The City's Motion to Dismiss is **GRANTED IN PART** as to the Petition for Judicial Review on the grounds of issue preclusion.
2. The Petition for Judicial Review is **DENIED** without prejudice should Judge Crockett's Order be overturned on appeal.
3. The Developer's Countermotion to Allow More Definite Statement If Necessary And Countermotion To Stay Litigation Of Inverse Condemnation Claims Until Resolution Of The Petition For Judicial Review And Countermotion For NRCP Rule 56(F) Continuance are **DENIED AS MOOT** as to the Petition for Judicial Review.

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4. The Developer's alternative claims for inverse condemnation may proceed in the ordinary course.

DATED: October 2, 2019.

THE HONORABLE GLORIA STURMAN
District Court Judge

Submitted By:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 29th day of July, 2021, a true and correct copy of the foregoing **[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING MOTION TO DISMISS AND COUNTERMOTION TO ALLOW MORE DEFINITE STATEMENT IF NECESSARY AND COUNTERMOTION TO STAY LITIGATION OF INVERSE CONDEMNATION CLAIMS UNTIL RESOLUTION OF THE PETITION FOR JUDICIAL REVIEW AND COUNTERMOTION FOR NRCP RULE 56(F) CONTINUANCE** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

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EXHIBIT “C”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
JACK B. BINION, AN INDIVIDUAL; DUNCAN R. LEE AND IRENE LEE, INDIVIDUALS AND TRUSTEES OF THE LEE FAMILY TRUST; FRANK A. SCHRECK, AN INDIVIDUAL; TURNER INVESTMENTS, LTD., A NEVADA LIMITED LIABILITY COMPANY; ROGER P. WAGNER AND CAROLYN G. WAGNER, INDIVIDUALS AND AS TRUSTEES OF THE WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC; JASON AWAD AND SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE THOMAS AND KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE KENNETH J. SULLIVAN FAMILY TRUST; DR. GREGORY BIGLER; AND SALLY BIGLER,
Respondents.

No. 75481

FILED
MAR 05 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order granting a petition for judicial review of the Las Vegas City Council's decision that approved

three land use applications. Eighth Judicial District Court, Clark County; James Crockett, Judge.[1]

Appellant Seventy Acres filed three development applications with the City's Planning Department in order to construct a multi-family residential development on a parcel it recently acquired. Specifically, Seventy Acres filed a general plan amendment, a rezoning application, and a site development plan amendment. Relying on reports compiled by the Planning Commission staff and statements made by the Planning Director, the City's Planning Commission and City Council approved the three applications.

Respondents filed a petition for judicial review of the City Council's approval of Seventy Acres's applications. Respondents' primary argument was that the City failed to follow the express terms of Title 19 of the Las Vegas Municipal Code (LVMC) in granting the applications. Respondents also argued that the City's decision was not supported by substantial evidence. Following a hearing, the district court concluded that the City adopted its interpretation of Title 19 of the LVMC as a litigation strategy and declined to give the City's interpretation of its land use ordinances deference. Citing a report prepared by the Planning Commission staff, the district court found that the City previously interpreted Title 19 of the LVMC as requiring Seventy Acres to obtain a major modification of the Peccole Ranch Master Plan before it could develop

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[1]The Honorables Kristina Pickering, Chief Justice, and Mark Gibbons, James Hardesty, Ron Parraguirre, and Abbi Silver, Justices, voluntary recused themselves from participation in the decision of this matter. The Governor designated The Honorable Lynne Simons, District Judge of the Second Judicial District Court, to sit in place of the Honorable James Hardesty.

the parcel. Therefore, the district court determined that the City's previous interpretation should apply and Seventy Acres was required to obtain a major modification of the Peccole Ranch Master Plan before having the subject applications approved. Accordingly, the district court granted the petition for judicial review and vacated the City Council's approval of Seventy Acres's three applications. Seventy Acres appeals.

Title 19 of the LVMC does not require a major modification for residential planned development districts

This court's role in reviewing an administrative agency's decision is identical to that of the district court and we give no deference to the district court's decision. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013); *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011). We review an administrative agency's legal conclusions de novo and its "factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011) (internal quotations omitted). When construing ordinances, this court "gives meaning to all of the terms and language[,] . . . read[ing] each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 274, 236 P.3d 10, 17-18 (2010) (internal citation and internal quotation omitted). Additionally, this court presumes a city's interpretation of its land use ordinances is valid "absent a manifest abuse of discretion." *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1994).

Having considered the record and the parties' arguments, we conclude that the City Council properly interpreted the City's land use ordinances in determining that Seventy Acres was not required to obtain a major modification of the Peccole Ranch Master Plan before it could develop the parcel. LVMC 19.10.040(B)(1) expressly limits master development plans to planned development district zoning designations. Therefore, the major modification process described in LVMC 19.10.040(G)(2), which is required to amend a master development plan, only applies to planned development district zoning designations. Here, the parcel does not carry the planned development district zoning designation. Therefore, the major modification process is not applicable to the parcel.

Instead, the parcel carries a zoning designation of residential planned development district. LVMC 19.10.050(B)(1) expressly states that site development plans govern the development of residential planned development districts. Therefore, as the City correctly determined, Seventy Acres must follow the site development plan amendment process outlined under LVMC 19.16.100(H) to develop the parcel. LVMC 19.10.050(D). This process does not require Seventy Acres to obtain a major modification of the Peccole Ranch Master Plan prior to submitting the at-issue applications. Accordingly, we conclude that the City Council's interpretation of the City's land use ordinances did not constitute a manifest abuse of discretion. *Cinnamon Hills Assocs.*, 110 Nev. at 247, 871 P.2d at 326 (1994).

Substantial evidence supports the City's approval of the applications

We next consider whether substantial evidence supports the City's decision to grant Seventy Acres's applications. "Substantial evidence is evidence that a reasonable person would deem adequate to support a decision." *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 899,

59 P.3d 1212, 1219 (2002). In determining whether substantial evidence exists to support an agency's decision, this court is limited to the record as presented to the agency. *Id.* Although conflicting evidence may be present in the record, "we cannot substitute our judgment for that of the City Council as to the weight of the evidence." *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 530, 96 P.3d 756, 761 (2004).

The parties dispute whether substantial evidence supported the City's decision to grant Seventy Acres's three applications.[2] The governing ordinances require the City to make specific findings to approve a general plan amendment, LVMC 19.16.030(I), a rezoning application, LVMC 19.16.090(L), and a site development plan amendment, LVMC 19.16.100(E). In approving the applications, the City primarily relied on a report prepared by the Planning Commission staff that analyzed the merits of each application.[3] The report found that Seventy Acres's applications met the statutory requirements for approval. The City also relied on the testimony

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[2]Respondents point to evidence in the record showing that the public schools that serve the community where the parcel is located are currently over capacity and that many of the residents that live in the surrounding area are opposed to the project. However, "it is not the place of the court to substitute its judgment for that of the [City Council] as to weight of the evidence." *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) (explaining that "conflicting evidence does not compel interference with [a] . . . decision so long as the decision was supported by substantial evidence").

[3]The report erroneously found that Seventy Acres had to obtain a major modification of the Peccole Ranch Master Plan prior to submitting a general plan amendment. Setting that finding aside, the report found that Seventy Acres met the other statutory requirements for approval of its general plan amendment, its rezoning application, and its site development plan amendment.

of the Planning Director, who found that the applications were consistent with the goals, objectives, and policies of the City's 2020 Master Plan, compatible with surrounding developments, and substantially complied with the requirements of the City's land use ordinances. Evidence in the record supports these findings. Accordingly, we conclude that a reasonable person would find this evidence adequate to support the City's decision to approve Seventy Acres's general plan amendment, rezoning application, and site development plan amendment. *Reno Police Protective Ass'n*, 118 Nev. at 899, 59 P.3d at 1219.

In sum, we conclude that the district court erred when it granted respondents' petition for judicial review. The City correctly interpreted its land use ordinances and substantial evidence supports its decision to approve Seventy Acres's three applications. We therefore

ORDER the judgment of the district court REVERSED.

_____, J.
Stiglich

_____, J.
Cadish

_____, D.J.
Simons

cc: Hon. James Crockett, District Judge
Ara H. Shirinian, Settlement Judge
Law Offices of Kermitt L. Waters
EHB Companies, LLC
Marquis Aurbach Coffing
Claggett & Sykes Law Firm
Hutchison & Steffen, LLC/Las Vegas
Pisanelli Bice, PLLC
Las Vegas City Attorney
Eighth District Court Clerk

EXHIBIT “D”

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, LTD, SEVENTY ACRES, LLC, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, v. CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entitles I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entitles I through X, Defendants.	Case No. A-18-780184-C Dept. No. III **FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING CITY OF LAS VEGAS' MOTION FOR SUMMARY JUDGMENT**

Departmental History

The instant matter was filed in the Eighth Judicial District Court (hereinafter referred to by "Department" designations) by Plaintiff's 180 Land Company, LLC et al. (hereinafter "Developer") on August 28, 2018, and assigned to Judge Israel in Department 28. Based on a peremptory challenge filed by the Defendant City of Las Vegas (hereinafter "City"), the matter was reassigned on February 5, 2019, to Judge Silva in Department 9. The peremptory challenge was subsequently reversed and the matter was reassigned back to Department 28 on February 22, 2019.

Thereafter, on March 12, 2019, Department 28 recused itself from hearing the matter and it was again reassigned to Department 9. Based on a new peremptory challenge filed by

the Developer, the matter was reassigned on April 26, 2019, to Department 8, which was at that time vacant pending the appointment of a new judge.

Prior to the appointment of the new Department 8 judge, the matter was removed to Federal Court on August 22, 2019. In September, 2019, Judge Atkin was appointed to Department 8. On October 24, 2019, the matter was remanded back to State Court by the Federal Court.

On November 6, 2019, Department 8 recused itself and the matter was then reassigned to Judge T. Jones in Department 10. Department 10 presided over the case until September, 2020. At that time, a caseload reassignment occurred and the matter was reassigned to this court, Department 3.

Procedural History

The instant case centers on disputes between the Developer and the City over property formerly known as the Badlands Golf Course. Based on those disputes, Developer filed a series of inverse condemnation actions in the Eighth Judicial District Court. The actions are each specific to separate parcels of land and are commonly identified by the acreage at issue.

The instant matter is commonly referred to as the "65-Acre Property case" and was filed, as stated above, on August 28, 2018. Pending before Judge Williams in Department 16 is Case A758528, the "35-Acre Property case," which was filed on July 18, 2017. Pending before Senior Judge Bixler is Case A773228, the "17-Acre Property case," which was filed on April 20, 2018. Lastly, pending before Judge Sturman in Department 26 is Case A775804, the "133-Acre Property case," which was filed on June 7, 2018.

Also relevant and of note is the fact that the above four inverse condemnation actions were preceded by Case A752344, the "Crockett case" which was filed on March 10, 2017, and assigned to Judge Crockett in Department 24. That matter also dealt with the "17-Acre Property" and was a Petition for Judicial Review filed by a group of citizens challenging the

decision of the City to grant Developer's application to develop that particular property. Judge Crockett granted the Petition for Judicial Review over the objection of both the Developer and the City. Developer then appealed and the City filed an amicus brief in support of the Developer. The Nevada Supreme Court reversed Judge Crockett's decision by way of an order filed March 5, 2020. By then, however, Developer had filed the "17-Acre Property case" now pending before Senior Judge Bixler.

On November 9, 2020, City filed the instant Motion for Summary Judgment (hereinafter "Motion"). On November 23, 2020, Developer filed their Opposition and a Countermotion to Determine the Two Inverse Condemnation Sub-Inquiries in the Proper Order (hereinafter "Countermotion"). On December 9, 2020, City filed a Motion to Strike Developer's Countermotion (hereinafter "Motion to Strike"). The pending motions have been fully briefed.

The court held a lengthy hearing on the pending motions on December 16, 2020. Appearing remotely were James J. Leavitt, Elizabeth Ghanem Ham, Autumn Waters and Michael Schneider on behalf of the Developer, and George F. Ogilvie III, Andrew Schwartz and Philip R. Byrnes on behalf of the City. The court made an initial ruling denying the City's Motion to Strike, finding that the relief requested was proper for a countermotion as it simply asked this court to engage in a certain legal analysis format if and when it addressed the merits of the City's summary judgement request, and to make certain findings, if necessary, in favor of Developer based on that legal analysis.

Regarding the Summary Judgment Motion and the Countermotion, the Court having reviewed the pleadings and exhibits in the instant case, and, where relevant and necessary, in the companion cases, and having considered the written and oral arguments presented, and being fully informed in the premises, makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

I. The Badlands as open space for Peccole Ranch

1. In 1980, the City approved William Peccole's petition to annex 2,243 acres of undeveloped land to the City. Ex. A at 1-11.[1] Mr. Peccole's intent was to develop the entire parcel as a master planned development. *Id.* at 1. After the annexation, the City approved an integrated plan to develop the land with a variety of uses, called the "Peccole Property Land Use Plan." Ex. B at 12-18. In 1986, Mr. Peccole requested approval of an amended master plan featuring two 18-hole golf courses, one of which was in the general area where the Badlands golf course was later developed. Ex. C at 31-33; Ex. WW.

2. In 1988, the Peccole Ranch Partnership ("Peccole") submitted a revised master plan known as the Peccole Ranch Master Plan ("PRMP") and an application to rezone 448.8 acres for the first phase of development ("Phase I"). Ex. E at 62-93. In 1989, the City approved the PRMP and Phase I rezoning application, after Peccole agreed to limit the overall density in Phase I and reserve 207.1 acres for a golf course and drainage in the second phase of development ("Phase II") of the PRMP. *Id.* at 96-97.

3. In 1989, the City included Peccole Ranch in a Gaming Enterprise District ("GED"), which allowed Peccole to develop a resort hotel in the PRMP so long as Peccole provided a recreational amenity such as an 18-hole golf course. Ex. G at 114-124, 130, 135-37. Peccole reserved 207 acres for a golf course to satisfy this requirement. Ex. E at 96, 98; Ex. G at 123-124.

4. In 1990, Peccole applied to amend the PRMP for Phase II. Ex. H at 138-161. The revised PRMP highlighted an "extensive 253-acre golf course and linear open space system winding throughout the community [that] provides a positive focal point while creating a

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[1] References to lettered Exhibits are to the Exhibits contained in the City's Appendix. References to numbered Exhibits and/or "LO Appx" Exhibits are to the Exhibits contained in the Developer's Appendix.

mechanism to handle drainage flows." *Id.* at 145. The City approved the Phase II rezoning application under a resolution of intent subject to all conditions of approval for the revised PRMP. *Id.* at 183-94.

II. The PR-OS General Plan designation of the Badlands

5. Since 1992, the City's General Plan has designated the Badlands for parks, recreation, and open space, a designation that does not permit residential development. On April 1, 1992, the City Council adopted a new Las Vegas General Plan, including revisions approved by the Planning Commission. Ex. I at 195-204, 212-18. The 1992 General Plan included maps showing the existing land uses and proposed future land uses. *Id.* at 246. The future land use map for the Southwest Sector designated the area set aside by Peccole for an 18-hole golf course as "Parks/Schools/ Recreation/Open Space." *Id.* at 248. That designation allowed "large public parks and recreation areas such as public and private golf courses, trails and easements, drainage ways and detention basins, and any other large areas of permanent open land." *Id.* at 234-35.

6. From 1992 to 1996, Peccole developed the 18-hole golf course in the location depicted in the 1992 General Plan, and a 9-hole course to the north of the 18-hole course. *Compare id.* at 248 *with* Ex. TT; *see also* Ex. J, UU. The 9-hole course was also designated "P" for "Parks" in the City's General Plan as early as 1998. *See* Ex. K. The Badlands 18-hole and 9-hole golf courses, totaling 250 acres, remain in the same configuration today. When the City Council adopted a new General Plan in 2000 to project growth over the following 20 years ("2020 Master Plan"), it retained the "parks, recreation, and open space" [PR-OS] designation. Ex. L at 265; compare *id.* at 269 with Ex. I at 234-35, 248. Beginning in 2002, the City's General Plan maps show the entire Badlands designated as PR-OS. Ex. M at 274-77.

7. In 2005, the City Council incorporated an updated Land Use Element in the 2020 Master Plan. Ex. N at 278-82. This 2005 Land Use Element designated all 27 holes of the

Badlands golf course as PR-OS for "Park/Recreation/Open Space." *Id.* at 291. Each ordinance of the City Council updating the Land Use Element of the General Plan since 2005 has approved the designation of the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged. *See* Ex. O at 292, 300-01 (Ordinance #6056 9/2/2009); Ex. P at 302-04, 316-17 (Ordinance #6152 5/8/2011); Ex. Q at 318, 331-32 (Ordinance #6622 6/26/2018).

III. The R-PD7 zoning of the Badlands

8. In 1972, the City established R-PD7 zoning (Residential-Planned Unit Development, 7 units/acre). Ex. R. "The purpose of a Planned Unit Development [was] to allow a maximum flexibility for imaginative and innovative residential design and land utilization in accordance with the General Plan." *Id.* at 333. The "PD" in R-PD stands for "Planned Development." Planned Development zoning, generally applicable to larger development sites, "permits planned-unit development by allowing a modification in lot size and frontage requirements under the condition that other land in the development be set aside for parks, schools, or other public needs." *Zoning*, *Black's Law Dictionary* (11th ed. 2019). The R-PD district in the Las Vegas Uniform Development Code was intended "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns." Ex. R at 333. "As a[n R-PD7] Residential Planned Development, density may be concentrated in some areas while other areas remain less dense, as long as the overall density for this site does not exceed 7.49 dwelling units per acre. Therefore, portions of the subject area can be restricted in density by various General Plan designations." Ex. ZZZ at 1414-15.

9. During the 1990's, the City approved rezoning requests by a resolution of intent, meaning that a rezoning was provisional until the rezoned property was developed. Once rezoned property was developed, the City would adopt an ordinance amending the Official

Zoning Map Atlas to make the rezoning permanent. *See, e.g.* Ex. S at 341. In 1990, the City adopted a resolution of intent to rezone the 996.4 acres in Phase II in accordance with the amended PRMP. Ex. H at 189-94. To obtain the City Council's approval of tentative R-PD7 zoning for housing lining the fairways of a golf course, Peccole agreed to set aside 211.6 acres for a golf course and drainage. *Id.* at 159, 163-165, 167-168, 171-172, 187-188.

10. In 2001, the City amended the Zoning Map to rezone to R-PD7 the Phase II property previously approved for R-PD7 zoning under the resolution of intent. Ex. T at 345-61. In 2011, the City discontinued the R-PD zoning district for new developments, replacing the R-PD zoning category with "PD." The City, however, did not alter the R-PD7 zoning of the Badlands and surrounding residential areas of Phase II. Ex. U at 363.

IV. The Developers due diligence in acquiring the Badlands property

11. The principals of the Developer are accomplished and professional developers that have constructed more homes and commercial development in the vicinity of the 65-Acre Property than any other person or entity and, through this work, gained significant information about the entire 250-Acre Residential Zoned Land (which includes the 65-Acre Property).[2] *LO Appx. Ex. 22*, Decl. Lowie. They have extensive experience developing luxurious and distinctive commercial and residential projects in Las Vegas, including but not limited to: (1) One Queensridge Place, which consists of two 20-floor luxury residential high rises; (2) Tivoli Village at Queensridge, an Old World styled mixed-used retail, restaurant, and office space shopping center; (3) over 300 customs homes, and (4) multiple commercial shopping centers to name a few. *LO Appx. Ex. 22*, Decl. Lowie, at 00534, p. 1, para. 2. The Developer principles live in the Queensridge common interest community and One Queensridge Place (which is adjacent to the 250 Acre Residential Zoned Land) and are

[2] Yohan Lowie, one of the Landowners' principles, has been described as the best architect in the Las Vegas valley. *LO Appx. Ex 21* at 00418-419.

the single largest owners within both developments having built over 40% of the custom homes within Queensridge. Id.

12. In 1996, the principals of the Developer began working with William Peccole and the Peccole family (referred to as "Peccole") to develop lots adjacent to the 250-Acre Residential Zoned Land within the common interest community commonly known as "Queensridge" (the "Queensridge CIC") and consistently worked together with them in the area on property transactions thereafter. *LO Appx. Ex. 22*, Decl. Lowie, at 00534, p. 1, para. 3.

13. In or about 2001, the principals of the Developer learned from Peccole that the Badlands Golf Course was zoned R-PD7. *LO Appx. Ex 22*, Decl. Lowie, at 00535, p. 2, para. 4. They further learned that Peccole had never imposed any restrictions on the use of the 250-Acre Property and that the 250-Acre Property would eventually be developed. Id. Peccole further informed the Developer that the 250-Acre Residential Zoned Land is "developable at any time" and "we're never going to put a deed restriction on the property." Id. The Land abuts the Queensridge CIC. Id.

14. In or about 2001, the principals of the Developer retained legal counsel to confirm Peccoles' assertions and counsel advised that the 250-Acre Residential Zoned Land is "Not A Part" of the Queensridge CIC, the Land was residentially zoned, there existed rights to develop the Land, the Land was intended for residential development and that as a homeowner within the Queensridge CIC, according to the Queensridge Covenants, Conditions and Restrictions (the "CC&Rs") they had no right to interfere with the development of the 250-Acre Residential Zoned Land. *LO Appx. Ex. 22*, Decl. Lowie, at 00535, p. 2, para. 5.

15. In 2006, Mr. Lowie met with the highest ranking City planning official, Robert Ginzer, and was advised that: 1) the entire 250-Acre Residential Zone Land is zoned R-PD7; and, 2) there is nothing that can stop development of the property. *LO Appx. Ex. 22*, Decl. Lowie, at 00535, p. 2, para. 6.

16. With this knowledge and understanding, the principals of the Developer then obtained the right to purchase all five separate parcels that made up the 250-Acre Residential Zoned Land and continued their due diligence and investigation of the Land. *LO Appx. Ex. 22*, Decl. Lowie, at 00535, p. 2, para. 6.

17. In November 2014, the Developer was given six months to exercise their right to purchase the 250-Acre Residential Zoned Land and conducted their final due diligence prior to closing on the acquisition of the Land. *LO Appx. Ex. 22*, Decl. Lowie, at 00535, p. 2-3, para. 6. The Developer met with the two highest ranking City Planning officials at the time, Tom Perrigo and Peter Lowenstein, and asked them to confirm that the entire 250-Acre Residential Zoned Land is developable and if there was "anything" that would otherwise prevent development and the City Planning Department agreed to do a study that took approximately three weeks. Id.; *LO Appx. Ex. 23* at 00559-560, pp. 66-67; 69:15-16; 70:13-16 (Lowie Depo, Binion v. Fore Star).

18. After three weeks the City Planning Department reported that: 1) the 250-Acre Residential Zoned Land was hard zoned and had vested rights to develop up to 7 units an acre; 2) "the zoning trumps everything;" and, 3) any owner of the 250-Acre Residential Zoned Land can develop the property. *LO Appx. Ex. 22*, Decl. Lowie, at 00536, p. 3, para. 8; *LO Appx. Ex. 23* at 00561, pp. 74-75, specifically, 75:13; 74:22-23; 75:12 (Lowie Depo, Binion v. Fore Star).

19. The Developer requested that the City adopt its three-week study in writing as the City's official position in order to conclusively establish the developability of the entire 250-Acre Residential Zoned Land prior to closing on the acquisition of the property. *LO Appx. Ex 22*, Decl. Lowie, at 00536, p. 3, para. 9. The City agreed and provided the City's official position through a "Zoning Verification Letter" issued by the City Planning & Development Department on December 30, 2014, stating: 1) "The subject properties are zoned R-PD7 (Residential Planned Development District – 7 units per acre;" 2) "The density allowed in the R-PD District shall be reflected by a numerical designation for that

district. (Example, R-PD4 allows up to four units per gross acre.);" and, 3) "A detailed listing of the permissible uses and all applicable requirements for the R-PD Zone are located in Title 19 ("Las Vegas Zoning Code") of the Las Vegas Municipal Code." Id.; *LO Appx. Ex. 23* at 00561-562, pp. 77:24-25, 80:20-21.

20. Their due diligence now complete, Developer was ready to complete the acquisition of the subject property.

V. The Developer's acquisition and segmentation of the Badlands property

21. In early 2015, Peccole owned the Badlands through a company known as Fore Stars Ltd ("Fore Stars"). Ex. V at 365-68; Ex. VV. In March 2015, the Developer acquired Fore Stars, thereby acquiring the 250-Acre Badlands. Ex. W at 379; Ex. AAA. At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. Ex. QQQ at 1160; Ex. X at 382-410; Ex. XX. The Developer transferred 178.27 acres to 180 Land Co. LLC ("180 Land") and 70.52 acres to Seventy Acres LLC ("Seventy Acres"), leaving Fore Stars with 2.13 acres. Ex. W at 379; *see also* Ex. V at 370-77. Each of these entities is controlled by the Developer's EHB Companies LLC. *See* Ex. V at 371 and 375 (deeds executed by EHB Companies LLC). The Developer then segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands. *See* Ex. HH; Ex. BBB; Ex. LL; Ex. Z. At issue in this case is a 65-Acre parcel of the Badlands owned by 180 Land, Fore Stars, and Seventy Acres (the "65-Acre Property"). *See* Complaint for Declaratory Relief and Injunctive Relief, and Verified Claims in Inverse Condemnation filed Sept. 5, 2018 ("Compl.") ¶ 7.

VI. The City's approval of 435 luxury housing units on the 17-Acre Property

22. In November 2015, the Developer, acknowledging the need to make application to the City in order to develop a parcel of property, applied for a General Plan Amendment, Re-Zoning, and Site Development Plan Review to redevelop the 17-Acre Property from golf course use to luxury condominiums ("17-Acre Applications"). Ex. Z at 446-66. The 17-Acre Applications sought to change the General Plan designation from PR-OS, which did not permit residential development, to H (High Density Residential) and the zoning from R-PD7 to R-4 (High Density Residential). *Id.* at 449-52. The Planning Staff Report for the 17-Acre Applications noted that the proposed development required a Major Modification Application to amend the PRMP. Ex. AA at 470. In 2016, the Developer submitted a Major Modification Application and related applications, but later that year withdrew the applications. Ex. BB at 483-94; Ex. CC.

23. In February 2017, the City Council approved the 17-Acre Applications for 435 units of luxury housing and approved a rezoning to R-3, along with a General Plan Amendment to change the land use designation from PR-OS to Medium Density Residential. Ex. DD at 586, 587-89, 591-97; Ex. SSS. In approving the 17-Acre Applications, the City did not require the Developer to file a Major Modification Application.

VII. The homeowners' challenge to the City's approval of the 17-Acre Applications

24. After the City approved the 17-Acre Applications, nearby homeowners filed a Petition for Judicial Review of the City's approval, which was assigned to Judge Crockett in Department 24. Ex. EE at 599, 609 (the "Crockett Order"). On March 5, 2018, Judge Crockett granted the homeowners' petition over the objection of both the Developer and the City, vacating the City's approval on the grounds that the City Council was required to approve a Major Modification Application before approving applications to redevelop the Badlands. *Id.* at 598, 610-11. The Developer appealed the Crockett Order. *See* Ex. DDD.

Although the City did not appeal the Crockett Order, it did file an amicus brief in support of the Developer's position that a Major Modification Application was not required. Ex. CCC.

25. Following Judge Crockett's decision invalidating the City's approval, the Developer filed a lawsuit (the 17-Acre case) against the City, the Eighth Judicial District Court, and Judge Crockett. Ex. GG at 631, 632, 639. The City removed that case to federal court. Following a remand order, the 17-Acre case is now pending before Senior Judge James Bixler. On December 9, 2020 Judge Bixler denied the City's motion to dismiss the 17-Acre Complaint.

26. Ultimately, the Nevada Supreme Court reversed Judge Crockett's decision granting the Petition for Judicial Review. In its Order of Reversal filed March 5, 2020, the Nevada Supreme Court found that a Major Modification Application was not required to develop the 17-Acre Property because the City's UDC required Major Modification Applications for property zoned PD, but not property zoned R-PD. Ex. DDD. The Supreme Court subsequently denied rehearing and en banc reconsideration and issued a remittitur, rendering its determination final. Ex. EEE. The Supreme Court's decision was consistent with the City's argument in the District Court in support of it's granting of Developer's application, and in its amicus brief that a Major Modification Application was not required to develop the 17-Acre Property. Ex. CCC at 1003-06. The District Court thereafter, consistent with the Nevada Supreme Court's decision, entered an Order on November 6, 2020, denying the petition for judicial review. *See* Ex. RRR.

27. The Nevada Supreme Court's reversal of the Crockett Order reinstated the City's approval of the Developer's applications to develop the 17-Acre Property. Ex. DDD. The City provided the Developer with notice of that fact by letter on March 26, 2020. Ex. FFF at 1019. The City's letter explained that once remittitur issued in the Nevada Supreme Court's order of reversal, "the discretionary entitlements the City approved for [the Developer's] 435-unit project on February 15, 2017 . . . will be reinstated." *Id.* The City also notified the Developer that the approvals would be valid for two years after the date of the

remittitur. *Id.* On September 1, 2020, the City notified the Developer that the Nevada Supreme Court had issued remittitur, the City's original approval of 435 luxury housing units on the 17-Acre Property had been reinstated, and the Developer is free to proceed with its development project. Ex. GGG at 1021. The City again notified the Developer that the approvals would be extended for two years after the date of the remittitur. *Id.*

VIII. The 35-Acre Applications

28. While the 17-Acre Applications were pending, the Developer filed applications to redevelop the 35-Acre Property ("35-Acre Applications"). Ex. HH; Compl. ¶ 32. On June 21, 2017, the City Council denied the 35-Acre Applications due to significant public opposition to the proposed development, concerns over the impact of the proposed development on surrounding residents, and concerns on piecemeal development of the Master Development Plan area rather than a cohesive plan for the entire area. Ex. 46; *see also* Ex. II at 673-78. Developer did not submit a second application to develop the 35-Acre Property.

The Developer filed a petition for judicial review and complaint for a taking (the 35-Acre Property case), which was assigned to Judge Williams in Department 16. Ex. JJ at 680, 692. Judge Williams concluded that substantial evidence supported the Council's denial of the 35-Acre Applications, that Judge Crockett's Decision had preclusive effect, and the Developer had no vested right under the R-PD7 to approval of its application. Ex. KK at 780-82, 789-92. The Developer filed an amended complaint alleging inverse condemnation claims, which is also currently pending before Judge Williams, following the City's removal to federal court and subsequent remand. *See 180 Land Co. v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J.

IX. The Master Development Application

29. Before the City denied the 35-Acre Applications, the Developer sought a new Master Development Agreement (MDA) for the entire Badlands, including the 35-Acre Property. Ex. LL; Ex. II at 679. On August 2, 2017, the City Council disapproved the MDA by a vote of 4-3. Ex. MM at 880-82; Compl. ¶¶ 39, 42. The Developer did not seek judicial review of the City's decision to deny the development agreement.

X. The 133-Acre Applications

30. In October 2017, the Developer filed applications to redevelop the 133-Acre Property ("133-Acre Applications"). Compl. ¶ 46. On May 16, 2018, after the Crockett Order but before the Nevada Supreme Court's reversal of said order, the City Council voted to strike the 133-Acre Applications as incomplete because they did not include an application for a Major Modification, as the Crockett Order required. Compl. ¶¶68, 77, 85; Ex. BBB at 989-98.

31. The Developer filed a petition for judicial review (the 133-Acre Property case) challenging the City's action to strike the 133-Acre Applications and a complaint for a taking and other related claims. That action was assigned to Judge Sturman in Department 26, who dismissed the petition for judicial review on the grounds that the parties were bound by the Crockett Order and, therefore, the Developer's failure to file a Major Modification Application was valid grounds for the City to strike the application. Judge Sturman allowed the Developer's inverse condemnation claims to proceed. Ex. NN. The City removed the case to federal court, and it has since been remanded back to state court.

XI. The 65-Acre Applications

32. To date, there has been no evidence presented to the court that Developer has submitted any development applications to the City for consideration of a proposed development of the individual 65-Acre parcel. As noted above, there was a Master

Development application, Ex. LL; Ex. II at 679, that was eventually denied by the City but no individual applications for the 65-Acre property.

XII. The increase in value of the Badlands due to the City's approval of 435 units on the 17-Acre Property

33. Under the Membership Purchase and Sale Agreement between the Peccole Family and the Developer, the Developer purchased the 250-Acre Badlands Golf Course for $7,500,000, or $30,000 per acre ($7,500,000/250 acres = $30,000). Ex. AAA at 966. This figure does not represent the total cost to Developer as there were clearly monies spent during its due diligence process (Developer has stated that the total cost for due diligence and purchase was $45 million). $7,500,000 is however the stated figure, per the Purchase and Sale Agreement, that Developer paid for the actual property. Ex. UUU at 1300.

34. The Developer contends in its Initial Disclosures that if the Badlands can be developed with housing, it is worth $1,542,857 per acre. Ex. JJJ at 1135-36.[3] Thus, according to the Developer's own evidence, the City's approval of 435 housing units in the Badlands has increased the value of the 17-Acre Property alone to $26,228,569 (17 x $1,542,857 = $26,228,569), thereby quadrupling the Developer's property purchase investment in the Badlands. Furthermore, the Developer still owns the remaining 233 acres with the potential to continue golf course use or develop the remaining acreage.

35. Even if the Developer paid $45 million for the Badlands as it contends, or $180,000/acre ($45,000,000/250 acres = $180,000/acre), the City's approval of 435 housing units in the Badlands has increased the value of the Badlands by $23,168,569 (the City's approval improved the value of each acre in the 17-Acre Property from $180,000 to

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[3] The Developer's Initial Disclosures in the 35-Acre case make the same claim. Ex. VVV at 1319. Both initial disclosures are based in part on the Lubawy appraisal of 70 acres of the Badlands that includes the entire 17-Acre Property and a portion of the 65-Acre Property. Ex. QQQ at 1165. The Lubawy appraisal assumed that the land being appraised could be developed with medium density housing. *Id.* at 1196-97.

$1,542,857, an increase of $1,362,857 per acre ($1,362,857 x 17 = $23,168,569).

CONCLUSIONS OF LAW

The instant motion and countermotion pose three areas of inquiry for the court's consideration. First, a discussion of the legal frame work surrounding the issue of a regulatory taking. Second, a discussion of whether or not the instant claims by the Developer are ripe for court action. And third, if necessary, a discussion of the merits of the Developer's claims under summary judgment standards.

I. The Legal Framework

A. City's liability for a regulatory taking is a question of law

1. Under NRCP 56(a), summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The non-moving party must "'set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.'" *Id.* (quoting *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110 825 P.2d 588, 591 (1992)).

2. Whether the government has inversely condemned private property is a question of law. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006).

B. A regulatory taking requires extreme interference with the use or value of property

1. Courts generally defer to the exercise of land use regulatory powers by the legislative and executive branches of government

3. In the United States, planning commissions and city councils have broad authority to limit land uses to protect health, safety, and welfare. Because the right to use land for a

particular purpose is not a fundamental constitutional right, courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use. The United States Supreme Court declared that the Court does "not sit to determine whether a particular housing project is or is not desirable," since "[t]he concept of the public welfare is broad and inclusive." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Instead, where the legislature and its authorized agencies "have made determinations that take into account a wide variety of uses," it is "not for [the courts] to reappraise them." *Id.*

4. The role of the courts in overseeing land use regulation is limited to cases of the most extreme restrictions on the use of private property under the regulatory takings doctrine. The narrow scope of the doctrine stems from the separation of powers between the legislative and executive branches of government and the judicial branch. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (judicial restraint respects the political questions doctrine and separation of powers because it requires that the courts refrain from replacing the policy judgments of lawmakers and regulators with their own with regard to non-fundamental constitutional rights); *Gorieb v. Fox*, 274 U.S. 603, 608 (1926) ("State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions . . . require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.").

5. Nevada's Constitution expressly prohibits any one branch of government from impinging on the functions of another. *Secretary of State v. Nevada State Legislature,* 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Nevada State Constitution provides that the state government "shall be divided into three separate departments" and prohibits any person authorized to exercise the powers belonging to one department to "exercise any functions, appertaining to either of the others" except where expressly permitted by the Constitution. Nev. Const. art. 3 § 1.

6. Separation of powers "is probably the most important single principle of government." *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). Within this framework, Nevada has delegated broad authority to cities to regulate land use for the public good. The State has specifically authorized cities to "address matters of local concern for the effective operation of city government" by "[e]xpressly grant[ing] and delegat[ing] to the governing body of an incorporated city all powers necessary or proper to address matters of local concern so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government." NRS 268.001(6), (6)(a).

7. "Matters of local concern" include "[p]lanning, zoning, development and redevelopment in the city." NRS 268.003(2)(b). "For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land." NRS 278.020(1); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 254, 439 P.2d 219, 222 (1968) (upholding a county's authority under NRS 278.020 to require an applicant for a special use permit to present evidence that the use is necessary to the public health and welfare of the community).

8. As a charter city, the City has the right to "regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land within those districts" and "[e]stablish and adopt ordinances and regulations which relate to the subdivision of land." Las Vegas City Charter § 2.210(1)(a), (b). Cities in Nevada limit the height of buildings, the uses permitted and the location of uses on property, and many other aspects of land use that could have an impact on the community. *See, e.g., Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 239, 871 P.2d 320, 321 (1994) (upholding City's denial of building permit application); *State ex rel. Davie v. Coleman*, 67 Nev. 636, 641, 224 P.2d 309, 311 (1950) (upholding Reno ordinance establishing land use plan and restricting use of land).

2. To avoid encroaching on the responsibilities and authority of other branches of government, courts intervene in land use regulation only in cases of extreme economic burden on the property

9. In its Third through Seventh Causes of Action, the Developer alleges a variety of types of takings under the Fifth Amendment of the United States Constitution, which provides "nor shall private property be taken for public use, without just compensation," and its counterpart in Article 1, Section 8 of the Nevada Constitution. The Just Compensation Clause of the Fifth Amendment was originally intended to require compensation only for eminent domain – *i.e.*, direct government takings. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In 1922, the Supreme Court held that a regulation that "goes too far," such that it destroys all or nearly all of the value or use of property, equivalent to an eminent domain taking, can require the regulatory agency to compensate the property owner for the value of the property before the regulation was imposed. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005). This type of inverse condemnation that does not involve a physical occupation of private property by the government, but rather alleges excessive regulation of the property owner's use of the property, is known as a "regulatory taking."[4] Under separation of powers, however, courts intervene in regulation of land use by the legislative and executive branches of government only in cases of (1) extreme regulation where the economic impact of the regulation is equivalent to an eminent domain taking, wiping out or nearly wiping out the use of value of the property, similar to a physical ouster of the owner by eminent domain, or (2) interference with reasonable investment-backed expectations. *Lingle*, 544 US. at 539 (categorical and *Penn Central* regulatory takings test both "aim[] to identify regulatory actions that are

[4] The Developer conflates eminent domain and inverse condemnation. The two doctrines have little in common. In eminent domain, the government's liability for the taking is established by the filing of the action. The only issue remaining is the valuation of the property taken. In inverse condemnation, by contrast, the government's liability is in dispute and is decided by the court. If the court finds liability, then a judge or jury determines the amount of just compensation.

functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").[5]

10. The Nevada Supreme Court has established an identical test, requiring an extreme economic burden to find liability for a regulatory taking. *State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "'completely deprive an owner of all economically beneficial use of her property'") (quoting *Lingle*, 544 U.S. at 538); *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*, 110 Nev. at 245-46, 871 P.2d at 324-35 (taking requires agency action that "destroy[s] all viable economic value of the prospective development property").

11. The Developer cites to numerous statements and actions of the City Council, individual Council members, City officials, and City staff that the Developer contends were unfair to the Developer. Because courts defer to the authority of local government to regulate land use for the public good, the regulatory takings doctrine is not concerned with the soundness or fairness of government regulation of land use. Because the regulation is presumed valid in regulatory takings cases, it is inappropriate to delve into the validity of or the motives underlying the regulation:

> The notion that . . . a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable. [The] inquiry [as to a regulation's validity] is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but

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[5] In settling the test for a regulatory taking, *Lingle* resolved inconsistencies in prior federal and state court decisions. The *Lingle* opinion was unanimous and had no footnotes, indicating that the Supreme Court intended to bring clarity and simplicity to the regulatory takings doctrine.

> rather requires compensation "in the event of otherwise proper interference amounting to a taking.

Lingle, 544 U.S.at 543 (citing *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987)); *cf. Sproul Homes of Nev. v. State ex rel. Dept. of Highways*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (judicial interference by mandamus, not by inverse condemnation, is appropriate if an agency's action was arbitrary or accompanied by manifest abuse). Assuming the truth of the Developer's allegations regarding the statements and actions of the City Council, individual Council members, City officials, and City staff, they are not relevant unless they can be shown to result in a wipeout or near wipeout of use and value or interfere with the Developer's reasonable investment-backed expectations.

12. A requirement that regulatory agencies pay compensation to property owners for regulation short of a wipeout would encroach on the powers of the legislative and executive branches of government to regulate land use to promote the general health, safety, and welfare. *Lingle*, 544 U.S. at 544 ("[R]equir[ing] courts to scrutinize the efficacy of a vast array of state and federal regulations" to determine whether they substantially advance legitimate state interests is "a task for which courts are not well suited. Moreover, it would empower-and might often require-courts to substitute their predictive judgments for those of elected legislatures and expert agencies."); *id.* at 537 (recognizing compensable regulatory takings only when the effect of government regulation is tantamount to a direct appropriation or ouster). As a result, a regulation is not a taking unless it virtually wipes out all the economic value or use of the property, because only then is it the functional equivalent of eminent domain. *Id.* at 539. Moreover, a standard for public liability for a regulatory taking that merely reduces the use or value of private property without destroying the use or value would lose its connection to the United States and Nevada Constitutions because that regulation would not be the functional equivalent of an eminent domain taking. *Id.* at 539.

13. Complying with government regulation, like the alleged regulation of the redevelopment of the Badlands in this case, is simply a cost of doing business in a complex society. "'[G]overnment regulation—by definition—involves the adjustment of rights for the public good.'" *Id.* at 538 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)); *see also Mahon*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978) ("Legislation designed to promote the general welfare commonly burdens some more than others.").

3. The Developer alleges a categorical and *Penn Central* regulatory taking

14. The Developer has alleged two types of regulatory takings: categorical and *Penn Central*. A categorical taking occurs either when a regulation results in a permanent physical invasion of property, or when a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019). A *Penn Central* taking is determined based on review of several factors; "[p]rimary" among them is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id.* at 538-39 (quoting *Penn Central*, 438 U.S. at 124. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). Under both the categorical and the *Penn Central* takings tests, the only regulatory actions that cause takings are those "that are functionally equivalent to the classic taking in

which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.[6]

15. To be the functional equivalent of eminent domain, the challenged regulatory action must cause a truly "severe economic deprivation" to the plaintiff. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007); see also *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient to show a taking); *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing cases in which diminutions of 75% and 92.5% insufficient to show a taking); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (1979) (95% diminution not a taking); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% diminution in property value not a taking); *Brace v. United States*, 72 Fed. Cl. 337, 357 (2006) ("diminutions well in excess of 85 percent" required to show a taking).

16. The Developer cites several federal cases finding a taking even where the diminution in value was less than 100%. *E.g.*, *Formanek v. United States*, 26 Cl.Ct. 332 (Fed. Cl. Ct. 1992) (finding a taking where government action resulted in 88% decline in value). Even though the Developer's cases were decided before *Lingle* clarified the regulatory takings doctrine in 2005 to require that liability for a taking can be found only where government action wipes out or nearly wipes out the economic value of property, the cases cited did require a near wipeout of value before a finding of a taking.

17. The Developer also relies on *Tien Fu Hsu v. County of Clark*, 173 P.3d 724 (Nev. 2007); *Sisolak*, 137 P.3d 1110; *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23

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[6] The Developer's "categorical" and "regulatory per se" takings are the same thing. The majority in *Lucas v. S.C. Coastal Council* classified economic wipeouts and physical takings resulting from government regulation as "categorical" takings, while the dissent characterized the same test as a "per se" standard. 505 U.S. at 1015, 1052 (Blackmun, J., dissenting). A unanimous Supreme Court in *Lingle* also uses the terms interchangeably. 544 U.S. at 538. Similarly, the Nevada Supreme Court in *Sisolak* refers to physical takings interchangeably as "categorical" and "per se." 122 Nev. at 662-63, 137 P.3d at 1122-23).

(2012); *ASAP Storage v. City of Sparks*, 123 Nev. 639 (2008); and *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327 (9th Cir. Ct. App. 1977) for the contention that regulation that "substantially impairs" or "direct[ly] interfere[s] with or disturb[s]" the owner's property can give rise to a regulatory taking. These cases are physical takings cases (*Tien*, *Sisolak*, *Arkansas*, and *ASAP*) or precondemnation cases (*Richmond*) and are inapplicable. The Developer also contends that takings are defined more broadly in Nevada than in federal law, citing *Vacation Village, Inc. v. Clark County*, 497 F.3d 902 (9th Cir. 2007). *Vacation Village*, however, concludes only that physical takings are broader in Nevada, not regulatory takings, citing *Sisolak*. *Id.* at 915-16. The scope of agency liability for regulatory takings in Nevada is identical to the federal standard. *See State*, 131 Nev. at 419, 351 P.3d at 741 (2015); *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35.

18. To support its contention that the test for a regulatory taking is less deferential to the agency action than as established in *Lingle*, *Penn Central*, *Concrete Pipe*, *Colony Cove*, *State*, *Kelly*, and *Boulder City*, the Developer cites to a 2008 amendment to Article 1, Section 22 of the Nevada Constitution to allow owners of property taken by eminent domain to recover for damage to their property from the construction of a public improvement. This amendment concerns eminent domain and has no bearing on the test for a regulatory taking claim.

19. The Developer claims that the City has taken the 65-Acre Property because it did not comply with NRS 37.039, which sets out requirements for agencies exercising eminent domain to acquire property for open space. Because the City did not condemn the 65-Acre Property or any other portion of the Badlands, this statute does not apply.

II. The Ripeness Issue

20. A regulatory takings claim is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is

also denied. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) ("*Williamson County*"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) ("[T]he final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted."); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53 (1986) (at least two applications required to ripen takings claim).

21. The Nevada Supreme Court has fully embraced the final decision requirement:

> Generally, courts only consider ripe regulatory takings claims, and "a claim that the application of government regulations effects a taking of a property interest ***is not ripe until the government entity*** charged with implementing the regulations ***has reached a final decision regarding the application*** of the regulations to the property at issue. . . [The] regulatory takings claim is unripe for review for a failure to file any land-use application with the City. And although Ad America contends that exhaustion was futile because there was a de facto moratorium on developing property within Project Neon's path, the record does not support this contention. The opinion of Ad America's political consultant, which was based on alleged statements from only one of seven City Council members, is insufficient to establish the existence of such a moratorium." (emphasis added).

State v. Eighth Jud. Dist. Ct., 131 Nev. at 419-20, 351 P.3d at 742 (quoting *Williamson County*, 473 U.S. at 186). Because the Nevada Supreme Court follows *Williamson County*, the courts of this state require that at least two applications be denied before finding that a regulatory takings claim is ripe.

22. A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id.*

23. The Developer has failed to meet its burden to show that its regulatory takings claims are ripe. The Nevada Supreme Court requires that a regulatory takings claimant file at least two applications to develop "the property at issue." *State*, 131 Nev. at 419-20, 351 P.3d at 742.

24. The Developer filed this action seeking damages for a taking of the 65-Acre Property only. *See* Compl. ¶7. The Developer has submitted no evidence that it has filed any application, much less two or more, to redevelop the individual 65-Acre Property, and obviously, no subsequent application for a variance, reduced density, or alternate project. As such, Developer has provided City with no individual 65-Acre Property application to consider and the City cannot be said to have reached a "clear, complete, and unambiguous" decision and that the City has "drawn the line, clearly and emphatically, as to the sole use to which [the 65-Acre Property] may ever be put." *Hoehne*, 870 F.2d at 533.

25. It can certainly be said that Developer may have very well been frustrated with what had occurred. Its first application was approved, only to then find itself being sued by a group of homeowners, thereafter receiving an unfavorable District Court ruling necessitating a Nevada Supreme Court appeal and the perceived need to file multiple lawsuits. That frustration does not, however, excuse the necessity of first making application to develop the 65-Acre Property before filing the instant case against the City alleging a taking of that property. This is especially true where, as here, Developer chose to file four separate court actions specifically directed at each individual parcel of property that Developer alleged was taken.

26. It must also be noted that fifty percent (50%) of Developer's applications directed to the individual properties were approved. Their first application for the 17-Acre Property was approved by the city. The application for the 35-Acre Property was denied. The application for the 133-Acre Property was deemed incomplete because of the then controlling Crockett Order and it was never resubmitted. And, as stated above, no application was ever submitted for the 65-Acre Property at issue in the instant case.

27. This court holds that any argument that proffering a development proposal for the 65-Acre Property would be futile is without merit as the City approved fifty percent (50%) of the individual applications it received, and felt it had legal authority to consider. This court would be engaging in inappropriate speculation were it to try and guess at what type of proposal Developer would have made for the 65-Acre Property and what type of response the City would have provided.

28. The Developer argued that the denial of the Master Development Agreement (MDA) also plays into the futility argument but the court finds that stance to be unpersuasive. To begin, the MDA was made after the individual 17-Acre Property proposal was made (which was approved) and after there was an application pending before the City for the development of the individual 35-Acre Property. Any denial of the MDA proposal while multiple individual proposals were pending and/or already approved cannot be said to be at all unreasonable. Moreover, even if the MDA denial was considered as part of the futility argument, the City would still have granted one-third (1/3) of the Developer's three proposals with the fourth proposal being deemed incomplete. As such, Developer's argument still places this court in the position of having to speculate about a possible 65-Acre Property proposal and the possible response by the City. Lastly, Developer made its 133-Acre Property application after the City denied the MDA. As such, it is clear that Developer did not believe that the MDA denial rendered further individual property development applications futile, rather, Developer chose to only proceed with the application for the 133-Acre Property.

29. The City's actions simply cannot be said to have been so "clear, complete, and unambiguous" as to excuse the need for Developer to propose a development plan for the 65-Acre Property before Developer made the choice to seek court intervention for that specific parcel of property.

30. To the extent Developer argues that the approval of the 17-Acre Property was somehow vacated and therefore no applications could be said to have been granted by the

City, the Court finds this position to also be without merit. There is no evidence that the City has taken any action to limit the Developer's proposed use of the 17-Acre Property for 435 luxury housing units. The Developer's contention that the City "nullified" the 435-unit approval is without any support in the evidence. The Developer's contention that the City's declining to extend the 17-Acre approvals after Judge Crockett invalidated the approvals means that the City "nullified" the approvals is frivolous. The City supported Developer and opposed Judge Crockett's Order at the trial court level and in the Nevada Supreme Court, where the City filed an amicus brief requesting that the Supreme Court reverse the Crockett Order and reinstate the 17-Acre Property approvals. Ex. CCC.

31. Prior to the Supreme Court's Order of Reversal, the 17-Acre Property approvals were legally void and there was nothing to extend. If the City had attempted to extend the approvals, the City could arguably have been in contempt of Judge Crockett's Order. *See* NRS 22.010(3) (disobedience or resistance to any lawful writ or order issued by the court shall be deemed contempt); *see also Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007) (a judgment has preclusive effect even when it is on appeal), *abrogated on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008). After the Supreme Court reinstated the approvals, the City had no power to nullify the approvals even if it had intended to do so. And it evidenced no intent to do so. To the contrary, upon reinstatement, the City twice wrote to the Developer extending the approvals for two years after the date of the remittitur. Ex. FFF at 1019; Ex. GGG at 1021. The Court accordingly rejects the Developer's argument that the City "nullified" the City's approval of 435 luxury housing units on the 17-Acre Property. All evidence establishes the opposite. The 17-Acre approvals are valid, and the Developer may proceed to develop 435 luxury housing units on the 17-Acre Property.

32. The Developer argues that it is not subject to the final decision ripeness rule adopted by the United States and Nevada Supreme Courts because the "taking is known." This argument is circular and is rejected. The Court cannot determine whether the City has

"gone too far" unless the City denies specific applications to develop the property.

33. The Developer also argues that the final decision ripeness requirement adopted in *State* and *Kelly* has been eliminated because takings are "self-executing," citing *Knick* and *Alper v. Clark County*, 93 Nev. 569, 572, 571 P.2d 810, 811-12 (1977). *Knick* had nothing to do with final-decision ripeness, nor would it because the claimant in *Knick* alleged a physical taking. A physical taking is not subject to final-decision ripeness. *Knick*, 139 S.Ct. at 2169 ("the validity of [the] finality requirement . . . is not at issue here." The only issue in *Knick* was whether takings claims could be brought in the first instance in federal court. *Id.* at 2179.

34. In *Alper*, the Nevada Supreme Court stated that, "as prohibitions on the state and federal governments," the taking clauses of the state and federal constitutions are "self-executing," meaning that "they give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one." 93 Nev. at 572, 571 P.2d at 811-12. Thus, the "self-executing" nature of the taking clauses means only that the taking clauses do not need to be implemented by statute. Being self-executing does not mean, as the Developer asserts, that payment of just compensation is automatically due without first satisfying the requirement to obtain a final agency decision. The Developer further contends that *Alper* proscribes the ripeness requirement as a "barrier[] or precondition[]" to a taking claim. To the contrary, the Nevada Supreme Court in *Alper* did not address the ripeness requirement of taking claims. Instead, it held that the state's Six Months' Claims Statutes codified in NRS 244.245 and NRS 244.250, which require that a claimant presents his or her claim to a County before suing the County, do not apply to actions in inverse condemnation. *Alper*, 93 Nev. at 570, 572.

35. The Developer asserts that its *Penn Central* regulatory taking claim is ripe because the City disapproved the Developer's MDA for the entire Badlands. The MDA, while it included parts of the 65-Acre Property, covered the entire 250-acre Badlands outside of the 17-Acre Property, development on which the City had already approved. Ex. LL at 801. It did not constitute an application to develop the 65-Acre Property standing alone,

which is "the property at issue." *See State*, 131 Nev. at 419. The City's denial of the MDA, therefore, is not considered an application to develop the 65-Acre Property for purposes of ripeness. Even assuming that it was an application to develop the 65-Acre Property standing alone, the Developer's regulatory takings claim would not be ripe until the Developer files at least one additional application. Again, the Developer has presented no evidence that it has done so.

36. The Court also does not consider the MDA to constitute an initial application to develop the 65-Acre Property for purposes of a final decision because the MDA was not the specific and detailed application required for the City to take final action on a development project. *See* Ex. LL at 810-19 (general outline of proposed development in the Badlands). The MDA divided the Badlands into four "Development Areas" and proposed permitted uses, maximum densities, heights, and setbacks for the four areas. *Id.* at 812, 814. For Development Areas 2 and 3, which contained portions of the 65-Acre Property, the MDA proposed a maximum residential density of 1,669 housing units, and the Developer was to have the right to determine the number of units developed on each Area up to the maximum density. *Id.* at 813-14. The indefinite nature of the MDA is also evident from the uncertainty expressed about various uses. For example: "[t]he Community is planned for a mix of single family residential homes and multi-family residential homes including mid-rise tower residential homes"; "[a]ssisted living facilit(ies) . . . may be developed within Development Area 2 or Development Area 3"; and "additional commercial uses that are ancillary to multifamily residential uses shall be permitted." *Id.* at 812. Finally, the MDA provided that [t]he Property shall be developed as the market demands . . . and at the sole discretion of Master Developer." *Id.* at 814. Accordingly, the MDA was not clear as to how many housing units would eventually be built in the 65-Acre Property. Nor was the City Council apprised by the MDA of the types and locations of uses, the dimensions or design of buildings, or the amount and location of access roads, utilities, or flood control on the 65-Acre Property. *See id.* at 813-16.

37. Given the uncertainty in the MDA as to what might be developed on the 65-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 65-Acre Property. This once again places the court in the untenable position of having to speculate about what the City might have done, said speculation being improper.

38. The MDA also did not constitute a valid set of land use applications for the 65-Acre Property. A development agreement is not a substitute for the required UDC Applications. The UDC states that "all the procedures and requirements of this Title shall apply to the development of property that is the subject of a development agreement." UDC 19.16.150(D). To develop the 65-Acre Property even after an MDA were approved, the Developer would be required to file a Site Development Review application and seek a General Plan Amendment. *See* Ex. LL at 819 (City would process "all applications, including General Plan Amendments, in connection with the Property"); *id.* at 820 ("Master Developer shall satisfy the requirements of the Las Vegas Municipal Code section 19.16.100 for the filing of an application for a Site Development Plan Review").

39. Developer had applied for the required Site Development Review and General Plan Amendment in applying for the original 17-Acre Property application and was therefore clearly aware of the requirements. The version of the MDA the City Council rejected on August 2, 2017 acknowledged that the Developer must comply with all "Applicable Rules," defined as the provisions of the "Code and all other uniformly-applied City rules, policies, regulations, ordinances, laws, general or specific, which were in effect on the Effective Date." *Id.* at 804, 810. Similarly, the MDA indicated that the property would be developed "in conformance with the requirements of NRS Chapter 278, and as otherwise permitted by law." *Id.* at 802. Because the Developer did not submit any of the site-specific development applications related to the 65-Acre Property, the City Council's denial of the MDA did not constitute a final decision by the City Council regarding what development would be permitted on the 65-Acre Property.

40. The Developer contends that following the City's denial of the MDA, it would have been futile to file the UDC Applications to develop the 65-Acre Property. As with the earlier discussion on futility, the court finds Developer's position here to be unpersuasive. The Developer cites no evidence for its statement that the City insisted that the MDA was the only application it would accept to develop the 65-Acre Property. The Developer previously acknowledged that City Councilmembers expressed a preference for a holistic plan addressing the entire Badlands. Ex. WWW at 1323. Such a preference does not indicate a refusal to consider other options. Indeed, the City did consider—and approve—significant development on the 17-Acre Property within the Badlands, indicating that the City is open to considering development of this area.

41. The Developer contends that *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) supports the claim that it would be futile to file any application to develop the 65-Acre Property. In *Del Monte Dunes*, the City reviewed and denied five separate applications to develop the property, each of which proposed a lower density than the previous application. 526 U.S. at 695-96. The Court affirmed the Ninth Circuit's holding that the plaintiff had satisfied the final decision ripeness requirement. *Id.* at 698-99, 723. Unlike *Del Monte Dunes*, the Developer here has filed no application specific to the 65-Acre Property. Even if the MDA is considered an application, the ripeness rule applied in *Del Monte Dunes* requires at least a second application.

42. The Developer contends that this case is similar to *Del Monte Dunes* because the Developer conducted detailed and lengthy negotiations over the terms of the MDA with City staff and made many concessions and changes to the MDA requested by the staff before the MDA was presented to the City Council with the staff's recommendation of approval. Concessions and changes to the MDA requested by staff and a staff recommendation of approval, however, do not count for ripeness. The City Council, not the staff, is the decision-maker for purposes of a regulatory taking. An application must be made to the City Council, and if denied, at least a second application to the City Council must be made and denied

before a takings claim is ripe.

43. Furthermore, the Developer's reliance on Bills 2018-5 and 2018-24 in support of its claim of futility is misplaced. The bills imposed new requirements that a developer discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City and other requirements for the application to develop property. They were designed to increase public participation and did not impose substantive requirements for the development project, and did not prevent the Developer from applying to redevelop the 65-Acre Property. Moreover, the second bill was adopted in the Fall of 2018 after the Developer filed this action for a taking. As such, it could not have had any effect on the 65-Acre Property. The bill could not have taken property that was allegedly already taken. Both bills were also repealed in January 2020, and are therefore inapplicable to show futility. *See* Exs. LLL, MMM.

44. At the City Council hearing on the MDA, no Councilmember indicated that he/she would not approve development of the Badlands at a reduced density if the Developer submitted a revised development agreement. *See* Ex. WWW at 1365-70. The vote to deny the MDA was 4-3 (*id.* at 1370). Therefore, had a modified proposal been made regarding the MDA, it was only necessary for one of the four members who voted to deny the application to became satisfied with the proposed changes, for it to be approved. And it must be noted that two of the four City Councilmembers who voted against the MDA are no longer members. Indeed, four of the seven members of the City Council that heard the MDA are no longer on the Council.

45. Much of the commentary about the MDA from Councilmembers at the public hearing indicates that they may approve a lower density development. For example, Councilmember Coffin, who voted against the MDA, stated that he would support "some sort of development agreement" for the Badlands. Ex. WWW at 1327; *see also id.* at 1328 (Badlands "still could be developed if you paid attention to [preserving the desert landscape]"). Similarly, Councilmember Seroka, who voted to deny the MDA, noted that

three different drafts of the development agreement had been circulated in the previous week (*id.* at 1362); he had insufficient time to review and understand the version of the agreement before the City Council (*id.*); the proposed residential development was too dense (*id.* at 1361-62); and the development agreement contained no timeline for development of the Badlands (*id.* at 1363). Seroka explained that "a reasonable and equitable development agreement is possible, but this is not it," and that the Developer could resubmit a development agreement for the Council's consideration. *Id.* at 1365-66. Similarly, the majority of citizens testifying at the City Council hearing on the development agreement indicated not that they were opposed to all development of the Badlands, but rather that the density of residential development proposed in the agreement was excessive. *E.g.*, *id.* at 1339, 1344-45, 1350, 1353-55, 1357-60.

46. The City's disapproval of the MDA falls short of the "clear, complete, and unambiguous" proof that the agency has "drawn the line, clearly and emphatically, as to the sole use to which the [65-Acre Property] may ever be put." *Hoehne*, 870 F.2d at 533. Even if the MDA were considered to be an initial application, Nevada law requires that the Developer file at least one additional application and have that denied before its regulatory takings claims are ripe for adjudication.

47. In sum, Developer chose to file applications to develop each of the three other individual properties at issue in the aforementioned cases, while also filing a MDA. Developer chose not to file any application for the individual 65-Acre Property at issue in this case before instituting this court action, which is specific to the individual 65-Acre Property. The City indicated a willingness to reasonably consider the applications and has granted one of the two individual applications that were proposed, while denying a third due to the then controlling Crockett Order. The City was not, however, given an opportunity to evaluate an application for the individual 65-Acre Property. The court does not find that filing an application for the 65-Acre Property would have been futile. Accordingly, the Court concludes that the Developer's categorical and *Penn Central* regulatory takings claims are

unripe and the Court has no jurisdiction over the claims. The Court grants summary judgment to the City on that ground.

III. The Remaining Issues

48. Because the court finds that the failure to have made an application to the City in regard to the development of the individual 65-Acre Property renders the Developer's claims in the instant case unripe, that decision is fatal to Developer's case and renders further court inquiry unnecessary.

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

ORDER

IT IS HEREBY ORDERED THAT the City's Motion for Summary Judgment is **GRANTED** and Developer's Countermotion is **DENIED** as **MOOT.**

Dated this 29 day of December 2020.

Douglas W. Herndon, District Court Judge

Exhibit 7

RIS

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, Ltd., SEVENTY ACRES, LLC, a Nevada Limited Liability Company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, vs. CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendants.	Case No.: A-18-775804-J Dept No.: XXVI **CITY OF LAS VEGAS' REPLY IN SUPPORT OF MOTION TO REMAND 133-ACRE APPLICATIONS TO THE LAS VEGAS CITY COUNCIL** Hearing Date: September 13, 2021 Hearing Time: 10:00 a.m.

McDONALD CARANO
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I. INTRODUCTION

It is indisputable that the Las Vegas City Council did not consider the Developer's 133-Acre Applications on the merits. Without a remand of the 133-Acre Applications, the Developer's categorical and *Penn Central* claims cannot be ripe because the City has not denied those applications on the merits.

Under Nevada law, cities have broad discretion to regulate the use of property to protect the surrounding community. Where such regulation "goes too far", the city may be required to pay just compensation to the property owner for a regulatory taking. To avoid courts encroaching on the wide discretion delegated to local agencies to limit the use of property for the good of the community, regulatory takings are reserved for only the most extreme regulations, namely, the rare case where a regulation of use wipes out or virtually wipes out the economic value of property or interferes with objective and reasonable investment-backed expectations.

If the government does not take final action on the merits of an application for development, however, a court cannot determine the economic value of the property after the challenged regulation is imposed. A regulatory taking claim, therefore, is ripe only when the owner has filed at least one application for development that is denied on the merits and a second application for a reduced density or a variance that is also denied on the merits. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985) ("*Williamson County*"). The Nevada Supreme Court has fully embraced the final decision requirement:

> Generally, courts only consider ripe regulatory takings claims, and "a claim that the application of government regulations effects a taking of a property interest *is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application* of the regulations to the property at issue."

State v. Eighth Judicial Dist. Ct., 131 Nev. 411, 419-20, 351 P.3d 736, 742 (2015) (quoting *Williamson County*, 473 U.S. at 186) (emphasis added); *see also* Ex. CCCC at 1505 (Judge Herndon held that the Nevada Supreme Court requires final decision ripeness). The court in *State v. Eighth Judicial Dist. Ct.* concluded that the regulatory takings claim in that case was unripe because the developer had "fail[ed] to file any land-use application with the City." *State v. Eighth Judicial Dist. Ct.*, 131 Nev. at 420, 351 P.3d at 742.

In the third and fourth causes of action of its civil complaint, the Developer alleges that the City effected categorical and *Penn Central* regulatory takings of the 133-Acre Property because the City denied the Developer's 133-Acre Applications to develop housing on the property, allegedly preventing any *use* of the property through regulation. The City, however, did not make a final decision as to the development it would allow on the 133-Acre Property, and hence the categorical and *Penn Central* taking claims are unripe.

On March 5, 2018, the Honorable James Crockett entered an order in Case No. A-17-752344-J ("Crockett Order"), ruling that the Las Vegas Municipal Code requires the approval of a major modification application ("MMA") before the City may approve land use applications to develop the Badlands Golf Course. Ex. EE at 598-611[1]. In compliance with the Crockett Order, on May 16, 2018, the Las Vegas City Council struck the 133-Acre Applications because the Developer had not filed an MMA with those applications. In striking the 133-Acre Applications, *the City Council did not consider the 133-Acre Applications on the merits*.

This Court's February 15, 2019 minute order upheld the City Council's decision finding that the Developer's 133-Acre Applications were incomplete, holding that the City Council and the Court were bound by the Crockett Order:

> City's Motion to Dismiss GRANTED IN PART as to the Petition for Judicial Review only on the grounds of issue preclusion; Judge Crockett having decided the same issue in his Order issued in A-17-752344 and as that decision is currently on appeal, the dismissal herein is WITHOUT PREJUDICE should that decision be overturned.

Ex. NN at 883. On October 2, 2019, the Court signed Findings of Fact, Conclusions of Law and Order adopting its Minute Order in full and denying the Developer's Petition for Judicial Review ("PJR"). Ex. TTTT. Accordingly, without an MMA, the 133-Acre Applications could not be considered on the merits.

Now that the Nevada Supreme Court has reversed the Crockett Order (Ex. DDD at 1010-16), the City Council is no longer constrained from considering the 133-Acre Applications on the merits. Consistent with denial of the PJR "without prejudice should [Judge Crockett's Order] be overturned" on

[1] Letter exhibits refer to the City's Appendices of Exhibits in support of its Countermotion for Summary Judgment filed August 6, 2021. Number exhibits refer to the Developer's Appendices.

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appeal, and in accordance with NRS 233B.135(3), this Court should remand the 133-Acre Applications for consideration by the City Council. If the City Council denies the 133-Acre Applications on the merits, the Developer can file another petition for judicial review, this time challenging the City Council's decision on the merits.

Without a remand, however, the Developer's categorical and *Penn Central* claims cannot be ripe because the City has not denied the 133-Acre Applications on the merits, no less denied a second application on the merits. Accordingly, without a remand and the City's consideration of at least two applications to develop the 133-Acre Property on the merits, this Court would be required to speculate as to what use of the 133-Acre Property the City would allow. In the 65-Acre case, under similar facts (i.e., City had not denied any application for development on the merits), Judge Herndon held that the Developer's categorical and *Penn Central* taking claims were unripe and granted summary judgment to the City on those claims. Ex. CCCC at 1515.

In reversing the Crockett Order, the Nevada Supreme Court reinstated the City's approval of the Developer's 435-unit luxury housing project for the 17-Acre Property. Judge Herndon found that the 17-Acre approvals alone multiplied the Developer's $4.5 million investment in the Badlands by four based on the Developer's own evidence. Ex. CCCC at 1496. Although the City notified the Developer it was free to proceed with that development following issuance of the Court's remittitur in September 2020 and extended the time for the Developer to start building by two years to account for the time the Crockett Order was on appeal (Ex. GGG at 1021), the Developer has rejected that invitation, electing instead to pursue $386 million in "taking" damages. By opposing the Motion to Remand, it has become increasingly obvious that the Developer has no intention of developing the 133-Acre Property, the 17-Acre Property, or any other part of the Badlands because to do so would undercut its narrative of victimization that the Developer hopes to ride to a massive payoff from the taxpayers. This Court should remand the 133-Acre Applications to the City Council for a decision, for the first time, on the merits.

On July 22, 2021, the Developer filed a Motion to Determine Property Interest. In that motion, the Developer makes the preposterous claim that all owners of property subject to zoning (meaning every owner of real property, because virtually all privately owned property in Nevada is zoned) have a constitutionally protected "property interest" to build whatever they desire, free from any government

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discretion to limit that development through regulation, as long as the owner uses the property for a use "permitted" in the zone. Because the Developer's motion seeks to remove all discretion in the City's consideration of land use applications and limit the City's ability to regulate the *use* of property through regulation, the motion is relevant only to the Developer's categorical and *Penn Central* taking claims. It is not relevant to the Developer's physical, non-regulatory, or temporary taking claims, which do not allege excessive regulation of the use of the 133-Acre Property. In the 65-Acre case, Judge Herndon concluded that the Developer's very same motion was moot and denied it. Judge Herndon held, because the City had not denied at least two applications to develop the 65-Acre Property on the merits, Judge Herndon had no way of knowing if the City had "taken" the alleged constitutional right (if it even existed, which it does not). Ex. CCCC at 1514-15.[2]

This case presents the same circumstance as the case before Judge Herndon. The Developer's categorical and *Penn Central* claims are not ripe. Therefore, the Developer's Motion to Determine Property Interest is moot, regardless of whether the Court remands the 133-Acre Applications to the City Council.

The Developer claims that Judge Trujillo "set aside" the Herndon FFCL. That contention is false. The Developer misrepresents the proceedings before Judge Trujillo. After Judge Herndon was elevated to the Nevada Supreme Court, Judge Trujillo took over the 65-Acre case. Based on misleading argument in the Developer's motion for a new trial, Judge Trujillo questioned Judge Herndon's conclusion on a single issue of law – whether final decision ripeness applies to categorical wipeout taking claims. (The City has since demonstrated to Judge Trujillo that final decision ripeness applies to such claims.) Judge Trujillo also questioned whether Judge Herndon had actually ruled on the Developer's physical, non-regulatory, and temporary taking claims. Judge Trujillo then set the matter for further hearing. The

[2] Besides contradicting all authority, the Developer's claim that zoning confers "property interests" or "property rights" is based on a fundamental misconception of zoning. Zoning is government regulation that *limits* the owner's *use* of property to protect the surrounding community. Zoning does not grant "property interests" or "vested rights." To the contrary, under Nevada property law "interests" arise from the ownership of property. Here, the Developer owns a fee simple interest in the 133-Acre Property. In its categorical and *Penn Central* claims, the Developer contends that the City has taken its ownership interest through excessive regulation of the *use* of the property. Petition and Civil Complaint filed 7/13/21 ("Cplt") ¶¶ 261-63, 291.

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document that the Developer represents as Judge Trujillo's "Minute Order" is in fact the court clerk's minutes of the hearing. Judge Trujillo did not issue any decision on the merits of any issue and filed no orders, minute order or otherwise, granting a new trial or "setting aside" Judge Herndon's FFCL. Regardless, Judge Herndon's findings and conclusions are based on overwhelming case law and Nevada and Las Vegas statutes that require rejection of the Developer's claims. Judge Herndon's FFCL is well-reasoned and well-supported by ripeness jurisprudence. The Developer cites no relevant authority and presents no argument refuting Judge Herndon's FFCL, including the conclusion of law that the 65-Acre categorical and *Penn Central* taking claims are unripe for failure to file and have denied on the merits at least two applications.

II. ARGUMENT

A. This Court has retained jurisdiction over the PJR

The Developer incorrectly contends that the Court has no jurisdiction over the PJR. First, the Developer refiled the PJR on July 13, 2021, despite the Court's February 15, 2019 Minute Order dismissing the PJR "without prejudice" pending the Nevada Supreme Court's decision on the appeal of the Crockett Order. By refiling the PJR after the Court had indicated it would dismiss the PJR, the Developer has conceded the Court's continuing jurisdiction over the PJR.

Second, because the Court dismissed the PJR "without prejudice" to await the Nevada Supreme Court's decision on the appeal of the Crockett Order, this Court retains jurisdiction over the PJR. "Nevada district courts retain jurisdiction until a final judgment has been entered." *SFPP, L.P. v. Second Jud. Dist. Court*, 123 Nev. 608, 612, 173 P.3d 715, 718 (2007). The finality of an order or judgment is determined "by looking to what the order or judgment actually *does*, not what it is called. […] More precisely, a final, appealable judgment is 'one that disposes of the issues presented in the case … and leaves nothing for the future consideration of the court.'" *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 974 P.2d 729, 733 (1994) (*citing Alper v. Posin*, 77 Nev. 328, 330, 363 P.2d 502, 503 (1961) (emphasis original*); see also Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713, fn. 27 (2008) ("valid final judgment […] does not include a case that was dismissed without prejudice or for some reason (jurisdiction, venue, failure to join a party) that is not meant to have preclusive effect."); *Trustees of Hotel and Restaurant Employees and Bartenders Intern. v. Royco, Inc.*, 101 Nev.

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96, 98, 692 P.2d 1308, 1309-10 (1985) ("*Royco*") (order dismissing complaint without prejudice, based solely on the parties' representation that they had reached a settlement, was "clearly not a final adjudication of the merits.").

Moreover, district courts can retain jurisdiction while an issue germane to the case is resolved. In *American West Development, Inc. v. City of Henderson*, 111 Nev. 804, 806, 898 P.2d. 110, 114 (1995), the city refused to consider a zoning application until a developer submitted a new master plan. The district court granted the developer's petition for a writ of mandamus in part, directing the city to finalize its decision on the application, which had not been officially denied. *Id*. at 806. The district court also retained jurisdiction to consider whether the developer was required to submit a new master plan in the event the city denied the application. On remand, the city denied the application; only then did the district court entertain (and deny) the developer's petition on the merits. *Id.*

Here, the Court's dismissal of the Developer's PJR was "clearly not a final adjudication of the merits." *See Royco*, 101 Nev. at 98, 692 P.2d at 1309-10. Like the order in *Royco*, the dismissal without prejudice was based solely on the fact that the Crockett Order, then on appeal, could be overturned, allowing—indeed, requiring—the City to consider the 133-Acre Applications on the merits. Far from disposing of the issues presented in the case, the Court's dismissal clearly contemplated that the Court would further consider those issues if the Crockett Order was overturned. Like the district court in *American West Development*, the Court took partial action on narrow procedural grounds but retained jurisdiction to consider the Developer's PJR on the merits if and when the Crockett Order was overturned. Because the Court's dismissal without prejudice was not a final, appealable judgment, the Court retained jurisdiction over the Developer's PJR.

B. The Developer would rather reap a windfall from the taxpayers' than develop the property

The Developer insists that it wants to develop its property and has made "valiant efforts" to do so. Opp. at 5. If this is true, why prevent the City Council from considering the 133-Acre Applications on the merits? Perhaps because allowing the City Council to consider—and potentially approve—the 133-Acre Applications on the merits undercuts the narrative of victimization that underlies each of Developer's cases. As Judge Herndon found in granting summary judgment to the City in the 65-Acre

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case, the Developer paid no more than $7.5 million for the entire 250-acre Badlands. Recent documents produced by the Developer in the 35-Acre case in response to an order granting the City's motion to compel reveal that the Developer actually paid less than $4.5 million for the Badlands. Ex. FFFF at 1591-1605. The Seller of the Badlands, the Peccole family, confirmed that the sale price for the Badlands was less than $4.5 million. Ex. SSSS at 3786-88. At the same time, the Developer claims $386 million in damages in the four actions, which amounts to $205 million for the 133-Acre Property alone.

The Developer's failure to move forward with the 435-unit project on the 17-Acre property, its rejection of its approvals for the 435-unit project, the Developer's resistance to remand of its 133-Acre Applications to the City Council for a decision on the merits, the Developer's failure to file a second application to develop the 35-Acre Property at a lower density, and the Developer's failure to file any applications to develop the 65-Acre Property all demonstrate that the Developer has no intention of developing anything on the Badlands. The Developer has made it clear that it only wants a $386 million gift from the taxpayers, for property it bought for less than $4.5 million, and for doing nothing other than applying for development and then suing the City.

The Developer's insistence that the City has "denied all use" of each area the Developer carved out of the Badlands is patently false. The simple facts are fatal to the Developer's taking claims. The Developer purchased a golf course sitting on 250 acres; the City has taken no action to deny the Developer the right to operate that golf course. Moreover, the City approved the development of 435 luxury housing units on the 17-Acre property. Based on the Developer's own evidence, Judge Herndon found that the 17-Acre approval increased the value of that portion of the Badlands to $26,228,569, six times the Developer's investment in the entire 250-acre Badlands, and the Developer still has 233 acres left to use or sell. Ex. CCCC at 1495.

To the extent the Developer argues that the approval of the 17-Acre Property was somehow vacated and, therefore, no applications could be said to have been granted by the City, Judge Herndon found that position to also be wholly without merit:

> The Developer's contention that the City's declining to extend the 17-Acre approvals after Judge Crockett invalidated the approvals means that the City "nullified" the approvals is frivolous. . . . After the Supreme Court reinstated the approvals, *the City had no power to nullify the approvals even if it had intended to do so*. To the contrary, upon reinstatement, the City twice wrote

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> to the Developer extending the approvals for two years after the date of the remittitur. . . . The Court accordingly rejects the Developer's argument that the City "nullified" the City's approval of 435 luxury housing units on the 17-Acre Property. All evidence establishes the opposite. The 17-Acre approvals are valid, and the Developer may proceed to develop 435 luxury housing units on the 17-Acre Property.

Ex. CCCC at 1507-08 (emphasis added). The fact that the Developer has done nothing to date to develop the 17-Acre Property and now refuses to give the City Council the chance to consider the 133-Acre Applications on the merits speaks volumes as to the Developer's motivation in bringing and continuing to prosecute this lawsuit. This lawsuit is an attempt to weaponize the courts to extort hundreds of millions of dollars from the taxpayers.

C. The Court contemplated a remand when dismissing the Developer's Petition for Judicial Review without prejudice

Under NRS 233B.135(3)(d), the court is empowered to remand a matter to a government agency where substantial rights of the petitioner have been prejudiced because the final decision of the agency is affected by an "error of law."[3] The Court contemplated the *very* circumstance that it would remand the 133-Acre Applications when it issued its decision dismissing the PJR. The Court recognized that the Crockett Order prevented the City from considering the 133-Acre Applications on the merits. Ex. NN at 883. It likewise recognized that a decision on the merits of the PJR could not be reached until the appeal of the Crocket Order had been resolved and a determination whether Judge Crockett had made an "error of law." Thus, the Court granted the City's motion to dismiss the PJR "WITHOUT PREJUDICE should that decision be overturned." *Id*.

The Crockett Order has now been overturned and, on July 13, 2021 *the Developer refiled its PJR.* An "amended complaint supersedes the original." *McFadden v. Ellsworth Mill & Mining Co.*, 8 Nev. 57, 60 (1872); *see also Las Vegas Network, Inc. v. B. Shawcross and Associates*, 80 Nev. 405, 407,

[3] By its own terms NRS 233B.031 only permits review of a decision from "an agency ... of the Executive Department of the State Government" and municipalities are not a division of Nevada's executive department. In *Clark County Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 658, 730 P.2d 443, 446 (1986), the Nevada Supreme Court recognized that NRS 233B does not apply to local land use decisions but nevertheless held that court have traditional equitable powers to remand cases to local authorities. Notwithstanding that decision, the Court has applied NRS 233B in other cases involving decisions by local boards. *See, e.g., Consol. Municipality of Carson City v. Lepire*, 112 Nev. 363, 365, 914 P.2d 631, 633 (1996).

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395 P.2d 520, 521 (1964). There is no need for the City to "revive" the Developer's PJR—the Developer has done that itself. Because appeal of the Crockett Order has been resolved, and because the operative complaint pleads a PJR, the Court may now consider the PJR on the merits. Likewise, because the Crockett Order has been reversed, it is clear that the City Council's decision to strike the 133-Acre Applications was necessary to adhere to the Crockett Order, and the Court can adjudicate the PJR or remand it to the City Council.

Under these circumstances, the Court can—and should—remand to the City Council to consider the 133-Acre-Applications on the merits. The illustrative cases are numerous. In *Sierra Pacific Industries v. Wilson*, 135 Nev. 105, 440 P.3d 37 (2019), for instance, the State Water Engineer found that generic option contracts for water rights satisfied compliance with the state's anti-speculation doctrine. In reviewing the State Water Engineer's decision, the Supreme Court adopted an opposite rule from Colorado. The Court remanded, ordering the State Water Engineer to "reevaluate […] in light of" this new authority. *See also Buma v. Providence Corp. Development*, 135 Nev. 448, 449, 453 P.3d 904, 906 (2019) (remanding to workers' compensation appeals officer "to reevaluate the matter under the correct standards"); *Department of Corrections v. Ludwick*, 135 Nev. 99, 104, 440 P.3d 43, 47 (2019) (hearing officer's reliance on invalid regulation was "a clear error of law warranting remand—because the regulation [was] invalid, the hearing officer should not have relied on it for any purpose.").

The facts here are no different. The City made a decision that was "[a]ffected by [an] error of law." Consistent with NRS 233B.135(3)(d), the Court should remand to the City with instructions that the City consider the 133-Acre Applications in light of the Supreme Court's reversal of the Crockett Order. The Court has equitable powers to remand actions challenging local agency decisions for further proceedings "where justice demands that course in order that some defect in the record be supplied." *Clark County Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 658, 730 P.2d 443, 446 (1986) (quoting *Ford Motor Company v. National Labor Relations Board*, 305 U.S. 364, 373, 59 S.Ct. 301, 306, 83 L.Ed.2d 221 (1939).

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D. Because the City Council has never considered the 133-Acre Applications on the merits, the Developer's categorical and *Penn Central* claims are not ripe

Remand is proper for an additional reason: because the 133-Acre Applications have never been considered on the merits, the City has not made a final decision on the uses allowed for the 133-Acre Property and, thus, the Developer's categorical and *Penn Central* taking claims are not ripe. An understanding of the Developer's categorical and *Penn Central* taking claims is necessary for proper application of the final decision ripeness doctrine.

i. A regulatory taking is reserved for the rare case where the government, in a final decision on the merits, denies an application for real estate development and wipes out or virtually wipes out the economic value of the property

a. Courts generally defer to the exercise of land use regulatory powers by the legislative and executive branches of government

Judge Herndon held:

> In the United States, planning commissions and city councils have broad authority to limit land uses to protect health, safety, and welfare. ***Because the right to use land for a particular purpose is not a fundamental constitutional right***,[4] courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use. . . .
>
> Nevada has delegated broad authority to cities to regulate land use for the public good. The State has specifically authorized cities to "address matters of local concern for the effective operation of city government" by "[e]xpressly grant[ing] and delegat[ing] to the governing body of an incorporated city all powers necessary or proper to address matters of local concern so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government." NRS 268.001(6), (6)(a).
>
> Matters of local concern" include "[p]lanning, zoning, development and redevelopment in the city." NRS 268.003(2)(b). "For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land." NRS 278.020(1); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 254, 439 P.2d 219, 222 (1968) (upholding a county's authority under NRS 278.020 to require an applicant for a special use permit to present evidence that the use is necessary to the public health and welfare of the community).
>
> As a charter city, the City has the right to "regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land within those districts" and "[e]stablish and adopt ordinances and

[4] This conclusion of law, by itself, is fatal to the Developer's claim to a constitutionally protected property right under zoning to build whatever it pleases, and requires rejection of its regulatory taking claims.

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> regulations which relate to the subdivision of land." Las Vegas City Charter § 2.210(1)(a), (b). Cities in Nevada limit the height of buildings, the uses permitted and the location of uses on property, and many other aspects of land use that could have an impact on the community. *See, e.g.*, *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 239, 871 P.2d 320, 321 (1994) (upholding City's denial of building permit application); *State ex rel. Davie v. Coleman*, 67 Nev. 636, 641, 224 P.2d 309, 311 (1950) (upholding Reno ordinance establishing land use plan and restricting use of land).

Ex. CCCC at 1496-98 (emphasis added.).

b. To avoid encroaching on the police powers of other branches of government, courts intervene in land use regulation only in cases of extreme economic burden on the property

Judge Herndon further held:

> . . . [T]he Developer alleges a variety of types of takings under the Fifth Amendment of the United States Constitution, which provides "nor shall private property be taken for public use, without just compensation," and its counterpart in Article 1, Section 8 of the Nevada Constitution. The Just Compensation Clause of the Fifth Amendment was originally intended to require compensation only for eminent domain – *i.e.*, direct government takings. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In 1922, the Supreme Court held that a regulation that "goes too far," such that it destroys all or nearly all of the value or use of property, equivalent to an eminent domain taking, can require the regulatory agency to compensate the property owner for the value of the property before the regulation was imposed. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005). This type of inverse condemnation that does not involve a physical occupation of private property by the government, but rather alleges excessive regulation of the property owner's use of the property, is known as a "regulatory taking."
>
> Herndon fn. The Developer conflates eminent domain and inverse condemnation. The two doctrines have little in common. In eminent domain, the government's liability for the taking is established by the filing of the action. The only issue remaining is the valuation of the property taken. In inverse condemnation, by contrast, the government's liability is in dispute and is decided by the court. If the courts finds liability, then a judge or jury determines the amount of compensation. [End of fn]
>
> Under separation of powers, however, courts intervene in regulation of land use by the legislative and executive branches of government only in cases of (1) extreme regulation where the economic impact of the regulation is equivalent to an eminent domain taking, wiping out or nearly wiping out the use of value of the property, similar to a physical ouster of the owner by eminent domain, or (2) interference with reasonable investment-backed expectations. *Lingle*, 544 US. at 539 (categorical and *Penn Central* regulatory takings test both "aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").
>
> The Nevada Supreme Court has established an identical test, requiring an extreme economic burden to find liability for a regulatory taking. *State v.*

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> *Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "'completely deprive an owner of all economically beneficial use of her property'") (quoting *Lingle*, 544 U.S. at 538); *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*, 110 Nev. at 245-46, 871 P.2d at 324-35 (taking requires agency action that "destroy[s] all viable economic value of the prospective development property").

Id. at 1499-1500.

c. The Developer's categorical and *Penn Central* taking claims allege excessive regulation of use of property that wipes out or nearly wipes out its value

Judge Herndon categorized the Developer's categorical and *Penn Central* claims as follows:

> The Developer has alleged two types of regulatory takings: categorical and *Penn Central*. A categorical taking occurs either when a regulation results in a permanent physical invasion of property, or when a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019). A *Penn Central* taking is determined based on review of several factors; "[p]rimary" among them is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id*. at 538-39 (quoting *Penn Central*, 438 U.S. at 124. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). Under both the categorical and the *Penn Central* takings tests, the only regulatory actions that cause takings are those "that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

Id. at 1502. The Court explained in *Lucas* that, where regulation either totally wipes out economic value or requires the owner to allow the government or others to enter and physically occupy its property, the regulation comes closest to an eminent domain taking, requiring compensation without further consideration of the facts. *Lucas*, 505 U.S. at 1019. For taking claims that do not meet the categorical test, courts apply the three-factor *Penn Central* test. Unfortunately, the majority in *Lucas* classified economic wipeouts and physical takings as "categorical" takings, while the dissent characterized the same test as a "per se" standard. 505 U.S. at 1015, 1052 (Blackmun, J., dissenting). A unanimous Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) also uses the terms interchangeably. Similarly, the Nevada Supreme Court in *Sisolak* refers to physical takings interchangeably as "categorical" and "per se." 122 Nev. at 662-63, 137 P.3d at 1122-23). The use of the

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two different terms to mean the same thing, which thing in turn has two parts – wipeouts and physical invasions—has given the Developer an opening to distort the law.

ii. The Developer's argument that the ripeness doctrine does not apply to categorical wipeout claims is contrary to all authority

Both categorical wipeout and *Penn Central* claims require a showing that the City's regulation of the 133-Acre Property wiped out or nearly wiped out the economic use of the property. *Lingle*, 544 U.S. at 538-40. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). If the government does not take final action, however, a court cannot determine the value of the property "after the government action." A regulatory taking claim, therefore, is ripe only when the landowner has filed at least one application that is denied on the merits and a second application for a reduced density or a variance that is also denied. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985) ("*Williamson County*"), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001) ("[T]he final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted."); *MacDonald*, 477 U.S. at 351-53 (at least two applications required to ripen takings claim). This is the final decision ripeness doctrine: "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348.

Moreover, a regulatory taking claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). **The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final.** *Id.*

The Nevada Supreme Court has adopted the final decision requirement in full. *State v. Eighth Judicial Dist. Ct.*, 131 Nev. at 419-20, 351 P.3d at 742 (*quoting Williamson County*, 473 U.S. at 186); *see also* Ex. CCCC at 1505 (Judge Herndon held that the Nevada Supreme Court requires final decision

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ripeness). Because the Nevada Supreme Court follows *Williamson County*, the courts of this State require that at least two applications be denied before finding that a regulatory takings claim is ripe.

The Developer inexplicably refers to the final decision ripeness doctrine as "an entirely made up rule" (Opp. at 3), perhaps because the doctrine so clearly precludes its categorical and *Penn Central* taking claims. To the contrary, however, this doctrine is based on decades of clear Supreme Court, federal appellate and district court, and state court jurisprudence, as described above. Moreover, Judge Herndon recognized—and correctly applied—the doctrine in the 65-Acre case. When applied here, it is clear that the Developer has failed to meet its burden to show that the City has "drawn the line, clearly and emphatically, as to the sole use to which [the 133-Acre Property] may ever be put." *Hoehne*, 870 F.2d at 533.

a. The Developer deliberately confuses physical and wipe out categorical taking claims to mask its distortion of *Sisolak*

To avoid the ripeness doctrine, which clearly mandates dismissal of its categorical and *Penn Central* taking claims, the Developer cloaks its taking claims in language carefully calculated to confuse the Court. The Developer's aim is to persuade the Court to apply holdings in *Sisolak*, a physical taking case, to its claim alleging excessive regulation of *use* that wipes out the economic value of property. In applying *Sisolak* to its economic wipe out claim, the Developer engages in elaborate distortion of that decision, attempting to force a round peg into a square hole. Judge Herndon soundly rejected the Developer's reliance on *Sisolak*, a physical taking case, as authority for the standard of liability for the Developer's categorical and *Penn Central* claims. Ex. CCCC at 1504. Judge Herndon correctly concluded that *Sisolak* and other physical taking cases do not apply to the Developer's categorical taking claim, which concerns regulation of the Developer's *use* of property. *Id*. The Court in *Sisolak* held:

> Categorical rules apply when a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property. . . The second type of per se taking, complete deprivation of value, is *not at issue in this case* because Sisolak never argued that the Ordinances completely deprived him of all beneficial use of his property.

122 Nev. 662-63, 137 P.3d at 1122 (emphasis added). The *Sisolak* Court explained the origins of the physical taking doctrine:

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> In *Loretto* [*v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982)], a New York statute required landlords to permit a cable television company to install cables and junction boxes in their buildings. The Supreme Court held that the New York statute authorized a permanent physical occupation of the landowners' property that required compensation.

122 Nev. 666-67, 137 P.3d at 1124-25. The Court went on to find that:

> [T]he Ordinances authorize a physical invasion of Sisolak's property and require Sisolak to acquiesce to a permanent physical invasion. Thus, the County has appropriated private property for public use without compensating Sisolak and has effectuated a *Loretto*-type per se regulatory taking.

122 Nev. at 667, 137 P.3d at 1125. The *Sisolak* Court noted that final decision ripeness applies to taking claims for denial of the owner's use, but does not apply to physical invasion takings where regulation requires an owner to submit to physical occupation of the owner's property by others. A physical taking does not involve decisions on applications to use property, where the government has discretion to achieve a range of outcomes, some of which could be so extreme as to require compensation. 122 Nev. at 664, 137 P.3d at 1123. A government regulation requiring a property owner to submit to a physical invasion of its property, by contrast, is ripe as soon as the invasion occurs. *Id*. Accordingly, the *Sisolak* Court found, physical taking cases are not relevant to the whether the Developer's categorical and *Penn Central* claims are ripe. The Developer's assertion that one of the dissenting justices in *Sisolak* concluded that the majority held that final decision ripeness does not apply to economic wipe out claims is incorrect. The dissenting justice agreed with the majority that the ripeness doctrine does not apply to physical takings. *See* 122 Nev. at 684, 137 P.3d at 1136 (Maupin, J., dissenting).

The clear distinction in the caselaw between economic wipe out and physical takings claims for application of the final decision ripeness requirement, including in *Sisolak*, has not stopped the Developer from misrepresenting *Sisolak* as holding that ripeness does not apply to its categorical taking claim. For example, in its initial PJR and Complaint the Developer's third claim for relief entitled "Categorical Taking" did not allege the first type of categorical taking under *Lucas*, where regulation results in a permanent physical invasion. Rather, the Developer alleged the second type, where a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." Cplt. filed 6/7/18 ¶ ¶ 99-111. In the fifth claim for relief in its initial PJR and Complaint, entitled "Regulatory Per Se Taking," the Developer alleged a physical taking. *Id*. ¶¶ 133-140. By referring to a wipe out claim

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and a physical invasion claim—two completely different types of takings—by "categorical" for the former and its synonym "per se" for the latter, instead of calling them a "categorical wipe out taking" and "physical taking," the Developer hopes that the Court will not notice that whether you call a claim "categorical" or "per se" does not tell you whether you are referring to an economic wipe out or physical invasion claim. Thus, the Developer distorts language from *Sisolak*—a categorical physical taking case where the final decision ripeness does not apply—for the proposition that final decision ripeness does not apply to a categorical economic wipe out claim, simply because they are both classified as "categorical" taking claims under *Lucas*.

b. The final decision ripeness requirement of *Williamson County* and *State* applies to both categorical and *Penn Central* claims

The Developer contends that *Williamson County*'s final decision requirement as adopted by the Nevada Supreme Court in *State v. Eighth Judicial Dist. Ct.* applies only to its *Penn Central* claim and not to its categorical taking claim.[5] This contention is preposterous. Judge Herndon correctly found that the final decision requirement applies to both categorical and *Penn Central* claims and granted summary judgment to the City. Ex. CCCC at 1504-15. Moreover, it is illogical to suggest that the final decision requirement of *Williamson County* applies to *Penn Central* claims (near wipe-outs) but not categorical claims (total wipe-outs). In both instances, if a property owner rests its claim on only one (or no) government denial of an application for development, doubt will remain as to whether the government might permit some lesser—but still economically beneficial—use of the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19 (2001). Indeed, even where an initial government decision arguably denies the owner all economically beneficial use of its property, unless the owner takes "reasonable and necessary steps" to allow the government to "exercise [its] full discretion in considering development plans for the property, including the opportunity to grant variances or waivers . . . the extent of the restriction on [the] property is not known." *Id.* at 620-21.

Consistent with this logic, the Supreme Court has made it clear that *Williamson County* applies equally to all regulatory taking claims alleging denial of use, including categorical claims. In *Palazzolo*,

[5] The final decision requirement does not apply to the Developer's physical or nonregulatory taking claims. It applies only where an owner claims that regulation has limited *use* of property.

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for instance, the Court applied the *Williamson County* ripeness analysis to a categorical claim, in which the owner alleged that the agency's denial of a development proposal "deprived him of 'economically, beneficial use' of his property […], resulting in a total taking requiring compensation" under *Lucas*. 533 U.S. at 616, 618-26. The *Palazzolo* Court's explanation of the rationale behind the *Williamson County* final decision requirement leaves zero doubt that it applies to both *Penn Central* and categorial claims:

> 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, *see Lucas*, *supra*, at 1015, 112 S.Ct. 2886, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, *see Penn Central*, *supra*, at 124, 98 S.Ct. 2646. These matters cannot be resolved in definitive terms until a court knows the extent of permitted development on the land in question.

Id. at 618 (internal quotations omitted).

The lower federal courts have likewise consistently held that the *Williamson County* ripeness doctrine applies to both *Penn Central* and categorical takings claims. *See, e.g.*, *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 124-25, 131 (2d Cir. 2003) (applying *Williamson County* to claim alleging categorical taking under *Lucas*) (*abrogated on other grounds by San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005)); *Barlow & Haun, Inc. v. U.S.*, 805 F.3d 1049, 1057-59 (Fed. Cir. 2015) (applying *Williamson County* to claim alleging categorical taking of oil and gas leasing rights); *Seiber v. U.S.*, 364 F.3d 1356, 1365-66, 1368 (Fed. Cir. 2004) (same to claim alleging that denial of logging permit effected temporary categorical taking of landowner's property).

In sum, there is no legal or logical basis for the Developer's contention that the *Williamson County* and *State* final decision ripeness requirement does not apply to its categorical taking claim.

iii. The Developer's single application to develop the 133-Acre Property was not considered on the merits

The Developer filed one application to develop the 133-Acre Property. The City could not consider the Developer's application, however, without being in contempt of Judge Crockett's Order. Ex. TTTT at 3796-98. Therefore, the City struck the application on procedural grounds. Because the 133-Acre Applications were not considered on the merits, the City made no decision, no less a final

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decision, as to the uses that the 133-Acre Property could be put. Thus, the Court cannot determine how far the City's regulation goes and the categorical and *Penn Central* taking claims are not ripe.

In its opposition to this motion, the Developer misrepresents the reasons for the City Council's finding that the 133-Acre Applications were incomplete, contending that the City could have, but elected not to, consider the applications on the merits. This Court has already rejected the Developer's contention based on the Crockett Order, which this Court found was binding on the City. *Id*. at 3799 ("Because Judge Crockett's Order requires that the Developer get approval of a major modification, and no such approval was obtained before the Develop submitted its 133-Acre Applications, *the City Council properly struck the Developer's 133-Acre Applications*." (emphasis added)). The record reflects this as well. The City Council specifically discussed the potential legal risks of contradicting the governing law as set out in the Crockett Order. Ex. BBB at 992 ("The judge further ruled the City's failure to . . . approve a Major Modification . . . is legally fatal to the City's approval. So we knowingly would be operating outside the law."); *see also* Ex. PPPP at 2325, 2330. Following this discussion, the City Council voted to strike the 133-Acre Applications due in part to the failure to comply with the Crockett Order. Ex. BBB at 996-98. The City Council simply complied with the law. Thus, prior to the Supreme Court's Order of Reversal, the City was under an order of this Court to require an MMA before approving housing construction in the Badlands. If the City had not struck the 133-Acre Applications for the Developer's failure to submit an MMA, the City would have been in contempt of Judge Crockett's Order. *See* NRS 22.010(3) (disobedience or resistance to any lawful writ or order issued by the court shall be deemed contempt).

Judge Herndon agrees that the City was required to comply with the Crockett Order. In finding that the Developer's argument that the City "nullified" the 17-Acre approvals because the City declined the Developer's request to "extend" the 17-Acre approvals following Judge Crockett's Order voiding those approvals, Judge Herndon stated:

> Prior to the Supreme Court's Order of Reversal, the 17-Acre approvals were legally void and there was nothing to extend. If the City had attempted to extend the approvals, the City could arguably have been in contempt of Judge Crockett's Order. *See* NRS 22.010(3) (disobedience or resistance to any lawful writ or order issued by the court shall be deemed contempt); *see also Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007) (a judgment has preclusive effect

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> even when it is on appeal), abrogated on other grounds by *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008).

Ex. CCCC at 1508. Unless the 133-Acre Applications are remanded to the City Council, the taking claims based on an alleged "denial" of those applications will be unripe. There is no support for the Developer's assertion that the City's decision to strike the 133-Acre Applications was "egregious" or "telling" of the City's purported intent to "take" the 133-Acre Property.

iv. The futility exception to the final decision ripeness doctrine does not apply

Despite the ease of reconsideration of the 133-Acre Applications by the City Council, the Developer argues at length in its opposition that actions of City staff, individual City Councilmembers, and even private persons shows that it would be futile to allow the current City Council to vote on the 133-Acre Applications on the merits. Judge Herndon correctly rejected the same futility argument and dismissed the Developer's assertion that applications to develop property *other than* the 65-Acre Property standing alone count as applications to develop the 65-Acre Property for purposes of final decision ripeness. Judge Herndon held that it is *incumbent on the Developer* to file and have rejected two applications, regardless of representations of City staff or individual City Councilmembers as to their preference for applications to develop the Badlands:

> It can certainly be said that Developer may have very well been frustrated with what had occurred. Its first application was approved, only to then find itself being sued by a group of homeowners, thereafter receiving an unfavorable District Court ruling necessitating a Nevada Supreme Court appeal and the perceived need to file multiple lawsuits. That frustration does not, however, excuse the necessity of first making application to develop the 65-Acre Property before filing the instant case against the City alleging a taking of that property. This is especially true where, as here, Developer chose to file four separate court actions specifically directed at each individual parcel of property that Developer alleged was taken.
>
> It must also be noted that fifty percent (50%) of Developer's applications directed to the individual properties were approved. Their first application for the 17-Acre Property was approved by the city. The application for the 35-Acre Property was denied. The application for the 133-Acre Property was deemed incomplete because of the then controlling Crockett Order and it was never resubmitted. And, as stated above, no application was ever submitted for the 65-Acre Property at issue in the instant case.
>
> This court holds that any argument that proffering a development proposal for the 65-Acre Property would be futile is without merit as the City approved fifty percent (50%) of the individual applications it received, and felt it had legal authority to consider. This court would be engaging in

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> inappropriate speculation were it to try and guess at what type of proposal Developer would have made for the 65-Acre Property and what type of response the City would have provided.

Ex. CCCC at 1506-07.

v. The Master Development Agreement was not an application to develop "the property at issue" as required by the Nevada Supreme Court in *State*

The Developer asserts that its categorical and *Penn Central* regulatory taking claims are ripe because the City disapproved the Developer's Master Development Agreement ("MDA") and that when added to the City's denial of the 133-Acre Applications, the City denied two applications on the merits as required under *State* for final decision ripeness. Of course, the City did not deny the 133-Acre Applications, so the Developer's premise fails. But moreover, the MDA, while it included the 133-Acre Property, covered the entire 250-acre Badlands. Ex. LL at 801. It did not constitute an application to develop the 133-Acre Property standing alone, which is "the property at issue" in the takings inquiry. *See State*, 131 Nev. at 419. The City's denial of the MDA, therefore, is not considered even a first application to develop the 133-Acre Property on the merits for purposes of ripeness.

Judge Herndon considered the same Developer argument and rejected it:

> The Developer argued that the denial of the Master Development Agreement (MDA) also plays into the futility argument but the court finds that stance to be unpersuasive. To begin, the MDA was made after the individual 17-Acre Property proposal was made (which was approved) and after there was an application pending before the City for the development of the individual 35-Acre Property. Any denial of the MDA proposal while multiple individual proposals were pending and/or already approved cannot be said to be at all unreasonable. Moreover, even if the MDA denial was considered as part of the futility argument, the City would still have granted one-third (1/3) of the Developer's three proposals with the fourth proposal being deemed incomplete. As such, Developer's argument still places this court in the position of having to speculate about a possible 65-Acre Property proposal and the possible response by the City. Lastly, Developer made its 133-Acre Property application after the City denied the MDA. As such, it is clear that Developer did not believe that the MDA denial rendered further individual property development applications futile, rather, Developer chose to only proceed with the application for the 133-Acre Property.
>
> The city's actions simply cannot be said to have been so "clear, complete, and unambiguous as to excuse the need for Developer to propose a development plan for the 65-Acre Property before Developer made the choice to seek court intervention for that specific parcel of property.
>
> The Developer asserts that its *Penn Central* regulatory taking claim is ripe because the City disapproved the Developer's MDA for the entire Badlands.

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The MDA, while it included parts of the 65-Acre Property, covered the entire 250-acre Badlands outside of the 17-Acre Property, development on which the City had already approved. Ex. LL at 801. It did not constitute an application to develop the 65-Acre Property standing alone, which is "the property at issue." *See State*, 131 Nev. at 419. The City's denial of the MDA, therefore, is not considered an application to develop the 65-Acre Property for purposes of ripeness. Even assuming that it was an application to develop the 65-Acre Property standing alone, the Developer's regulatory takings claim would not be ripe until the Developer files at least one additional application. The Developer has presented no evidence that it has done so.

The Court also does not consider the MDA to constitute an initial application to develop the 65-Acre Property for purposes of a final decision because the MDA was not the specific and detailed application required for the City to take final action on a development project. *See* Ex. LL at 810-19 (general outline of proposed development in the Badlands). The MDA divided the Badlands into four "Development Areas" and proposed permitted uses, maximum densities, heights, and setbacks for the four areas. *Id.* at 812, 814. For Development Areas 2 and 3, which contained portions of the 65-Acre Property, the MDA proposed a maximum residential density of 1,669 housing units, and the Developer was to have the right to determine the number of units developed on each Area up to the maximum density. *Id.* at 813-14. The indefinite nature of the MDA is also evident from the uncertainty expressed about various uses. For example: "[t]he Community is planned for a mix of single family residential homes and multi-family residential homes including mid-rise tower residential homes"; "[a]ssisted living facilit(ies) . . . may be developed within Development Area 2 or Development Area 3"; and "additional commercial uses that are ancillary to multifamily residential uses shall be permitted." *Id.* at 812. Finally, the MDA provided that [t]he Property shall be developed as the market demands . . . and at the sole discretion of Master Developer." *Id*. at 814. Accordingly, the MDA was not clear as to how many housing units would eventually be built in the 65-Acre Property. Nor was the City Council apprised by the MDA of the types and locations of uses, the dimensions or design of buildings, or the amount and location of access roads, utilities, or flood control on the 65-Acre Property. *See id*. at 813-16.

Given the uncertainty in the MDA as to what might be developed on the 65-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 65-Acre Property. This once again places the court in the untenable position of having to speculate about what the City might have done, said speculation being improper.

The Developer contends that following the City's denial of the MDA, it would have been futile to file the UDC Applications to develop the 65-Acre Property. As with the earlier discussion on futility, the court finds Developer's position here to be unpersuasive. The Developer cites no evidence for its statement that the City insisted that the MDA was the only application it would accept to develop the 65 Acre Property was the MDA. The Developer previously acknowledged that City Councilmembers expressed a preference for a holistic plan addressing the entire Badlands. Ex. WWW at 1323. Such a preference does not indicate a refusal to consider other options. Indeed, the City did consider—and approve—significant development on the 17-Acre Property within the Badlands, indicating that

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the City is open to considering development of this area.

Ex. CCCC at 1507, 1509-12.

As indicated by Judge Herndon, the MDA was not the specific and detailed application to develop the 65-Acre Property required for the City to take final action on a development project. The MDA also did not constitute a valid set of land use applications for the 133-Acre Property. A development agreement is not a substitute for the required UDC Applications. The UDC states that "all the procedures and requirements of this Title shall apply to the development of property that is the subject of a development agreement." UDC 19.16.150(D). To develop the 133-Acre Property even if an MDA had been approved, the Developer would be required to file a Site Development Review application and seek a General Plan Amendment. *See* Ex. LL at 819 (City would process "all applications, including General Plan Amendments, in connection with the Property"); *id.* at 820 ("Master Developer shall satisfy the requirements of the Las Vegas Municipal Code section 19.16.100 for the filing of an application for a Site Development Plan Review"). The version of the MDA the City Council rejected on August 2, 2017 acknowledged that the Developer must comply with all "Applicable Rules," defined as the provisions of the "Code and all other uniformly-applied City rules, policies, regulations, ordinances, laws, general or specific, which were in effect on the Effective Date." *Id.* at 804, 810. Similarly, the MDA indicated that the property would be developed "in conformance with the requirements of NRS Chapter 278, and as otherwise permitted by law." *Id.* at 802. Because the Developer did not submit two site-specific development applications related to the 35-Acre Property, the City Council's denial of the MDA did not constitute a final decision by the City Council regarding what development would be permitted on the 35-Acre Property.

vi. Statements at the City Council hearing on the MDA indicate that remanding the 133-Acre Applications to the City Council would not be futile

At the City Council hearing on the MDA, no Councilmember indicated that he/she would not approve development of the Badlands at a reduced density if the Developer submitted a revised development agreement. *See* Ex. WWW at 1365-70. The vote to deny the development agreement was 4-3 (*id*. at 1370). Therefore, had a modified proposal been made regarding the MDA or the 35-Acre Property standing alone, it was only necessary for one of the four members who voted to deny the

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application to become satisfied with the proposed changes for it to be approved. And two of the four City Councilmembers who voted against the MDA, Seroka and Coffin, are no longer members of City Council. Overall, four of the seven members that considered the MDA are no longer on the Council. *See* https://www.lasvegasnevada.gov/Government/Mayor-City-Council. And two of the three members who voted *for* the MDA are still on the City Council. Accordingly, there is a realistic chance that a modified proposal for the 133-Acres would be approved.

Much of the commentary about the MDA from Councilmembers at the public hearing indicates that they might approve a lower density development. For example, Councilmember Coffin, who voted against the MDA, stated that he would support "some sort of development agreement" for the Badlands. Ex. WWW at 1327; *see also id.* at 1328 (Badlands "still could be developed if you paid attention to [preserving the desert landscape]"). Similarly, Councilmember Seroka, who voted to deny the MDA, noted that three different drafts of the development agreement had been circulated in the previous week (*id*. at 1362); he had insufficient time to review and understand the version of the agreement before the City Council (*id*.); the proposed residential development was too dense (*id*. at 1361-62); and the development agreement contained no timeline for development of the Badlands (*id*. at 1363). Seroka explained that "a reasonable and equitable development agreement is possible, but this is not it," and that the Developer could resubmit a development agreement for the Council's consideration. *Id*. at 1365-66. Similarly, the majority of citizens testifying at the City Council hearing on the development agreement indicated not that they were opposed to all development of the Badlands, but rather that the density of residential development proposed in the agreement was excessive. *E.g.*, *id.* at 1339, 1344-45, 1350, 1353-55, 1357-60. The City's disapproval of the MDA falls short of the "clear, complete, and unambiguous" proof that the agency has "drawn the line, clearly and emphatically, as to the sole use to which the [133-Acre Property] may ever be put." *Hoehne*, 870 F.2d at 533.

vii. The Developer's contention that the City "nullified" or "clawed back" its approval of 435 luxury housing units on the 17-Acre Property is frivolous

The Developer argues that the approval of the 17-Acre Property was somehow vacated and, therefore, no applications could be said to have been granted by the City. The City approved the 17-Acre Applications, defended them in Judge Crockett's Court, defended them in the Nevada Supreme Court,

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and notified the Developer as soon as the remittitur had been issued that the Approvals were once again valid and the Developer was free to proceed with the 435-unit project. The Developer has not a shred of evidence that the City has taken any action since the Supreme Court reinstated the 17-Acre Approvals to "nullify" the approvals. Nor has the Developer presented any authority that the City even has the power to "nullify" its approvals, no less approvals that the Nevada Supreme Court validated and ordered to be reinstated. Judge Herndon found that the Developer's claim that the City nullified the 17-Acre Approvals to be wholly unsupported by evidence and "frivolous." Ex. CCCC at 1508. Judge Herndon concluded:

> To the extent Developer argues that the approval of the 17-Acre Property was somehow vacated and therefore no applications could be said to have been granted by the City, the Court finds this position to also be without merit. There is no evidence that the City has taken any action to limit the Developer's proposed use of the 17-Acre Property for 435 luxury housing units. The Developer's contention that the City "nullified' the 435-unit approve is without any support in the evidence. The Developer's contention that the City's declining to extend the 17-Acre approvals after Judge Crockett invalidated the approvals means that the City "nullified" the approvals is frivolous. The City supported Developer and opposed Judge Crockett's Order at the trial court level and in the Nevada Supreme Court, where the City filed an amicus brief requesting that the Supreme Court reverse the Crockett Order and reinstate the 17-Acre Property approvals. Ex. CCC.
>
> Prior to the Supreme Court's Order of Reversal, the 17-Acre approvals were legally void and there was nothing to extend. If the City had attempted to extend the approvals, the City could arguably have been in contempt of Judge Crockett's Order. *See* NRS 22.010(3) (disobedience or resistance to any lawful writ or order issued by the court shall be deemed contempt); *see also Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007) (a judgment has preclusive effect even when it is on appeal), abrogated on other grounds by *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008). After the Supreme Court reinstated the approvals, the City had no power to nullify the approvals even if it had intended to do so. To the contrary, upon reinstatement, the City twice wrote to the Developer extending the approvals for two years after the date of the remittitur. Ex. FFF at 1019; Ex. GGG at 1021. The Court accordingly rejects the Developer's argument that the City "nullified" the City's approval of 435 luxury housing units on the 17-Acre Property. All evidence establishes the opposite. The 17-Acre approvals are valid, and the Developer may proceed to develop 435 luxury housing units on the 17-Acre Property.

Ex. CCCC at 1507-08.

In addition to the specious claim that the City nullified the 17-Acre approvals by refusing to "extend" an entitlement that Judge Crockett had *voided*, the Developer asserts that the City's alleged

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denial of its attempt to add access to the Badlands and build fencing around a pond in the Badlands shows that the City has somehow nullified the 17-Acre Approvals. The Developer misrepresents facts.

The 17-Acre Property already had access at the time the Developer filed the 17-Acre Applications. The Developer had not applied for additional access in the Applications. Ex. DDDD at 1518. Even if the City had denied additional access to the 17-Acre Property, it would not have voided the 17-Acre Approvals. The fencing the Developer sought for the perimeter of a pond was not even on the 17-Acre Property. Ex. DDDD at 1519, 1541.

The Developer also misrepresents that the City denied its requests to install fencing and build three new access points to the Badlands. On the contrary, the Director of the City Planning Department correctly applied the City Code when it required the Developer to file the *correct applications* for major review before building fencing and adding access points. *See* Ex. DDDD ¶¶ 9-18; Exs. DDDD-5 at 1537, DDDD-7 at 1539-41. The Developer never filed the proper applications. Ex. DDDD at 1519. It is, therefore, untrue that the City "denied" the Developer access or fencing. Moreover, if the Developer was aggrieved by the City's requirement that the Developer file the appropriate applications for access or fencing, its remedy was to appeal that decision to the City Council. If it was still aggrieved, its remedy would be a PJR, not an action for a taking, which is essentially asking this Court to second-guess the City Planning staff's application of Las Vegas' ordinances to the Developer request for additional access or fencing. *See* UDC 19.16.100; *see also* NRS 278.3195. The Developer never appealed the Directors decision, nor did it file a PJR.

viii. The City's adoption of legislation affecting the application requirements for redevelopment of golf courses does not show futility

The Developer's reliance on Bills 2018-5 and 2018-24 in support of its claim of futility is misplaced. As Judge Herndon found, the bills merely imposed new requirements that a developer discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City, along with imposing other requirements for applications to redevelop property. Ex. CCCC at 1513. He further found that the purpose of the legislation was to increase public participation, that it did not impose substantive requirements for the development project, and that it did not prevent the Developer from applying to redevelop the 65-Acre Property. *Id*. Moreover, the City adopted the second bill in the

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Fall of 2018, after the Developer filed this action for a taking. Judge Herndon found that the bill could not have taken the 65-Acre Property that, like the 133-Acre Property, was allegedly already taken. *Id*. Both bills were repealed in January 2020 and are thus inapplicable to show futility. *See* Exs. LLL, MMM.

The Developer's claim that the two bills were aimed specifically at the Developer is also wrong. The legislation applied to all golf courses in the City. Ex. 130 at 3202-03. The evidence cited to support the Developer's claim consists entirely of statements of a citizen who supported the Developer, the Developer's own attorneys, and one member of the City Council who supported the Developer. However, legislative intent is not relevant in a takings case. Even if it were, the opinions of private citizens or the Developer's counsel, or even one member of the City Council do not determine legislative intent. *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) ("[I]f motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant."). Finally, the bill could not have been targeted at the Developer where it applied to "proposals" for redeveloping golf courses (Ex. DDDD-9 at 1554), the Developer had no "proposals" to redevelop the Badlands pending at the time they were enacted and did not propose any redevelopment of the Badlands during the 15-month period in which the bills were in effect. Finally, the bills could not have been aimed at the Developer where the "maintenance of ongoing public access" provision of which the Developer complains applied only at the City's discretion, and the City never elected to apply that provision to the Developer. Ex. DDDD at 1519-20.

The Developer also contends that Bill 2018-24 was enacted solely to prevent development of the Badlands, calling it the "Lowie Bill." The facts are otherwise. The City cannot have "targeted" the Badlands by adopting the Bill where the Bill never applied to the Badlands while it was in effect and the City never applied the Bill to the Badlands.

ix. Only regulatory actions can effect a taking

The Developer contends that statements and actions of individual City Councilmembers, City staff, and private individuals opposed to the Developer's construction of housing in the Badlands prove

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that remand of the 133-Acre Applications to the City Council would be futile. The Planning Director, Planning Staff, and the City Attorney do not make the law; the City Council makes the law. Under Nevada's Open Meeting Law, the City can only adopt regulations through the City Council at a properly noticed public meeting that meets all statutory requirements. *See* NRS 241.015, .020, .035, .036; *see also Pac. Tel. & Tel. Co. v. City of Seattle*, 14 F.2d 877, 880 (W.D. Wash. 1926) (A "city can speak only through its council."). A public body that must be 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). Absent compliance with all statutory requirements, the City's action would be void. NRS 241.036. The City Council adopted ordinances designating the Badlands PR-OS.

That a City employee is unaware of or misunderstands the law does not determine whether that law exists or is valid. Moreover, the Developer undercuts its reliance on the statements in question where it simultaneously contends that City staff orally informed the Developer that the General Plan designation was irrelevant but then refused to accept the Developer's applications without an application to lift the PR-OS General Plan designation.

Judge Herndon also rejected that notion that statements of individual Councilmembers and City staff are relevant to whether regulation effects a taking:

> Assuming the truth of the Developer's allegations regarding the statements and actions of the City Council, individual Council members, City officials, and City staff, they are not relevant unless they can be shown to result in a wipeout or near wipeout of use and value or interfere with the Developer's reasonable investment-backed expectations.

Judge Williams also distinguished between the statements of individuals and official actions of the City:

> The Court rejects the Developer's argument that the RPD-7 zoning designation on the Badlands Property somehow required the Council to approve its Applications. ¶ Statements from planning staff or the City Attorney that the Badlands Property has an RPD-7 zoning designation do not alter this conclusion.

Ex. XXX at 1385-86, 1391-92

x. The Ripeness issue moots the Motion to Determine Property Interest

Because the City is a long way from deciding what use it will allow on the 133-Acre Property, the Developer's Motion to Determine Property Interest ("MTDPI") is moot. In the MTDPI, the Developer alleges that it has a constitutional property right to develop housing in the 133-Acre Property,

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and that by allegedly denying any development, the City has "taken" that right. The difficulty with the Developer's claim is that the City has not denied any application for development of the 133-Acre Property and could not have "taken" any rights, even if the Developer had them (it didn't; *see* City's Opposition to MTDPI).[6] Instead, the City struck the applications because the Developer failed to file an MMA. In doing so, the City complied with the law at the time – the Crockett Order. On the same facts, Judge Herndon denied the same MTDPI as moot in the 65-Acre case on the ground that the City had not made a final decision as to what development it would allow on the 65-Acre Property. Ex. CCCC at 1515.

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[6] Even if the MTDPI were not moot, whether the Developer and all property owners have constitutionally protected "rights" under zoning is not a close question. The Developer's zoning property rights theory is not only contrary to all precedent, but also contravenes all state statute. *E.g.*, NRS 278.250 (zoning subordinate to General Plan); *see also Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004) (project proponent did not have vested right to site development plan despite fact that its proposed development was consistent with existing zoning); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 246, 871 P.2d 320, 325 (1994) ("The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest."); Ex. III at 1125-26 (Memorandum Decision in *180 Land Co. LLC v. City of Las Vegas*, United States Court of Appeals for the Ninth Circuit Case No. 19-16114 (March 26, 2018) (rejecting Developer's claim that City's disapproval of applications to develop Badlands deprived Developer of a "constitutionally protected property interest"). The Developer's contention that the Nevada Supreme Court decisions finding that zoning does not confer a constitutionally protected property interest are "PJR" cases and inapplicable to a taking claim is ludicrous. The *180 Land Co*. and *Boulder City* cases were constitutional challenges to land use regulation just like this case; they were not PJRs. These and the other unanimous decisions of the Nevada Supreme Court are based on bedrock principles of property and land use law that do not change merely because a property owner elects the PJR procedure rather than a taking procedure. It is not surprising that the Developer's contention is without precedent. If valid, the Developer's theory would mean that a City Council has discretion in its consideration of a development application only if the owner later sues for a PJR, but has no discretion if the owner later challenges the very same action as a taking. Moreover, if the Developer's claim had merit, every city in Nevada would be required to compensate every property owner in a district where the city changes the zoning.

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III. CONCLUSION

The City respectfully requests that the Court remand the 133-Applications to the Las Vegas City Council to allow the Council to consider the merits of those applications for the first time.

Respectfully submitted this 31st day of August, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 31st day of August, 2021, a true and correct copy of the foregoing **CITY OF LAS VEGAS' REPLY IN SUPPORT OF MOTION TO REMAND 133-ACRE APPLICATIONS TO CITY COUNCIL** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
Jelena Jovanovic

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