IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 84345
and
Case No. 84640

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

Appellant

v.

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

Respondent

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

REPLY IN SUPPORT OF MOTION TO CONSOLIDATE APPEALS AND OPPOSITION TO COUNTERMOTION TO EXPEDITE APPEAL

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REPLY IN SUPPORT OF MOTION TO CONSOLIDATE

Respondents 180 Land Co, LLC and Fore Stars Ltd. (collectively the "Developer") agree that consolidation of Case No. 84345 and Case No. 84640 is warranted and will result in judicial economy. *See* Response to Motion to Consolidate And Countermotion to Expedite Appeal, Dkt. 22-16833 at 2 ("Response and Countermotion"). Accordingly, the City of Las Vegas ("City") respectfully requests the Court grant its Motion to Consolidate in full.

Despite agreeing consolidation of the appeals is appropriate, the Developer spends 3½ pages addressing what it deems "unnecessary" facts contained within the City's Motion and providing a "correction" to those facts. *Id.* at 2. The City will forego debating the facts here, but will detail the facts with the requisite citations to the record in the appeal briefs. For purposes of the matter before the Court, the parties have agreed to consolidation. The parties disagree as to both the facts and legal underpinnings of the case and both positions will be fully briefed in the appellate briefs, which is the appropriate time to engage in such argument and discussion.

OPPOSITION TO COUNTERMOTION TO EXPEDITE APPEAL

The Developer's request that the consolidated appeals be expedited should be denied for several reasons. First, the City has identified a combined ***27 issues*** on appeal, which concern (i) a reversal of well-settled Nevada precedent (ii) an issue

arising under the Constitution; (iii) a substantial issue of first impression; (iv) an issue of public policy; and (v) an issue where en banc consideration is necessary to maintain uniformity of this Court's prior decisions. Second, the case law cited by the Developer to support its request for an expedited briefing schedule is inapplicable to the issues presented on appeal. Finally, because the considerations that generally warrant expedition are not present here, at a minimum, the standard briefing schedule set forth in NRAP 31(a)(1) should be followed.

1. The 27 Issues On Appeal Concern Matters Not Appropriate For Expedited Briefing.

As set forth in the Motion to Consolidate, in ruling on the Developer's petition for judicial review, the District Court correctly concluded: (i) the City properly exercised its discretion in declining to lift the historic open space designation of the 35-Acre Property and in denying the applications to convert the 35-Acre Property to houses; and (ii) zoning does not confer a vested property interest to develop. Notwithstanding those conclusions, the District Court inexplicably reversed itself when subsequently considering the Developer's inverse condemnation claims against the City and, consequently, entered a judgment wholly contrary to its prior conclusions of law.

Specifically, the District Court's inverse condemnation rulings are premised upon inconsistent and incorrect conclusions that (a) zoning confers a constitutionally protected property interest to use property for any permitted use in the zoning

district; (b) Nevada cities have no discretion to disapprove or condition an owner's proposed use of property as long as the use is a permitted use in the zoning district; (c) single-family and multi-family housing are the only permitted uses in a Residential Planned Development – 7 units/acre zoning district; (d) the parks, recreation, and open space designation in the City's General Plan cannot prevent the owner from using its property for any use permitted by zoning; and (e) the parcel as a whole for purposes of regulatory takings analysis is the 35-Acre Property, rather than the 1,569-acre Peccole Ranch Master Plan or the 250-acre Badlands. These conclusions were contrary to overwhelming Nevada law and the City's development code, and irreconcilable with the District Court's prior (and correct) conclusions of law denying the Developer's petition for judicial review.

Accordingly, central to the appeals is a finding by the District Court that zoning confers a constitutionally protected property interest on property owners to use the property for any use as long as the use is a permitted use in the zoning district. In finding that property owners have constitutional rights to build, the District Court necessarily and essentially found NRS 278.150, NRS 278.250, and virtually the state's entire system of land use regulation unconstitutional. The District Court's decision ignores unanimous decisions of this Court that these laws grant local agencies broad discretion to engage in land use planning and to exercise discretion in denying and conditioning approval of land use applications. *See*, *e.g.*, *Cty. Of*

Clark v. Doumani, 114 Nev. 46, 952 P.2d 13 (1998), *superseded by statute on other grounds; Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 898 P.2d 110 (1995); *Stratosphere Gaming v. City of Las Vegas*, 120 Nev. 523, 96 P.3d 756 (2004); *Tighe v. Von Goerken*, 108 Nev. 440, 833 P.2d 1135 (1992); *Nevada Contractors v. Washoe Cty.*, 106 Nev. 310, 792 P.2d 31 (1990); *Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nevada, Inc.*, 99 Nev. 739, 670 P.2d 102 (1983). These statutes and decisions confer broad discretion on cities to regulate the use of land in the public interest, require cities to adopt General Plans, and provide that General Plan designations of land uses take precedence over all other land use regulations, including zoning, except in the one circumstance identified in NRS 278.349(e).

In sum, the judgment has profound consequences for all Nevada municipalities' discretionary authority over land use decisions, ignores unanimous decisions of this Court holding that zoning does not confer vested rights, renders the statutorily mandated process of preparing and adopting master plans a pointless exercise, exceeds the District Court's subject matter jurisdiction because the Developer's claims were unripe, misinterprets NRS Chapters 37 and 278, and could bear on the Developer's numerous other takings lawsuits. Indeed, even the Developer recognized in its Countermotion the "importance of this constitutional proceeding." *See* Response and Countermotion at 7.

Such matters of importance that implicate long-standing precedent and concern constitutional questions of law necessarily require extensive briefing and consideration that cannot be accomplished in an expedited proceeding. The Court should deny the Developer's Countermotion.

2. The Considerations That Generally Warrant An Expedited Briefing Schedule Do Not Apply To These Appeals.

The Developer seeks an expedited briefing schedule because it simply does not want the Court to engage in a deep dive into the jurisprudence governing its claims. In seeking an expedited briefing schedule, it appears that the Developer is attempting to accomplish the same goal it pursued in the District Court – stand on its misstatement of facts, misrepresent applicable law, and engage in a game of obfuscation to avoid a thorough review and application of the law to the facts of the case. Indeed, the Developer's own Response and Countermotion belie any argument that an expedited briefing schedule is warranted. Tellingly, the Developer spends 3½ pages contradicting and "correcting" the procedural background facts set forth in the City's Motion to Consolidate notwithstanding its claim that the facts were "unnecessary" and that it would only spend a "brief" time on the alleged correction. *See* Response and Countermotion at 2. The mere fact that the Developer contests the procedural background facts underscores the need for a briefing schedule that will allow the parties sufficient opportunity to brief the 27 issues on appeal.

Moreover, the case law cited by the Developer does not support an expedited briefing schedule. *Id.* at 5-7. In *Bd. Of County Commissioners of Clark County v. Las Vegas Discount Golf & Tennis, Inc.*, 110 Nev. 567, 875 P.2d 1045 (1994), this Court granted the request for expedited briefing because "any delay in disposition of this appeal costs appellants, the taxpayers of Clark County, and the customers of the airport in general, thousands of dollars daily." *Id.* at 570, 875 P.2d at 1046. Such circumstance does not exist here.

First, the taxpayers for the City of Las Vegas are not being forced to expend thousands of dollars a day due to this appeal. Instead, the City is challenging a $34,000,000.00 judgment against it, as well as a $4,707,002.04 award to the Developer for a reimbursement of property taxes, attorneys' fees and costs and an award to the Developer of $10,258,953.30 in pre-judgment interest – all of which cost the taxpayers money. It is incumbent upon the City to challenge the erroneous judgment and resulting awards that stem from the judgment, and it is imperative that the City has sufficient time to fully brief the erroneous findings and conclusions of law resulting in such a judgment and post-trial awards. Thus, expediting the briefing schedule would have a contrary result from the one reached in *Las Vegas Discount Golf & Tennis, Inc.*

Further, the *appellants* moved for the expedited briefing in *Las Vegas Discount Golf & Tennis, Inc.*, not the respondents, as is the case here. *Id.*

Importantly, the Developer is not – and will not – suffer any economic hardship by maintaining a briefing schedule ordered in the normal course. The Developer claims that it has "lost *all* use and possession of their property without any payment" despite still having to pay taxes and other costs on the property and argues this is evidence of an economic hardship. *See* Response and Countermotion at 6 (emphasis added). This is incorrect. More than two years ago, this Court affirmed and reinstated the City's approval of the Developer's 435-unit luxury condominium project on the 17-Acre Property[1] after that approval had been voided by the district court. IV(0622-0629).[2] Moreover, the City notified the Developer that the order reinstating its approvals was final, and the deadline for the Developer to start construction was extended by two years. IV(0631-0636). Thus, contrary to its claim, the Developer has not been denied "all use" of its property. The City also invited the Developer to resubmit the 133-acre applications, which the City Council never reviewed on the merits, and file a first application for the 65-Acre Property and a second application for the 35-Acre Property, all of which the Developer declined to do. IV(0673-0681). Rather than build, the Developer elected solely to pursue the City for money

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[1] The terms "17-Acre Property," "65-Acre Property," and "35-Acre Property" mean and refer to the 17-acre segment, 65-acre segment and 35-acre segment, respectively, that is a part of the 250-acres Badlands property that the Developer segmented into four re-development areas of 17-, 35-, 65- and 133-acres.

[2] Citations to the record are to the City's appendices filed in Case No. 84345.

damages in all four Badlands lawsuits, including the 17-Acre case where the City *approved* the Developer's project and the Developer has had the green light to start building since September 2020. The Developer's own actions, therefore, belie its argument that it is suffering "economic hardship."

Nor is the Developer in any position to complain that the appeal must be expedited because the Court has stayed the City's payment of the damages and other money awarded to the Developer. If the Developer were to prevail on appeal, it will be entitled to interest at prime plus two percent on all money awarded in the judgment, including damages for the alleged taking, costs, attorneys' fees, prejudgment interest, and reimbursement of property taxes. *See* NRS 17.130(2).

In addition, while the Developer recognizes that this Court reversed the District Court's application of NRS 37.140 and NRS 37.170 to require immediate payment from the City as a precondition to any appeal, the Developer nonetheless relies on these statutes as an argument for expediting the appeals. *See* Request and Countermotion at 6. However, nothing in NRS 37.140 and NRS 37.170 provides a basis to expedite briefing in an appeal. As such, the Developer's reliance on these statutes as a basis for granting the Countermotion is unavailing.

The Developer also argues that the parties have extensively briefed all of the issues to the District Court, thus warranting an expedited briefing schedule. *See* Response and Countermotion at 7. Again, the City has identified 27 issues on appeal

and, while the underlying facts and arguments have all been raised with the District Court and are part of the record on appeal, not all of the issues have been "extensively briefed", such as, by way of example, the inconsistencies between the District Court's ruling on the petition for judicial review and the rulings on the Developer's inverse condemnation claims.

The District Court essentially found most of the land use regulatory system of the State of Nevada and the City of Las Vegas unconstitutional. If upheld, the judgment would effect a sea change in how land is used in Nevada. Accordingly, the substantial public policies at issue in this appeal deserve this Court's thoughtful review, not the short shrift by which the Developer believes it will be benefitted. The gravity, number, and complexity of the issues on appeal require substantial briefing by the parties and consideration by this Court.

CONCLUSION

The parties agree that consolidation of Case No. 84345 and Case No. 84640 is warranted, and the City respectfully requests the Court grant the parties' request for consolidation.

The City further requests the Court deny the Developer's request for an expedited briefing schedule as the issues that will be presented on appeal do not lend themselves to an expedited briefing schedule and none of the general considerations that provide for an expedited briefing schedule are present in these appeals.

Accordingly, the City maintains there should be one set of appellate briefs and one briefing schedule, with the opening brief and appendix in the consolidated case being due 120 days after the date of the order granting consolidation, consistent with the standard schedule set forth in NRAP 31(a)(1).

DATED this 2nd day of June, 2022 BY: /s/ *George F. Ogilvie III*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, LLP, and that on this 2nd day of June, a copy of the foregoing **REPLY IN SUPPORT OF MOTION TO CONSOLIDATE APPEALS AND OPPOSITION TO COUNTERMOTION TO EXPEDITE APPEAL** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system.

/s/ Jelena Jovanovic
An employee of McDonald Carano