IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Appellant,

vs.

180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY; AND FORE STARS, LTD., A NEVADA LIMITED-LIABILITY COMPANY,

Respondents.

No. 84345

180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY; AND FORE STARS, LTD., A NEVADA LIMITED-LIABILITY COMPANY,

Appellants/Cross-Respondents,

vs.

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Respondent/Cross-Appellant.

No. 84640

JOINT APPENDIX, VOLUME NO. 3

LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq.
Nevada Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq.
Nevada Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq.
Nevada Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq.
Nevada Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877

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

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan K. Scott, Esq.
Nevada Bar No. 4381
bscott@lasvegasnevada.gov
Philip R. Byrnes, Esq.
pbyrnes@lasvegasnevada.gov
Nevada Bar No. 166
Rebecca Wolfson, Esq.
rwolfson@lasvegasnevada.gov
Nevada Bar No. 14132
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
Telephone: (702) 229-6629

Attorneys for City of Las Vegas

CLAGGETT & SYKES LAW FIRM
Micah S. Echols, Esq.
Nevada Bar No. 8437
micah@claggettlaw.com
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone

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

McDONALD CARANO LLP
George F. Ogilvie III, Esq.
Nevada Bar No. 3552
gogilvie@mcdonaldcarano.com
Amanda C. Yen, Esq.
ayen@mcdonaldcarano.com
Nevada Bar No. 9726
Christopher Molina, Esq.
cmolina@mcdonaldcarano.com
Nevada Bar No. 14092
2300 W. Sahara Ave., Ste. 1200
Las Vegas, Nevada 89102
Telephone: (702)873-4100

LEONARD LAW, PC
Debbie Leonard, Esq.
debbie@leonardlawpc.com
Nevada Bar No. 8260
955 S. Virginia Street Ste. 220
Reno, Nevada 89502
Telephone: (775) 964.4656

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz, Esq.
schwartz@smwlaw.com
California Bar No. 87699
(admitted pro hac vice)
Lauren M. Tarpey, Esq.
ltarpey@smwlaw.com
California Bar No. 321775
(admitted pro hac vice)
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272

Attorneys for City of Las Vegas

SUPP
LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq., Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq., Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq., Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq., Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964

HUTCHISON & STEFFEN, PLLC
Mark A. Hutchison (4639)
Joseph S. Kistler (3458)
Matthew K. Schriever (10745)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: 702-385-2500
Facsimile: 702-385-2086
mhutchison@hutchlegal.com
jkistler@hutchlegal.com
mschriever@hutchlegal.com

Attorneys for Plaintiff Landowners

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, *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, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **SUPPLEMENT TO:** **PLAINTIFF LANDOWNERS' REQUEST FOR REHEARING / RECONSIDERATION OF ORDER / JUDGMENT DISMISSING INVERSE CONDEMNATION CLAIMS** Hearing date: January 17, 2018 Hearing time: 9:00 am

Plaintiffs, 180 LAND COMPANY, LLC, a Nevada Limited Liability Company, FORE STAR, Ltd, and SEVENTY ACRES, LLC, a Nevada Limited Liability Company (hereinafter the "Landowners") hereby supplement Plaintiff Landowners' Request for Rehearing / Reconsideration of Order / Judgment Dismissing Inverse Condemnation Claims, filed with this Court on December 11, 2018. The purpose of this supplement is to attach as an exhibit the Motion for Summary Judgment and appendices thereto that was filed on December 11, 2018, so that this Court can consider the arguments made in the Motion for Summary Judgment when deciding whether to grant a rehearing / reconsideration of this Court's Findings of Fact and Conclusions of Law on Petition for Judicial Review, November 26, 2018. The attached Motion for Summary Judgment clearly shows that not only was it error to dismiss the Landowners' inverse condemnation claims, but this Court should grant summary judgment on liability for the inverse condemnation claims.

DATED this 14th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
KERMITT L. WATERS, ESQ.
Nevada Bar # 2571
JAMES JACK LEAVITT, ESQ.
Nevada Bar #6032
MICHAEL SCHNEIDER, ESQ.
Nevada Bar #8887
AUTUMN WATERS, ESQ.
Nevada Bar #8917

Attorney for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 14th day of December, 2018, a true and correct copy of the foregoing **SUPPLEMENT TO: PLAINTIFF LANDOWNERS' REQUEST FOR REHEARING / RECONSIDERATION OF DISMISSAL OF INVERSE CONDEMNATION CLAIMS** was made by electronic means pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and addressed to each of the following:

McDonald Carano LLP
George F. Ogilvie III
Debbie Leonard
Amanda C. Yen
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
dleonard@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Las Vegas City Attorney's Office
Bradford Jerbic
Philip R. Byrnes
Seth T. Floyd
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
pbyrnes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

Pisanelli Bice, PLLC
Todd L. Bice, Esq.
Dustun H. Holmes, Esq.
400 S. 7th Street
Las Vegas, Nevada 89101
tlb@pisanellibice.com
dhh@pisanellibice.com

/s/ Evelyn Washington
An Employee of the Law Offices of
Kermitt L. Waters

Exhibit 4

Supplement to:
Plaintiff Landowners' Request for Rehearing/Reconsideration of Order/Judgment Dismissing Inverse Condemnation Claims

MSJD
LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq., Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq., Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq., Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq., Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964

HUTCHISON & STEFFEN, PLLC
Mark A. Hutchison (4639)
Joseph S. Kistler (3458)
Matthew K. Schriever (10745)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: 702-385-2500
0Facsimile: 702-385-2086
mhutchison@hutchlegal.com
jkistler@hutchlegal.com
mschriever@hutchlegal.com

Attorneys for Plaintiff Landowners

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, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **PLAINTIFF LANDOWNERS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS** Hearing date: _____ Hearing time: _____

COMES NOW Plaintiffs, 180 LAND COMPANY, LLC, a Nevada Limited Liability Company, FORE STAR, Ltd, and SEVENTY ACRES, LLC, a Nevada Limited Liability Company (hereinafter the "Landowners") by and through their attorney of record, the Law Offices of Kermitt L. Waters, and hereby files Plaintiff Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation Claims. This Motion is based upon the Memorandum of Points and Authorities included herein, the exhibits attached hereto, the pleadings and papers on file in this matter, and such oral arguments as may be heard by the Court at the time of the hearing in this matter.

DATED this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
KERMITT L. WATERS, ESQ.
Nevada Bar # 2571
JAMES JACK LEAVITT, ESQ.
Nevada Bar #6032
MICHAEL SCHNEIDER, ESQ.
Nevada Bar #8887
AUTUMN WATERS, ESQ.
Nevada Bar #8917

Attorney for Plaintiff Landowners

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVE that the undersigned will bring the above and foregoing Plaintiff Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation Claims on for hearing before the above-entitled Court, on the 6 day of Feb, 20 19, at the hour of 9:30am a.m./p.m. or as soon thereafter as counsel may be heard in the Regional Justice Center, Department No. XVI, Courtroom 12D, 200 Lewis Avenue, Las Vegas, Nevada, 89101

DATED this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
KERMITT L. WATERS, ESQ.
Nevada Bar # 2571
JAMES JACK LEAVITT, ESQ.
Nevada Bar #6032
MICHAEL SCHNEIDER, ESQ.
Nevada Bar #8887
AUTUMN WATERS, ESQ.
Nevada Bar #8917

Attorney for Plaintiff Landowners

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MEMORANDUM OF POINTS AND AUTHORITIES

This is a Fifth Amendment Constitutional proceeding filed by the Plaintiff Landowners (hereinafter "the Landowners") against the Defendant, the City of Las Vegas (hereinafter "the City" or "the Government") for the taking by inverse condemnation of their approximately 35 Acre Property. This pleading requests summary judgment on liability for the taking of the 35 Acre Property and exceeds the 30 page limit for several reasons. First, liability in this inverse condemnation action is based on the "aggregate" of City actions impacting the Landowners' property, therefore, these City actions must be set forth in detail.[1] Second, this is an immensely important case for the Landowners, as the City has entirely prevented them from using their 35 Acre Property into which they have invested significant time, resources and money. Finally, this case involves the Landowners' important constitutional right to payment of just compensation under the United States and Nevada Constitutions and, therefore, should be fully and fairly presented to the Court.[2]

---

[1] State v. Eighth Jud. Dist. Ct., 351 P.3d 736 (Nev. 2015) (*citing* Arkansas Game & Fish Comm's v. United States, 568 U.S. --- (2012)) (there is no "magic formula" in every case for determining whether particular government interference constitutes a taking under the U.S. Constitution; there are "nearly infinite variety of ways in which government actions or regulations can effect property interests." Id., at 741); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (inverse condemnation action is an "ad hoc" proceeding that requires "complex factual assessments." Id., at 720.); Lehigh-Northampton Airport Auth. v. WBF Assoc., L.P., 728 A.2d 981 (Comm. Ct. Penn. 1999) ("There is no bright line test to determine when government action shall be deemed a de facto taking; instead, each case must be examined and decided on its own facts." Id., at 985-86).

[2] McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006) ("The first right established in the Nevada Constitution's declaration of rights is the protection of a landowner's inalienable rights to acquire, possess and protect private property. . . . The drafters of our Constitution imposed a requirement that just compensation be secured prior to a taking, and our State enjoys a rich history of protecting private property owners against Government takings. Id., at 1126-27. (emphasis supplied)).

STATEMENT OF FACTS[3]

A. FACTUAL BACKGROUND RELATED TO THE LANDOWNERS' PROPERTY

This part of the factual background will set forth: 1) a general description of the 35 Acre Property; 2) an explanation of who the Landowners are; 3) the constitutionally vested right to develop the 35 Acre Property; and, 4) the Landowners' investment backed expectations in developing the 35 Acre Property.

1. The Property - The 35 Acre Property is Located Within the Physical Boundary of the Queensridge Community

The Landowners own 10 separate parcels generally located south of Alta Drive, east of Hualapai Way and north of Charleston Boulevard within the physical boundary of the Queensridge Community. For purposes of this pleading these 10 parcels will be referred to in segments as the 65 Acre Property, the 17 Acre Property, the 35 Acre Property, and the 133 Acre Property and jointly as the 250 Acre Residential Zoned Land. *See Exhibit 1: 1 App LO 00000001.*

2. The Landowners - the Landowners are Skillful Developers that Have a Compelling Interest in Seeing the 35 Acre Property Professionally Developed Consistent With Their Other Developments in the Area

The Landowners are accomplished and professional developers.[4] Over the past 20 years, they have assembled properties for, designed, and constructed over 3 million square feet of retail and residential development in the immediate vicinity of the 35 Acre Property, consisting of: 1) 40% of the custom homes within the Queensridge Community; 2) One Queensridge Place, which includes two world renowned 20-floor luxury residential high rises; 3) Tivoli Village, which includes 18 unique, old world designed buildings used for retail, restaurant, and office space; and, 4) Fort

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[3] These facts and documents will also put the City on further notice of the Landowners' factual basis for their claims pursuant to Liston v. Las Vegas Metropolitan Police Dep't, 111 Nev. 1575 (1995) (referring to an amended complaint, deposition testimony, interrogatory responses and pretrial statement demand as a basis to provide notice of facts that support a claim).

[4] Yohan Lowie, one of the Landowners' principles, has been described as the best architect in the Las Vegas valley, even having designed and constructed the Nevada Supreme Court building. *Exhibit 5: 2 App LO00000418-419.*

Apache Commons, which includes 65,000 square feet of development. More importantly, the Landowners' principals live in the Queensridge Community and One Queensridge Place, where the 35 Acre Property is located, and are the single largest owners of property within both developments. This means that no other person or entity has a higher stake in seeing the 35 Acre Property competently developed compatible and consistent with the surrounding properties.

3. The Vested Right to Develop the 35 Acre Property

a. The 250 Acre Residential Zoned Land Has Been Hard Zoned For a Residential Use Since 1986 and Reaffirmed in 1996, 2001, and 2015

On numerous occasions over the past 32 years (1986,[5] 1996,[6] 2001,[7] 2014,[8] 2016,[9] and 2018[10]), the City has confirmed the R-PD7 hard zoning on the 35 Acre Property. This residential zoning is so widely accepted that the Clark County tax Assessor has assessed the property as

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[5] *Exhibit 85.*

[6] *Id.*

[7] *Exhibit 2.* On August 15, 2001, the City Council approved Ordinance 5353 in a 7-0 vote, which had two purposes: 1) to include the 250 Acre Residential Zoned Land hard R-PD7 zoning on the City Zoning Atlas (which includes the 35 Acre Property); and, 2) to include this R-PD7 hard zoning on the City's land use plan. *Exhibit 2: 1App LO 00000002-83.* The City "repealed" any prior City actions that could possibly conflict with this R-PD7 hard zoning: "SECTION 4: All ordinances ***or*** parts of ordinances ***or*** sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Las Vegas, Nevada, 1983 Edition, in conflict herewith are ***hereby repealed.*** *Exhibit 2: 1 App LO 00000003. (emphasis supplied)."*

[8] *Exhibit 3.* Two "zoning verification Letters" which state "the subject properties are zoned R-PD7 (Residential Planned Development District – 7 units per acre)…. 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.)." *Exhibit 3: 1 App LO 00000084.*

[9] *Exhibit 4.* At a November 16, 2016, City Council hearing, Tom Perrigo, the City Planning Director, confirmed "[t]he land is zoned R-PD7, which we've discussed, which allows up to 7.49 units per acre. *Exhibit 4: 2 App LO 00000341 lines7473-7481.*

[10] *Exhibit 6.* City Attorney Brad Jerbic stated "they [City Planning Staff] gave him [the Landowner] a letter saying it's R-PD7. I have seen no evidence that they are wrong in what they gave him." *Exhibit 6: 3 App LO 00000523 lines 1160-1161.* City Staff concurred and stated on the record that "in all of our review of the zoning atlas, the zoning for the subject sites that are on the agenda today is R-PD7." *Id. at lines 1165-1166.*

residential for a value of approximately $88 Million. *Exhibit 36: 8 App LO 00001923-1938*. As will be explained below, the City has also readily approved residential development on at least 50 properties in the immediate vicinity of the 35 Acre Property that had similar R-PD7 hard zoning.

b. The Nevada Supreme Court Upheld the Landowners' Vested "Right To Develop" Residentially

Moreover, the pointed issue of whether the 35 Acre Property is R-PD7 hard zoned which grants the Landowners a "right to develop" has been fully litigated before the Honorable Judge Douglas E. Smith and affirmed by the Nevada Supreme Court. *Exhibit 83: 13 App., LO 2977-3001, Findings of Fact and Conclusions of Law and Judgment, filed November 30, 2016; Exhibit 7, 3 App., LO 00000557, Findings of Fact and Conclusions of Law, Final Order and Judgment, filed January 1, 2017; Exhibit 84, 13 App., LO 00003003; see also Exhibit 98: 16 App., LO 3830-3832, Supreme Court Order Denying Rehearing.* Following significant and lengthy briefing and oral argument, Judge Smith entered the following findings, concluding the Landowners have had hard zoning of R-PD7 since 1986 and this hard zoning of R-PD7 controls over any other conflicting land use plans, thereby granting the Landowners the "right to develop" the 35 Acre Property with a residential use:

- On March 26, 1986, a letter was submitted to the City Planning Commission requesting permission to use the 250 Acre Residential Zoned Land for a "golf course," however, the zoning that was sought was R-PD "as it allows the developer flexibility and the City design control." "Thus, ***keeping the golf course [250 Acre Residential Zoned Land, which includes the 133 Acre Property at issue in this case] for potential future development as residential was an intentional part of the plan***." *Exhibit 83: 13 App., at LO 00002990, finding #59.* (emphasis supplied).

- Even though there is a 1986 map that shows a golf course around the location of the Landowners' 250 Acre Residential Zoned Land, "the current Badlands Golf Course [250 Acre Residential Zoned Land] is not the same as what is depicted on the map" (*Exhibit 83: 13 App., at LO 00002990, finding #61)* and the Landowners "have the ***right to close the golf course*** and not water it" (*Exhibit 7: 3 App., LO 00000568, finding #26*). (emphasis supplied).

- The Zoning Bill No. Z-2001, Ordinance 5353, "demonstrates that the R-PD7 Zoning was codified and incorporated into the Amended Atlas in 2001." *Exhibit 83, 13 App., LO 00002989-00002990, finding #58.*

- "[T]wo letters from the City of Las Vegas to Frank Pankratz dated December 20, 2014, ***confirm the R-PD7 zoning on all parcels held by Fore Stars, Ltd.*** [the 250 Acre Residential Zoned Land]." *Exhibit 83: 13 App., LO 00002990, finding #60.*

- "The Court finds that the GC Land [250 Acre Residential Zoned Land] owned by the Developer Defendants [Landowners] has ***'hard zoning' of R-PD7. This allows up to 7.49***

units per acre subject to City of Las Vegas requirements." *Exhibit 83: 13 App, LO 00002994, finding #82; Exhibit 7: 3 App., LO 00000592, finding #130.* (emphasis supplied).

- "Notwithstanding any alleged 'open space' land use designation, the zoning on the GC Land [250 Acre Residential Zoned Land], as supported by the evidence, is R-PD7." The Court then rejected the argument that "suggests the land is 'zoned' as 'open space' and that they [Queensridge homeowners] have some right to prevent any modification of that alleged designation under NRS 278A." *Exhibit 7: 3 App., LO 0000576 - 577, finding #64, LO 00000593, finding #132.*

- The language from NRS 278.349(3)(e) supports the Landowners' position that the hard residential zoning trumps any other land use designation that may have been applied at any time to the Landowners 250 Acre Residential Zoned Land. *Exhibit 7: 3 App., LO 00000577, finding # 66.*

- "The court finds that the Developer Defendants [Landowners] have ***the right to develop*** the GC Land [250 Acre Residential Zoned Land].***"*** *Exhibit 83: 13 App., LO 00002994, finding #81.* (emphasis supplied). This finding was repeated in the subsequent order twice as follows: "The zoning on the GC Land [250 Acre Residential Zoned Land] dictates its use and ***Defendants rights to develop their land***" *(Exhibit 7: 3 App., LO 00000576, finding # 61,. (emphasis supplied))* and the Landowner has the ***"right to develop their land."*** (*Exhibit 7: 3 App., LO 00000592, finding # 130. (emphasis supplied)).*

- Judge Smith even held that the initial steps to develop, parceling the 250 Acre Residential Zoned Land, had proceeded properly: "The Developer Defendants [Landowners] properly followed procedures for approval of a parcel map over Defendants' property [250 Acre Residential Zoned Land] pursuant to NRS 278.461(1)(a) because the division involved four or fewer lots. The Developer Defendants [Landowners] parcel map is a legal merger and re-subdividing of land within their own boundaries." *Exhibit 83: 13 App., LO 00002986, finding #41.*

Judge Smith then held the Queensridge CC&Rs do not apply to the 35 Acre Property and the Queensridge Community could not restrain the Landowners "right to develop their land:"

- The 250 Acre Residential Zoned Land is not a part of the Queensridge Community and, therefore, is not subject to the Queensridge CC&Rs and "cannot be enforced against the GC Land [250 Acre Residential Zoned Land]."[11] *Exhibit 83: 13 App., LO 00002998, finding #51, LO 00002989, findings #53-57, LO 0002990-2993, findings 62-79; Exhibit 7: 3 App., LO 00000563-564, findings 5-7, LO 00000565, findings 15-16, LO 00000567, finding #24, LO 00000568-569, finding #29, 31, LO 00000571, findings 38-40, LO 00000576-577, findings # 64-65, LO 00000577-578, findings #68-70, LO 00000583, finding # 88, LO 00000586, finding #102, LO 00000589-590, findings # 120-124, LO 00000594, finding # 135.*

[11] The CC&Rs for the Queensridge Community plainly state "[t]he existing 18-hole golf course commonly known as the 'Badlands Golf Course' [250 acre property] **is not a part** of the Property or Annexable Property" governed by the Queensridge CC&R's. *Exhibit 66: 11 App LO 00002552-2704.* Also, the "Master Plan" for Queensridge shows that the 250 acre property is "NOT A PART" of the Queensridge Community. *Id.*

- The Queensridge Community, the geographic area where the 250 Acre Residential Land is located "may, but is not required to, include ... a golf course." *Exhibit 83: 13 App., LO 00002992, finding #70.*

- The Queensridge Homeowners transfer documents "evidence that no such guarantee [that the 250 Acre Residential Zoned Land would remain a golf course] was made and that Plaintiffs were advised ***that future development to the adjoining property [250 Acre Residential Zoned Land] could occur, and could impair their views or lot advantages."***[12] *Exhibit 7: 3 App., LO 00000565, finding # 13, LO 00000571, finding # 38, LO 00000574, finding #53.*

The Landowners' vested right to develop residentially is so irrefutable that Judge Smith found any challenge to this vested right (as the City is doing in this proceeding) is "frivolous" and "baseless," warranting an award of attorney fees. *Exhibit 7, 3 App. LO 00000584-585, finding #95, p. 27, LO 00000586, finding #102.*

The Nevada Supreme Court affirmed Judge Smith. *Exhibit 84, 13 App., LO 00003002.* The Court held "[b]ecause the record supports the district court's determination that the golf course [250 Acre Residential Zoned Land] was not part of the Queensridge community under the original CC&Rs and public map and records, regardless of the amendment, we conclude the district court did not abuse its discretion in denying appellants' motion for NRCP 60(b) relief." *Exhibit 84, 13 App., LO 00003003; see also Exhibit 98: 16 App., LO 3830-3832, Supreme Court Order Denying Rehearing.* The Court continued, "[a]ppellants filed a complaint alleging the golf course land [250 Acre Residential Zoned Land] was subject to the CC&Rs when the CC&Rs and public maps of the property demonstrated that the golf course land [250 Acre Residential Zoned Land] was not." *Id., p. 4.* The Supreme Court also upheld the award of attorney fees, confirming it is frivolous to challenge the Landowners' vested right to develop. *Id.*

Accordingly, it is settled Nevada law that the Landowners have the vested "right to develop" this specific 35 Acre Property with a residential use.

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[12] Every purchaser of property within the Queensridge Community was required to accept, as part of their purchase agreement, that there were no representations on how the 250 acre property would be developed: "Purchaser is not relying upon any warranties, promises, guarantees, advertisements or representations made by Seller or anyone…." and "….Seller has made no representations or warranties concerning zoning or the future development of phases of the Planned Community or the surrounding area or nearby property." *Exhibit 69, 11 App., LO 00002733-34*.

c. The Nevada Supreme Court Affirmance of the Judge Smith Orders Nullifies the Crockett Order

The City has relied heavily on the Crockett Order in these proceedings to assert that the Landowners need to submit a "major modification" to ripen their taking claims. The Nevada Supreme Court affirmance of the Judge Smith Orders, however, entirely nullifies the Crockett Order rendering it meaningless in this case (hereinafter "Crockett Order").

I. What the Crockett Order Holds

To understand how the Nevada Supreme Court nullified the Crockett Order, it is first important to analyze what the Crockett Order holds. According to the City, the Crockett Order holds that a "major modification" application is necessary to develop and the Landowners never submitted this application to the City. This City argument (applying the Crockett Order) is that an individual named William Peccole drafted a "conceptual" plan showing certain land use designations in 1986 and that this "conceptual" plan shows an open space / golf course designation on the 250 Acre Residential Zoned Land, which includes the 35 Acre Property. The City then asserts (applying the Crockett Order) that, if the Landowners want to use the 250 Acre Residential Zoned Land for a residential use, the Landowners need to request a "major modification" to change the designation from open space / golf course to a residential use on Mr. Peccole's conceptual plan. And, since the Landowners never filed for a "major modification" their claims are not ripe. This City argument (applying the Crockett Order) focuses entirely and solely on Mr. Peccole's "conceptual" plan and entirely ignores the hard R-PD7 zoning that has existed on the property since 1986. In other words, the Crockett Order holds that Mr. Peccole's "conceptual" plan on how he envisioned the area to develop trumps the R-PD7 hard zoning that was adopted by City ordinance.

ii. How The Nevada Supreme Court Nullifies the Crockett Order

This City argument, adopted in the Crockett Order, however, has been rejected in the two Judge Smith orders, which were affirmed by the Nevada Supreme Court. The Judge Smith orders rely entirely on the hard R-PD7 residential zoning that was on the 250 Acre Residential Zoned Land since 1986 instead of the "conceptual" land use plan drafted by Mr. Peccole. As detailed above, according to the Judge Smith orders and the Supreme Court affirmance, it is settled law that: 1) the

Landowners have the vested "right to develop" the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) with a residential use; 2) the 250 Acre Residential Zoned Land was never part of the Queensridge Community or subject to any Queensridge CC&Rs; 3) the Queensridge homeowners have no rights whatsoever to the 250 Acre Residential Zoned Land; 4) no Queensridge CC&Rs or other City plan may be invoked to prevent this development; and, 5) the Landowners properly proceeded with the residential development by filing the appropriate parcel maps. *Exhibits 7, 83, 84, 85, 89 and 98.* Accordingly, per Nevada law no "major modification" application is necessary - the property is zoned residential, its intended use, and the Landowners' have the "right to develop" the property for this use.

Moreover, it is important to understand the sole process for how Mr. Peccole's "concept" plan can even be applied to grasp how the Supreme Court Affirmance of the Judge Smith orders nullifies the Crockett Order. Mr. Peccole's conceptual plan itself states unequivocally that: 1) the plan is only Mr. Peccole's "concept"[13] - it is not a City master land use plan; and, 2) the sole and only way the "concept" plan can even be applied to any properties is through the adoption of Covenants Conditions and Restrictions ("CC&Rs"). *Exhibit 60: App LO 00002369 and 2383*. The Queensridge CCR's unequivocally state that the "'Badlands Golf Course' (which includes the 35 Acre Property) **is not a part**" of the Queensridge development under the Peccole 1990 Conceptual Plan. *Exhibit 66: 11 App LO 00002572*. The "Master Plan" for the Queensridge development that was recorded with the County Recorder, entitled the "Final Map For Peccole West," unequivocally shows the 35 Acre Property was "NOT A PART" of the Queensridge development, meaning it could not be reserved for open space use for the Queensridge development. *Exhibit 66: 11 App LO 00002685-90*. Additionally, the 35 Acre Property has always remained private land and there was not any condition by the City in 1990 as part of the approval of the Queensridge development that the 35 Acre Property be dedicated for public use, such as a park. The Nevada Supreme Court understood this well,

[13] The Peccole1990 Conceptual Plan was designed to be flexible: "as the City of Las Vegas General Plan is designed as a set of guidelines to help direct future growth of the City, so is the proposed Peccole Ranch Master Plan designed with an inherent flexibility to meet changing market demands at the time of actual development." *Exhibit 60: 10 App LO 00002384*.

specifically holding that the 35 Acre Property is not a part of any CC&Rs and, therefore, the CC&Rs "cannot be enforced against the [35 Acre Property]."[14]

Therefore, Mr. Peccole's concept plan does not even apply to the 35 Acre Property. If Mr. Peccole's concept plan does not apply to the 35 Acre Property, then it goes without saying that Mr. Peccole's open space designation does not apply and there is no need to "modify" Mr. Peccole's concept plan to develop the 35 Acre Property.

It is impossible to reconcile the Crockett Order with the Judge Smith orders and Supreme Court Affirmance. The Judge Smith orders focus on the R-PD7 hard zoning (approved by the City) and affirm the "right to develop" the property residentially.[15] The Crockett Order, on the other hand, ignores the R-PD7 zoning and, instead, focuses on Mr. Peccole's "concept" plan designation of open space and hold no residential units are allowed in the open space.[16]

This Court should follow the Judge Smith orders as they have been affirmed by the Nevada Supreme Court. *Exhibits 7 84, 89 and 98.* Moreover, Nevada's executive,[17] legislative,[18] and judicial branches[19] have all determined Judge Smith is correct - hard zoning trumps the land use plan,[20] especially a "concept" plan by Mr. Peccole that is not even a city master land use plan.

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[14] *See page 4, above.* The CC&Rs for the Queensridge Community plainly state "[t]he existing 18-hole golf course commonly known as the 'Badlands Golf Course' [250 acre property] **is not a part** of the Property or Annexable Property" governed by the Queensridge CC&R's. *Exhibit 66: 11 App LO 00002552-2704.* Also, the "Master Plan" for the Queensridge CC&Rs shows that the 250 acre property is "NOT A PART" of the Queensridge Community. *Id.*

[15] *Exhibits 7, 83, 84, 85, 89 and 98*.

[16] *Exhibit 72, 12 App., LO 00002821, see specifically LO 00002825, finding #13.*

[17] 1984 Nev. Op. Atty. Gen. No. 6 at 3 ("Nevada legislature has always intended local zoning ordinances to control over general statements or provisions of a master plan.")

[18] See NRS 278.349(3)(e).

[19] *See Exhibits 7, 84, 89 and 98.*

[20] The City, itself, has admitted that zoning trumps the General Plan. The City filed a pleading in the petition for judicial review related to the 17 Acre Property arguing: "[i]n the hierarchy, **the land use designation is subordinate to the zoning designation**, for example, because land use designations indicate the intended use and development density for a particular

d. Public Policy for the Nevada Supreme Court Affirmance of the Judge Smith Orders

The Nevada Supreme Court Affirmance of the Judge Smith Orders is well reasoned and based on strong public policy.

Reason / Public Policy #1 - First, as cited above the property has always been zoned residential, the intent was always to develop the property residentially, the City itself repeatedly affirmed this hard residential zoning, and hard zoning trumps any other conflicting land use plan designation.[21] In fact, any challenge to this vested "right to develop" is, as stated by Judge Smith, "frivolous."[22] This residential zoning is so widely accepted that the Clark County Tax Assessor has assessed the property as residential for a value of approximately $88 Million. *Exhibit 36: 8 App LO 00001923-1938.* Moreover, the ruling is consistent with the Nevada Supreme Court Sisolak and Schwartz cases, which hold that Nevada landowners have the vested right to develop their properties even if they have not put it to a beneficial use[23] and the government may only regulate that use with

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area, while zoning designations specifically define allowable uses and contain the design and development guidelines for those intended uses." Jack B. Binion, et al. v. City of Las Vegas, et al., Case No. A-17-752344-J, Respondent City of Las Vegas Answering Brief, 2:8-12. (emphasis supplied). The City's own attorney, Brad Jerbic, represented in a public hearing that "[i]f you do not grant the general plan amend[ment] tonight, you will leave in place a general plan that's inconsistent with the zoning, **and the zoning trumps it, in my opinion**." *Exhibit 71, 11-12 App., Transcript of Planning Commission meeting, Feb. 14, 2017, page 64 lines 1795-1797.* (emphasis supplied). Mr. Jerbic further stated, [b]ut the fact is, if you didn't even have a general plan amendment that synchronized the General Plan with the zoning, the zoning is still in place, and it doesn't change a thing." *Exhibit 21, Vol 4-5, Transcript of City Council Meeting of August, 2, 2017, page 95, lines 2652-2654.* Tom Perrigo, Planning Director for the City of Las Vegas, agreed with Mr. Jerbic and opined that zoning trumps the master plan. *Id., pp. 94-95.*

[21] *See Exhibit 7, 3 App., 00000557; Exhibit 83: 13 App., LO 00002977; Exhibit 84: 13 App., LO 00003002; Exhibit 89: 13 App., LO 00003093; Exhibit 98: 16 App., LO 3830-3832, Supreme Court Order Denying Rehearing.*

[22] *Exhibit 7, 3 App. LO 00000584-585, finding #95, p. 27, LO 00000586, finding #102.*

[23] McCarran Intl. Airport v. Sisolak, 122 Nev. 645 (2006) (landowner had a vested right to use the airspace above his property pursuant to NRS 493.040, even though he never used it and the County never approved the use. Schwartz v. State, 111 Nev. 998 (1995) (Nevada landowners have a vested right to access roadways adjacent to their property, even though the access has never been built).

"valid zoning and related regulations" that do not "give rise to a taking claim."[24] Otherwise, if the City had absolute discretion to grant or deny the use of property, then the Just Compensation Clause would be entirely eliminated. The City could deny all use of all properties in the City (under the City's alleged discretionary power) and never pay any compensation whatsoever for these denials. This despotic argument is not the law and never will be the law as it would bring all property transactions in the State of Nevada to an immediate and abrupt halt. No entity or person would ever purchase property in this State, because there would be no property rights. The only "thing" that would be purchased in a property transaction is dirt for which there are no rights, because the local entities, like the City, could tell the new owner that he cannot use the property at all under the City's absolute discretion argument.

Reason / Public Policy #2 - The City's own persons most knowledgeable have affirmed the vested right to develop and rejected the major modification argument. Brad Jerbic is perhaps the best person at the City who can offer an opinion on the major modification issue as he has been the City Attorney for nearly 30 years, has worked to draft the City Code, interprets the Code, and has advised the City Council on this Code for his entire career. Mr. Jerbic stated in a public hearing that the City's current "major modification" argument is nothing more than a "red herring."[25] Phil Byrnes has been an assistant City Attorney for over 20 years and, therefore, may be the next best person to provide an opinion on the City's "major modification" argument and he stated that a major modification is not required.[26] Tom Perrigo, the City's highest ranking planner, stated a major modification is not required to develop the 35 Acre Property.[27] Finally, further evidence that any

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[24] McCarran Intl. Ariport v. Sisolak, 122 Nev. 645, 660, fn. 25 (2006). This also further shows that the City's reliance on the Stratosphere is misplaced as that case applies to zoning issues, not inverse condemnation issues. And, all it holds is that the City has discretion to grant or deny certain uses. It does not say that the City has "absolute discretion" to deny all use of property without payment of just compensation.

[25] *See Exhibit 24, 5 App LO 00001071-1072.*

[26] *See Exhibit 38, 24:13-17; 26-27; 29; 30; 43:2-10, 8 App LO 0001964 - 9 App LO LO - 00002018.*

[27] *See Exhibit 5, 2App LO 0000400:1228-1233.*

"major modification" argument is a complete farce is the fact that the City has granted permission to develop fifty (50) other properties in the area of the 35 Acre Property that have R-PD7 zoning and were similarly in "open space" labeled areas on the Peccole 1990 Conceptual Plan and not once did the City reference a PR-OS or other "open space" designation or require a "Major Modification" from the Peccole 1990 Conceptual Plan for these 50 applications.[28]

Reason / Public Policy #3 - Judge Smith held that the 35 Acre Property has been hard zoned R-PD7 since 1986. The City's development code applicable to "R-PD" hard zoned property, like the Landowners' property, is LVMC 19.10.050 and this code provision does not require a major modification application as a precondition to develop. By comparison, the City's code to develop under the "PD" designation, LVMC 19.10.040, does require a major modification application to develop. Therefore, a major modification is not a barrier to exercise the vested right to develop.

Reason / Public Policy #4 - The Peccole 1990 Conceptual Plan was not recorded and did not dedicate anything to the City; it was only a "Conceptual Master Plan" that was the vision of a developer. *Exhibit 60: 10 App LO LO 00002369*. Unrecorded visions of a developer are not notice to or binding upon subsequent purchasers of land sufficient to trump the vested right to develop.

Reason / Public Policy #5 - This Court is required to consider the "practical reality"[29] facing landowners in inverse condemnation actions; the Court is not required to abandon all common sense and reason. Any argument that a major modification requirement is a barrier to exercising the vested right in this case requires this Court to do just this. Simply put, the City has represented to this Court

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[28] The City admitted that there have been six other development/entitlement actions done within the Peccole 1990 Conceptual Plan area, none of which were prohibited from developing due to an open space designation and none required a Major Modification from the open space designation. *Exhibit 5: 2 App LO 00000400:1228-1233 and Exhibit 61: 10 App LO 00002465:2314-2318*. The City also approved approximately 44 residential developments all zoned with R-PD7 with a similar open space designation on the Peccole 1990 Conceptual Plan without any delay or request for a Major Modification from the Peccole 1990 Conceptual Plan. *Exhibit 62: 10 App LO 00002471-2472*. 50-0 is not a mistake. This proves the 1990 Conceptual Plan is just that – a "plan" – that is only "conceptual" and what controls is the actual zoning of the property.

[29] City of Sparks v. Armstrong, 103 Nev. 619 (1987) (court upheld taking claim, explaining that the City of Sparks, in arguing that the taking did not occur earlier failed to recognize "the practical reality" the landowners faced as owner of the property).

during the petition for judicial review proceedings that if the Landowners had written the words "major modification" at the top of its applications to the City, then the City would not have engeaged in the following acts (these acts will be explained fully below): 1) the City's councilmen would not have called the Landowners' representative a "motherfucker," would not have stated "over my dead body" will development ever be allowed, and would not have stated he will "vote against the whole thing;" 2) the City would not have adopted the "Yohan Lowie Bills" and would not have strategically adopted the Bills to deny all applications to develop; 3) the City would not have denied the MDA (that included significantly more than any major modification requires); 4) the City would not have made it impossible to get a drainage study; 5) the City would not have denied the fence and access applications; 6) the City would not have denied the applications to develop for this 35 Acre Property and the 133 Acre Property; 7) the City would not have identified $15 million of City funds to take over the Landowners' property for a City "park;" 8) the City would not be vehemently trying to claw back the 17 Acre Property approvals; and 9) the Landowners' Property would be fully developed today. No reasonable person, considering the above cited facts, could possibly believe this argument.

Reason / Public Policy #6 - If this Court elects to follow the Crockett Order that entirely ignores the Landowners' hard zoning and vested right to develop, instead of the Judge Smith Orders and Nevada Supreme Court Affirmance, this will be a judicial taking of the 35 Acre Property. The United States Supreme Court has held that judicial action that "recharacterizes as public property what was previously private property is a judicial taking."[30] The Court explained that this is a proper taking claim, because the Taking Clause is concerned with the "act" that results in the taking and does not focus on the particular "government actor," meaning the judiciary also may engage in taking actions.[31] Acceptance of the Crockett Order in this case would amount to a judicial taking, because the order would be applied to recharacterize the Landowners' 35 Acre Property from a hard zoned residential property with the vested "rights to develop" to a public park / open space with zero developable units.

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[30] Stop the Beach Renourishment, Inc.v. Florida Dept. of Env. Protec., 130 S.Ct. 2592 (2010).

[31] Id., at 2601.

Therefore, there is strong public policy supporting the Landowners' vested right to develop.

4. The Landowners' Investment Backed Expectations to Develop the 35 Acre Property

In furtherance of their vested "right to develop" the 250 Acre Residential Zoned Land, the Landowners invested their time, money, expertise and resources. Based upon the Landowners' extensive investment and commitment to develop the 35 Acre Property, it is clear that development on the 35 Acre Property was not speculative or conjectural and would be a financial success. And, this process began in 2015, when the Las Vegas residential real estate market was booming. Therefore, the Landowners had significant investment backed expectations in the development of the 35 Acre Property.

B. FACTUAL BACKGROUND RELEVANT TO THE GOVERNMENT ACTION WHICH ELIMINATED ALL USE AND ENJOYMENT OF THE 35 ACRE PROPERTY, RENDERING THE PROPERTY USELESS AND VALUELESS

This part of the Landowners' Motion for Summary Judgment will set forth the systematic and aggressive actions by the City to prevent any and all development on the 35 Acre Property thereby rendering the property useless and valueless and establishing liability for a taking. It is important to consider all of these City actions and how the actions as a whole impact the 35 Acre Property, because "the form, intensity, and the deliberateness of the government actions toward the property must be examined … All actions by the [government], in the aggregate, must be analyzed."[32] These City actions demonstrate the basis for the Landowners' Inverse Condemnation claims.

1. City Action #1 - City Denial of the 35 Acre Property Applications

The Landowners submitted complete applications to develop the 35 Acre Property for a residential use consistent with the R-PD7 hard zoning. *Exhibit 22.* Again, it is settled law that the Landowners have the "right to develop" this property. *Exhibits 83, 84, 85, and 98*. The City Planning Staff thoroughly reviewed the applications, determined that the proposed residential development was consistent with the R-PD7 hard zoning, that it met all requirements in the Nevada Revised Statutes, and in the City's Unified Development Code (Title 19), and appropriately recommended approval. *Exhibit 22: 4 App LO 00000932-949 and Exhibit 23: 4 App LO 00000950-*

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32 Merkur v. City of Detroit, 680 N.W.2d 485, 496 (Mich.Ct.App. 2004).

976. Tom Perrigo, the City Planning Director, stated at the hearing that the proposed development met all City requirements and should be approved. *Exhibit 5: 2 App LO 00000376 line 566 - 377 line 587.*

The City Council denied the 35 Acre Property applications,[33] stating as the sole basis for denial the City's alleged desire to see the entire 250 Acre Residential Zoned Land developed under one Master Development Agreement (MDA). *Exhibit 5: 2 App LO 00000363, 372, 376.* The City assured the Landowners that the MDA approval was "very, very close" and "we are going to get there." *Exhibit 5: 2 App LO 00000367 line 336; 370 line 408; Exhibit 5: 2 App LO 00000466 lines 2987-2989; LO 0000475 line 3251 to LO 0000476 line 3256.* The City Attorney even stated "There's no doubt about it [approval of the MDA]. If everybody thinks that this can't be resolved, I'm going to look like an idiot in a month and I deserve it. Okay?" *Exhibit 5: 2 app LO 00000467 lines 3020-3021.*

2. City Action #2 - Denial of the Master Development Agreement (MDA)

To comply with the City request to have one unified development, between July, 2015, and August 2, 2017, the Landowners worked with the City on an MDA that would allow development on the 35 Acre Property along with all other parcels that made up the 250 Acre Residential Zoned Land. *Exhibit 25: 5 App LO 00001132-1179.*[34] As stated above, the City mandated that

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[33] One councilman understood that denying the 35 Acre Property applications would clearly expose the City to liability: "So I think actually the fastest way for the property owner to exercise their property rights would probably be for us to deny this, because then they can go to court **and a court will immediately reverse us, because this is so far inside the existing lines** [the City's Code requirements]." *Exhibit 5: 2 App LO 00000451 lines 2588-2590.*

[34] Exhibit 25 is a combination of numerous documents related to the MDA as follows: *Badlands Development Agreement CLV Comments 11-5-15; Planning 11/05/15 DA Highlights; email from City Planning Section Manager, Peter Lowenstein to Landowners' land use attorneys, dated November 5, 2015, with attachment identified as "Badlands DA Comments; email correspondence between City Planning Section Manager, Peter Lowenstein, and Landowner representative Frank Pankratz, dated February 24, 2016; email correspondence between City Attorney Brad Jerbic and Landowners' land use attorney Stephanie Allen, dated May 22, 2017; Addendum to MDA to provide additional changes, dated 2016; The Two Fifty Development Agreement's Executive Summary; City requested concessions signed by a representative of the Landowners; Substantial Changes to the Development Agreement for the Two Fifth Based on Residential Feedback (July 27, 2017); Comments on Development Agreement for Two Fifty (Draft*

development of the 35 Acre Property be included in the MDA covering all 250 acres,[35] rather than one application for just the 35 Acre Property.

The amount of work that went in to the MDA was demanding and pervasive.[36] The Landowners complied with each and every City demand, making more concessions than any developer that has ever appeared before this City Council.[37] A non-exhaustive list of the Landowners' concessions, as part of the MDA, include: 1) donation of approximately 100 acres as landscape, park equestrian facility, and recreation areas (*Exhibit 29: 8 App LO 00001836; Exhibit 24: 4 App LO 00000998 lines 599-601; Exhibit 30: 8 App LO 00001837*); 2) building brand new

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of May 25, 207) Michael Buckley, Fenemore Craig, P.C. (Brad/City Jerbic Response in Bold) June 13, 2017.

[35] The Landowners explained that they were going through this MDA process at the request of the City: "[w]e've been working on this agreement [MDA] at length for two years, because the direction of this Council was that you prefer to have a holistic, universal plan, and we have done that." *Exhibit 24: 4 App LO 00000990 lines 375-377.*

[36] The City Attorney stated that he has met with and worked "very, very hard" with the neighbors and the Landowners on the MDA "on a regular basis" and the Mayor acknowledged that the City and the Landowners had "been working for two years" and "working so many hours" on the MDA (*Exhibit 5: 2 App LO 00000367 lines 333-335; 446 lines 2471-2472; 447 lines 2479-2480; 465 lines 2964-2965*) and that, at times, she was meeting with the City Attorney and the Director of Planning "on a weekly basis or more often" on the MDA. *Exhibit 24: 5 App LO 00001002 lines 691-692.* The Mayor indicated that City Staff had dedicated "an excess of hundreds of hours beyond the full day" working on the MDA with the various groups involved. *Id. at 1002 lines 697-701.* The City Attorney recognized the "frustration" of the Landowners due to the length of time negotiating the MDA. *Exhibit 5: 2 App LO 00000466 lines 2991-2992.*

[37] Councilwoman Tarkanian commented that she had never seen anybody give as many concessions as the Landowners: "I don't know if I've ever seen anybody who's done as much as far as, you know, filling in gullies and giving you football field lengths behind you and stuff like that . . . **I've never seen that much given before**." *Exhibit 5: 2 App LO 00000458 lines 2785-2787; 459 lines 2810-2811. (emphasis supplied).* The Mayor acknowledged that "you did bend so much. And I know you are a developer, and developers are not in it to donate property. And you have been donating and putting back, ... And it's costing you money every single day it delays." *Exhibit 5: 2 App LO 00000446 lines 2462-2465.* The Landowners conveyed that the changes were extensive and always at the request of the City: "[w]e have done that through many iterations, and those changes were not changes that were requested by the developer. They were changes requested by the City and/or through homeowners to the City." *Exhibit 24: 4 App LO 00000990 lines 378-380.*

driveways and security gates and gate houses for the existing security entry ways for the Queensridge development; (Id.); 3) building two new parks, one with a vineyard; (Id.) and, 4) reducing the number of units, increasing the minimum acreage lot size, and reduced the number and height of towers. *Exhibit 5: 2 App LO 00000431 lines 2060-2070; Exhibit 29: 8 App LO 00001836; and Exhibit 30: 8 App LO 00001837*. The City demanded changes to the MDA that ranged from simple definitions, to the type of light poles, to the number of units and open space required for the overall project.[38] In total the City required at least 16 new and revised versions of the MDA. *Exhibit 28*.[39] In the end, the Landowners were very diligent in meeting all the City's demands[40] and the MDA met all of the City mandates, the Nevada Revised Statutes and the City's own Code requirements.[41] *Exhibit 24: 5 App LO 00001071-1073 lines 2652-2655.* Even the City's own Planning Staff, who

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[38] As just one example of this, *see Exhibit 31: 8 App LO 00001838-1845.* Another example of the significant changes requested and made over time can be seen in a comparison of just two of the MDAs – the MDA dated July 12, 2016 and the MDA dated May 22, 2017. *Exhibit 32: 8 App LO 00001846-1900.* During just this eight-month period there were 544 total changes to the MDA. *Id.* These changes can also be seen in a comparison of the "Design Guidelines" that were part of the MDA. *Exhibit 33: 8 App LO 00001901-1913.* Another 157 changes were made to these Design Guidelines in just over one year from the April 20, 2016, to May 22, 2017, version. *Id. at LO 00001913.*

[39] *Exhibit 28* consists of 16 versions of the MDA generated from January, 2016 to July, 2017. *Exhibit 28: 5 App LO 00001188- 8 App L0 00001835.* Importantly, the Landowners expressed their concern that the time, resources, and effort it was taking to negotiate the MDA may cause them to lose the property. *Exhibit 5: 2 App LO 00000447-450.*

[40] For example, on February 24, 2016, the City made numerous additional changes to the MDA at 1:41 pm and the Landowners had responded to and made the changes to the MDA by 11:53 pm that evening (*Exhibit 26: 5 App LO 00001180-1182*) and on May 22, 2017, the Landowners submitted the SDR (Site Development Plan Review) language for the MDA at 1:12 pm and by 3:32 pm that same day had already had a phone conversation with the City Attorney and made the changes to the SDR the City required. *Exhibit 27: 5 App LO 00001183-1187*.

[41] The MDA included over 55 pages of specific development standards for the 250 Acre Residential Zoned Land. *Exhibit 28: 5 App LO 00001188- 8 App L0 00001835.*

participated at every step in preparing the MDA, recommended approval, stating the MDA "is in conformance with the requirements of the Nevada Revised Statutes 278" and "the goals, objectives, and policies of the Las Vegas 2020 Master Plan" and "[a]s such, staff [the City Planning Department] is in support of the development Agreement." *Exhibit 24: 4 App LO 00000985 line 236 – 00000986 line 245; LO 00001071-00001073; and Exhibit 40: 9 App LO 00002047-2072*.

Notwithstanding the Landowners' efforts and sweeping concessions and the City's own Planning Staff recommendation to pass the MDA, on August 2, 2017, the MDA was presented to the City Council and the City denied the entire MDA altogether. *Exhibit 24: 5 App LO 00001128-112.* As the 35 Acre Property is vacant, this meant that the property would remain vacant. And, this means the City assertion that it wanted to see the entire 250 Acre Residential Zoned Land developed as one unit was an utter farce. Regardless of whether the Landowners submit individual applications (35 acre applications) or one omnibus plan for the entire 250 Acre Residential Zoned Land (the MDA), the City unilaterally denied all uses. As will be shown below, it has been discovered that the 35 Acre Property and MDA denials are in furtherance of a City scheme to specifically target the Landowners' property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for $ 15 Million which is 1%[42] of its fair market value. Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.

3. City Action #3 - Adoption of the Yohan Lowie Bills

After denial of the MDA, the City then raced to adopt two Bills that solely target the 250 Acre Residential Zoned Land in order to create an even further barrier to development.

The first is Bill No. 2018-5, which Councilwomen Fiore acknowledged "**[t]his bill is for one development and one development only. The bill is only about Badlands Golf Course** [250 Acre Residential Zoned Land]. . . . "**I call it the Yohan Lowie [a principle with the Landowners] Bill**." *Exhibit 44: 9 App LO 00002079 lines 57-58; 17:487. Id. at 17:487.* The purpose of the Yohan Lowie Bill was to block any possibility of developing the 35 Acre Property by giving veto power to adjoining property owners before any land use application can even be submitted regardless

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[42] This is an estimate as in 2017 the Tax Assessor placed an assessment value of approximately $88 Million on the Subject Property and the Tax Assessed Value is universally understood to be below market value. *Exhibit 36: App LO 00001923-1938.*

of the existing hard zoning and whether the neighbors have any legal interest in the property or not. *Exhibit 45: 9 App LO 00002099 lines 6-8.*

The second Bill is Bill No. 2018-24, which is also clearly intended to target only the Landowners' 250 Acre Residential Zoned Land (which includes the 35 Acre Property) by making it nearly impossible to develop and then applying unique laws to jail the Landowners for seeking development of their property. On October 15, 2018, a recommending committee considered Bill 2018-24 and it was shown that this Bill targets solely the Landowners' Property. *Exhibit 92, 93, and 94, 13-15 App., see specifically, Exhibit 94, 15 App., pp. 00003571-3573.* And, Bill 2018-24 defines the "requirements pertaining to the Development Review and Approval Process, Development Standards, and the Closure Maintenance Plan" for re-purposing "certain" golf courses and open spaces. *Exhibit 46: 9 App LO 00002106-2118.* Bill 2018-24 requires costly and technical application procedures, including: approval of expensive and technical master drainage, traffic, and sewer studies before any applications are even submitted; ecological studies; 3D topographic development models; providing ongoing public access to the private land; and requiring the Landowner to hire security and monitoring details. Id. passim. Additionally, Bill 2018-24 seeks to make it a misdemeanor subject to a $1,000 a day fine or "imprisonment for a term of not more than six months" or any combination of the two for an owner of a discontinued golf course who fails to maintain the course to a level that existed on the date of discontinuance, regardless of whether the course can be profitably operated at such a level. *Id. at LO 00002114-2116.* According to Councilwoman Fiore at the September 4, 2018, Recommending Committee meeting, if adopted, this would be the only ordinance in the City development code which could enforce imprisonment on a landowner. At the September 4, 2018, meeting the City Staff confirmed that Bill 2018-24 could be applied retroactively. This makes an owner of any failing golf course an indentured servant to neighboring owners whether such neighbors have any legal interest to the property or not. On November 7, 2018, despite the Bill's sole intent to target the Landowners' Property and prevent its development, the City adopted the Bill. *Exhibits 90-97, see specifically, Exhibits 96 and 97, 15 and 16 App., LO 00003594-3829.*

This further shows the lengths to which the City has gone to prevent the development of the

250 Acre Residential Zoned Land – seeking unique laws to jail the Landowners for pursuing development of their own property for which they have the "right to develop." As will be shown below, the adoption of these two City Bills is in furtherance of a City scheme to specifically target the Landowners' property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1%[43] of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

4. City Action #4 - Denial of an Over the Counter, Routine Access Request

In August, 2017, the Landowners filed with the City a request for three access points to streets the 250 Acre Residential Zoned Land abuts – one on Rampart Blvd. and two on Hualapai Way. *Exhibit 58: 10 App LO 00002359-2364*. This was a routine over the counter request and is specifically excluded from City Council review.[44] Moreover, the Nevada Supreme Court has held that a landowner cannot be denied access to abutting roadways, because all property that abuts a public highway has a special right of easement to the public road for access purposes and this is a recognized property right in Nevada.[45] The Court held that this right exists "despite the fact that the Landowner had not yet developed access."[46] Contrary to this Nevada law, the City denied this access application citing as the sole basis for the denial, "the various public hearings and subsequent debates concerning the development on the subject site." *Exhibit 59: 10 App LO 00002365.* In violation of its own City Code, the City required that the matter be presented to the City Council through a "Major Review." *Exhibit 59: 10 App LO 00002365.* As will be shown below, this access denial is also in furtherance of a City scheme to have the Landowners' property remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

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[43] This is an estimate as in 2017 the Tax Assessor placed an assessment value of approximately $88 Million on the Subject Property and the Tax Assessed Value is universally understood to be below market value. *Exhibit 36: App LO 00001923-1938.*

[44] *See* LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii).

[45] Schwartz v. State, 111 Nev. 998 (1995).

[46] Id., at 1003.

5. City Action #5 - Denial of an Over the Counter, Routine Fence Request

In August, 2017, the Landowners filed with the City a routine request to install chain link fencing to enclose two water features/ponds that are located on the 250 Acre Residential Zoned Land, which, again, they have the "right to develop." *Exhibit 55: 10 App LO 00002345-2352.* The City Code expressly states that this application is similar to a building permit review that is granted over the counter and not subject to City Council review.[47] The City denied the application, citing as the sole basis for denial, "the various public hearings and subsequent debates concerning the development on the subject site." *Exhibit 56: 10 App LO 2343.* In violation of its own Code, the City then required that the matter be presented to the City Council through a "Major Review" pursuant to LVMC 19.16.100(G)(1)(b) which states that "the Director determines that the proposed development could significantly impact the land uses on the site or on surrounding properties." *Exhibit 57: 10 App LO 00002354-2358.* The Major Review Process contained in LVMC 19.16.100 is substantial. It requires a pre-application conference, plans submittal, circulation to interested City departments for comments/recommendation/requirements, both a publicly noticed Planning Commission and City Council hearings. The City has required this extraordinary standard from the Landowners to install a simple chain link fence to enclose and protect two water features/ponds on their property. As will be shown below, this fence denial is also in furtherance of a City scheme to specifically target the Landowners' property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

6. City Action #6 - Denial of a Drainage Study

In an attempt to clear the property, replace drainage facilities, etc., the Landowners submitted an application for a Technical Drainage Study, which should have been routine, because the City and the Landowners already executed an On-Site Drainage Improvements Maintenance Agreement that allows the Landowners to remove and replace the flood control facilities on their property that they have a "right to develop." *Exhibit 78: 12 App LO 00002936-2947.* It is worth noting that the City's Yohan Lowie Bill requires a technical drainage study in order to grant entitlements. The City,

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47 *See* LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii).

however, in furtherance of its scheme to keep the Landowners' property in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value,[48] is mandating an impossible scenario - that **there can be no drainage study without entitlements while requiring a drainage study in order to get entitlements**. This is a clear catch-22 intentionally designed by the City to prevent any use of the Landowners' property.

7. City Action #7 - City Refusal to Even Consider the 133 Acre Property Applications

As part of the numerous development applications filed by the Landowners over the past three years to develop all or portions of the 250 Acre Residential Zoned Land, in October and November 2017, the necessary applications were filed to develop residential units on the 133 Acre Property consistent with the R-PD7 hard zoning. *Exhibit 47: 9 App LO 00002119-10 App LO 2256.*[49] *Exhibit 49: 10 App LO 00002271-2273*. Again, as determined by Judge Smith and affirmed by the Nevada Supreme Court, the Landowners have the "right to develop" this property. The City Planning Staff thoroughly reviewed the applications, determined that the proposed residential development was consistent with the R-PD7 hard zoning, that it met all requirements in the Nevada Revised Statutes, the City Planning Department, and the Unified Development Code (Title 19), and appropriately recommended approval. *Exhibit 51: 10 App. LO 00002308-2321*. Instead of approving the development, the City Council delayed the hearing for several months until May 16, 2018 - the same day it was considering the Yohan Lowie Bill, referenced above. *Exhibit 50: 10 App LO 00002285-2287.* The City put the Yohan Lowie Bill on the morning agenda and the 133 Acre Property applications on the afternoon agenda. The City then approved the Yohan Lowie Bill in the morning session. Thereafter, Councilman Seroka asserted that the Yohan Lowie Bill applied to deny development on the 133 Acre Property and moved to strike all of the applications for the 133 Acre

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[48] *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

[49] Although not required by code, GPA 7220 was "submitted under protest" by the Landowners to satisfy a housekeeping request made by the City. City Attorney, Brad Jerbic, admitted that "The law does not require a General Plan Amendment when the zoning is already in place and you're not requesting a change in the zoning." *Exhibit 6: 3 App LO 00000522 lines* 1114-1115. The City Staff Report admits the GPA was filed "at the city's request." *Exhibit 48: 10 App LO 00002258*.

Property filed by the Landowners. *Exhibit 6: 2 App LO 00000490 lines 206-207.* The other Council members were taken back and surprised by this clearly unconstitutional attempt to deny even the opportunity to be heard on the applications:

> Scott Adams (City Manager): "I would say we are not aware of the action. … So we're not really in a position to respond technically on the merits of the motion, cause it, it's something that I was not aware of." *Exhibit 6: 2 App LO 00000498 lines 443-450.*
>
> Councilwoman Fiore: "none of us had any briefing on what just occurred." *Id. at. lines 454-455.*
>
> Councilman Anthony: 95 percent of what Councilman Seroka said was, I heard it for the first time. So I – don't know what it means. I don't understand it." *Exhibit 6: 3 App LO 00000511 lines 810-811.*

The City then refused to allow the Landowners to be heard on their applications for the 133 Acre Property and voted to strike the applications. *Exhibit 51: 10 App LO 00002308-2321 and Exhibit 53: 10 App LO 00002327-2336.* Although not directly applicable to the 35 Acre Property at issue in this case, the strategic adoption and application of the Yohan Lowie Bill to strike all of the 133 Acre Property development applications is further evidence of the City's systematic and aggressive actions to deny any and all development on any part of the 250 Acre Residential Zoned Land. And, as will be shown below, this City action is also in furtherance of a City scheme to specifically target the Landowners' property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

8. City Action #8 - The City Announces It Will Never Allow Development on the 35 Acre Property, Because the City Wants the Property for a City Park and Wants to Pay Pennies on the Dollar

It is clear that the purpose for the repeated City denials is the City wants the Landowners' Property for a City park. In documents obtained from the City pursuant to a Nevada Public Records Request, it was discovered that the City has already allocated $15 million to acquire the Landowners' private property - "$15 Million-Purchase Badlands and operate." *Exhibit 35: 8 App LO 00001922.* In this same connection, Councilman Seroka issued a statement during his campaign entitled "The Seroka Badlands Solution" which provides the intent to convert the Landowners' private property into a "fitness park." *Exhibit 34: 8 App LO 00001915.* In an interview with KNPR

Seroka stated that he would "turn [the Landowners' private property] over to the City." *Id. at LO 00001917.* Councilman Coffin agreed, stating his intent in an email as follows: "I think your third way is the only quick solution…Sell off the balance to be a golf course with water rights (key). Keep the bulk of Queensridge green." *Exhibit 54: 10 App LO 00002344.* Councilman Coffin and Seroka also exchanged emails wherein they state they will not compromise one inch and that they "need an approach to accomplish the desired outcome," which, as explained, is to take the Landowners' property for a City park. *Exhibit 54: 10 App LO 00002340.*

In furtherance of this taking, the City has announced that it will never allow any development on the 35 Acre Property or any other part of the 250 Acre Residential Zoned Land. Councilman Seroka testified at the Planning Commission (during his campaign) that it would be "**over his dead body**" before the Landowners could use their private property for which they have a vested right to develop. *Exhibit 21: 4 App LO 00000930-931.* In reference to development on the Landowners' Property, Councilman Coffin stated firmly "I am voting against the whole thing," (*Exhibit 54: 10 App LO 00002341*) calls the Landowners' representative a "motherfucker," and expresses his clear resolve to continue voting against any development:

> I agree with you Chuck. Now that I have answered you from my home totally using personally paid – for resources like my personal cell phone thru a non-governmental server I have to submit this email to the aforementioned developer's lawyer. I could have said your characterization as dishonest would be improper but that would be subject to discovery as interpreted by his lawyers since the **Asshole** is suing me and claiming I am anti-sematic.
> **If this motherfucker gets his way in federal court <u>I will not be able to vote anymore on Badlands</u> [the 250 Acre Residential Zoned Land].** The **sonofabitch** asks for everything with the term "Badlands" including personal text messages, email, social media posts and comments [sic], voice mail and written notes or letters, handwritten.or.not [sic].
> The guy seems to be in the grip of several mental disorders including but not limited to narcissism and much of the obsessive compulsive spectrum. Greed can be an uncontrollable manifestation of his needs caused by his disorders. There can be no dishonesty if you are mentally ill but his illness has.cost [sic] local government millions and innocent bystanders like you a horrible cost of security in your home and loss of values.
> Better hope he does.not [sic] win his harassment lawsuits against Seroka and me because we will be in the grip of dictatorial capitalism.
> Bob Coffin. *Exhibit 76: 12 App LO 00002852. (Emphasis added).*

It is important to again note: 1) as affirmed by the Nevada Supreme Court, the Landowners have the vested "right to develop" their property; 2) the Landowners' property is not for sale; and,

3) the Clark County Assessor has placed a residential value of approximately $88 Million on the property. *Exhibit 36: 8 App LO 00001923-1938*. As it is universally understood that tax assessed value is well below market value,[50] the City's scheme to "Purchase Badlands and operate" for "$15 Million," (which equates to less than 6% of the tax assessed value and likely less than 1% of the fair market value) **shocks the conscience**.[51]

9. City Action #9 - The City Shows an Unprecedented Level of Aggression To Deny All Use of the 250 Acre Residential Zoned Land

The City then went to unprecedented lengths to interfere with the use and enjoyment of the property. Councilman Coffin sought "intel" against one of the Landowner representatives so that the intel could, presumably, be used to deny any development on the 250 Acre Residential Zoned Land (including the 35 Acre Property). In a text message to an unknown recipient, Councilman Coffin stated:

> Any word on your PI enquiry about badlands guy?
> While you are waiting to hear **is there a fair amount of intel on the scum** behind [sic] the badlands takeover? **Dirt will be handy if I need to get rough.** *Exhibit 81: 12 App LO 00002969. (emphasis supplied).*

Knowing the unconstitutionality of their actions, instructions were then given on how to hide communications regarding the 250 Acre Residential Zoned Land from the Courts. Councilman Coffin, after being issued a documents subpoena, wrote:

> "Also, his team has filed an official request for all txt msg, email, anything at all on my personal phone and computer under an erroneous supreme court opinion…So everything is subject to being turned over so, for example, your letter to the c[i]ty email is now public and this response might become public (to Yohan). I am considering only using the phone but awaiting clarity from court. **Please pass word to all your neighbors. In any event tell them to NOT use the city email address**

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50 Nichols' on Eminent Domain, at §22.1, 22.6 (Although the assessor is required to appraise the value of the property, it is an open secret that the assessment rarely approaches the true market value.)

51 This shows an incentive to deny all use of the property so the City can purchase the property for pennies on the dollar, which is an unconstitutional act in itself. To the extent the Government argues that the stunning level of bias is only evidenced from two Council members it should be noted that 3 other Council members have been deferring to these two Council members. *Exhibit 14: 4 App LO 00000781 lines 2760-2765*. It should also be noted that the Landowners are unaware of any rebuke of the publicly made statements of bias and intent to turn the Landowners' property into a City Fitness Park from the other Council members.

> **but call or write to <u>our</u> personal addresses. For now…PS. Same crap applies to Steve [Seroka]** as he is also being individually sued i[n] Fed Court and also his personal stuff being sought. This is no secret so let all your neighbors know." *Exhibit 54: 10 App LO 00002343. (Emphasis added).*

Then, Councilman Coffin actually advises Queensridge residents on how to circumvent the legal process and the Nevada Public Records Act[52] by instructing them on how not to trigger any of the search terms being used in the subpoenas. "Also, please pass the word for everyone to not use **B…l..nds in title or text of comms. That is how search works**." *Id. (emphasis supplied)*. Finally, There are emails between a City Councilman and a local lobbyist who has been referred to as one of the Las Vegas Valley's go-to people whenever businesses or organizations need someone to deal with local governments for the" which suggests a concern that "letters from certain pe[o]ple in queensridge on badlands issue" will "tie a link" to the Councilman. The email chain reads as follows:

> "Terry, this is from Councilman Coffin, please contact him directly should you need to. Susan"
>
> "Thanks, Got it. Terry Murphy"
>
> "It does not mention me by name but there will be other messages **w[h]ich tie a link.** [from Coffin]"
>
> "I will see what I can find…[from Murphy]"
>
> "Just got word from c[i]ty attorney office that someone has asked for letters from certain pe[o]ple in queensridge on badlands issue. The names are not familiar as t[h]ey seem like ordinary objectors. Will share when I get it today or Friday.[from Coffin]" *Exhibit 54: 10 App LO 00002337. (emphasis supplied).*

10. City Action #10 - the City Reverses the Past Approval on the 17 Acre Property

The City may assert that it approved a use on the 17 Acre Property and this proves the City's willingness to approve other uses on the 250 Acre Residential Zoned Land, including the 35 Acre Property at issue in this case. This 17 Acre approval was in early 2017 with a drastically different City Council and <u>each and every one</u> of the City actions cited above occurred after the 17 Acre approval, including the Yohan Lowie Bills that seek imprisonment of the Landowners' principles for

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[52] *See NRS 239.001* (use of private entitled in the provision of public services must not deprive members of the public access to inspect and copy books and records relating to the provision of those services)

attempting to use their property for which they have a "right to develop." Moreover, the City has tried to claw back the 17 Acre Property approvals. Whereas in approving the 17 Acre Property applications the City agreed the Landowners had the vested right to develop without a major modification, now the City is arguing in other documents that: 1) the Landowners have no property rights; and, 2) the approval on the 17 Acre Property was erroneous, because no major modification was filed:

> "[T]he Developer must still apply for a major modification of the Master Plan before a takings claim can be considered…" *Exhibit 37: 8 App LO 00001943 lines 18-20*;
>
> "Moreover, because the Developer has not sought a major modification of the Master Plan, the Court cannot determine if or to what extent a taking has occurred." *Id. at LO 00001944 lines 4-5*;
>
> "According to the Council's decision, the Developer need only file an application for a major modification to the Peccole Ranch Master Development Plan …to have its Applications considered." *Exhibit 39: 9 App LO 00002028 lines 11-15*;
>
> "Here, the Council's action to strike the Applications as incomplete in the absence of a major modification application does not foreclose development on the Property or preclude the City from ultimately approving the Applications or other development applications that the Developer may subsequently submit. It simply held that the City would not consider the Applications without the Developer first submitting a major modification application." *Id. at LO 00002032 lines 18-22.*

The irrefutable reason the City changed its position is the City is seeking to deny the Landowners their constitutional property rights so the Landowners' property will remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922*.

C. THE LANDOWNERS FILED SEVERAL INVERSE CONDEMNATION CLAIMS AGAINST THE CITY FOR THE TAKING OF THEIR 35 ACRE PROPERTY

On February 28, 2018, the Landowners filed five inverse condemnation[53] claims against the City (pursuant to this Court's order to sever the claims from the petition for judicial review) alleging

[53] Inverse condemnation is *a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127,1130 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258, 100 S. Ct. 2138 (1980).

that the City took their 35 Acre Property by inverse condemnation which requires payment of just compensation:

- First Claim for Relief in Inverse Condemnation, Categorical Taking. Landowners' Complaint, filed February 28, 2018 ("Complaint"), p. 10.
- Second Claim for Relief in Inverse Condemnation, Penn Central Regulatory Taking. Complaint, p. 12.
- Third Claim for Relief in Inverse Condemnation, Regulatory Per Se Taking. Complaint, p. 14.
- Fourth Claim for Relief in Inverse Condemnation, Non-regulatory Taking. Complaint, p. 15.
- Temporary Taking. Complaint, p. 16.

LEGAL ARGUMENT

The Landowners are seeking summary judgment on each of these inverse condemnation claims with the exception of the Penn Central claim.

A. STANDARD OF REVIEW

1. Standard for Summary Judgment

NRCP 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Further, "summary judgment ... may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." NRCP 56(c). In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026 (2005), the Nevada Supreme Court eliminated the "slightest doubt standard," holding that "[w]hile the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to do more than simply show that there is some 'metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor" and that "[t]he nonmoving party " 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'"[54]

[54] Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002) (quoting Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 442 (1993) (quoting Collins

Summary judgment may be sought "at any time after the expiration of 20 days from the commencement of the action." NRCP Rule 56(a). Here, more than 20 days has expired from the commencement of this action and, therefore, summary judgment is appropriately sought.

2. This Court Decides, as a Matter of Law, the Issue of Liability in Inverse Condemnation Cases - Whether a Taking has Occurred

This Court decides, as a matter of law, whether a taking has occurred in this case. McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (2006) ("whether the Government has inversely condemned private property is a question of law that we review de novo." Id., at 1119).[55] The Nevada Supreme Court in the case of County of Clark v. Alper, 100 Nev. 382, 391 (1984), recognized that "[I]nverse 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." Therefore, all "eminent domain" liability rules and principles cited herein apply equally to this "inverse condemnation" action.

B. GENERAL INVERSE CONDEMNATION LAW - JUST COMPENSATION IS CONSTITUTIONALLY MANDATED WHERE THERE IS A TAKING OF PRIVATE PROPERTY

The Fifth Amendment to the United States Constitution and Article 1 Section 8 of the Nevada State Constitution both provide that private property shall not be taken without payment of just compensation.[56] These constitutional provisions prohibit '[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

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v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983))); Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992) (quoting Collins, 99 Nev. at 302, 662 P.2d at 621)).

[55] *See also* Moldon v. County of Clark, 124 Nev. 507, 511, 188 P.3d 76, 79 (2008) ("whether a taking has occurred is a question of law.."); Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007) (date of taking determined by court to be August 1, 1990); City of Sparks v. Armstrong, 103 Nev. 619 (1987) (date of taking determined by the court to be September 12, 1972).

[56] "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. Const., V Amend. "Private property shall not be taken for public use without just compensation having first been made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made." Nev. Const, Art 1, § 8.

whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554, 1561 (1960). As Justice Holmes noted, even a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326 (1922). Nevada has a "rich history of protecting private property owners against Government takings" as the very "first right established in the Nevada Constitution's declaration of rights is the protection of a landowner's inalienable rights to acquire, possess and protect private property." McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1126-27 (Nev. 2006). The Nevada Supreme Court has held that any financial burden the government may bear is entirely "irrelevant" to the inquiry under the United States and Nevada Constitutions as to whether a taking has occurred. Sisolak, at 1127, Fn. 88.[57] Accordingly, where there is a taking of private property, just compensation must constitutionally be paid for the taken property and any other "desire" by the government to improve a public condition or "desire" to not pay just compensation to save money cannot trump that constitutional right to payment of just compensation.

These rules have a special application where vacant land, like the 35 Acre Property, is involved, because when the government engages in actions that interfere with the use and enjoyment of vacant land the "investment value" and "development value" are "frozen" and the value of the vacant and unimproved land to the owner is "destroyed."[58]

C. SUMMARY JUDGMENT IS APPROPRIATE ON ALL CLAIMS

1. THERE HAS BEEN A CATEGORICAL TAKING - Landowners First Claim for Relief in Inverse Condemnation - Complaint, ¶ 44-55

"Categorical [taking] 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

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[57] *See also* Arkansas Game and Fish Com'n v. U.S., 568 U.S. 23 (2012) (rejecting the argument that recognizing just compensation in a flooding case would unduly impede the government's ability to act in the public interest).

[58] Manke v. Airport Authority, 101 Nev. 755, 757, 710 P.2d 80, 81 (1985).

economical use of her property."[59] And, it is unanimously held that government action that seeks to preserve property for a future public improvement project so the government can acquire the property at a later date for a cheaper value, is a categorical taking.[60] The United States Supreme Court case of Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), is instructive. In Lucas, Mr. Lucas purchased two vacant lots in Charleston County, South Carolina to develop them residentially. Id., at 1006-07. Thereafter, the Beachfront Management Act (Act) was adopted that prevented the development on the two residential lots. Id., at 1008-09. Mr. Lucas conceded the validity of the Act as it was intended to protect the South Carolina beaches that were eroding, but challenged the Act as an uncompensated taking of his property and, after a bench trial, was awarded approximately $1,200,000.00 for the taking. Id., at 1009-10. On appeal to the United States Supreme Court, it was asserted that there was no taking, because Mr. Lucas could still use his property to exclude others, picnic, swim, camp in a tent, or live on the property in a moveable trailer, thereby leaving the property with some value and that his claim was improper since he failed to challenge the underlying validity of the Act. Id, at 1044-46. The United States Supreme Court rejected these minimal uses, held Mr. Lucas was not required to challenge the underlying Act as a precondition to bringing his inverse condemnation claim, and held that there had been a deprivation of all economic use of the property, resulting in a "categorical taking."

As explained above, according to the Judge Smith Orders, affirmed by the Nevada Supreme Court, the Landowners "have the right to develop" the 35 Acre Property, but have been deprived of all economic use of the 35 Acre Property by the City so the City can preserve the property for a City park. The City denied both the 35 Acre Property applications to develop and that the Master

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[59] McCarran Intern. Airport v. Sisolak, 122 Nev. 645, 663, 137 P. 3d 1110, 1122 (2006).

[60] Mentzel v. City of Oshkosh, 146 Wis.2d 804, 812-813, 432 N.W.2d 609, 613 (1988) (taking occurred when the City of Oshkosh denied the landowner's established liquor license because the City of Oshkosh desired to acquire the landowner's property and it sought to reduce the value of its acquisition.); City of Houston v. Kolb, 982 S.W.2d 949 (1999) (taking found where the City of Houston denied a subdivision plat submitted by the Kolbs for the sole purpose of keeping the right- of-way for a planned highway clear to reduce the cost for the State in acquiring the properties for the highway.)

Development Agreement (MDA), both of which met every single City requirement. The City will not even allow the Landowners to put up a fence. And, even though the Nevada Supreme Court has recognized Nevada landowners have a special right to access their property by way of adjacent roadways, the City has denied the Landowners' access. The City has even adopted the "Yohan Lowie Bills," special legislation that targets only these Landowners, which not only makes it impossible to develop, but unconstitutionally threatens fines, including imprisonment, for noncompliance. The City has strategically adopted this Yohan Lowie Bill so that it can use it as an excuse to deny all development applications on any part of the 250 Acre Residential Zoned Land. The City has also denied applications to develop the 133 Acre Property, showing there is no possibility that any development will ever be allowed on any one of the parcels that make up the 250 Acre Residential Zoned Land. Moreover, the City has created an impossible development scenario by requiring a drainage study in order to get entitlements to build, but then mandating that there can be no drainage study without entitlements. Additionally, the City Councilman, in whose jurisdiction the Landowners' Property is located (Seroka), has unabashedly testified before the City Planning Commission that "over his dead body" will development ever be allowed and another Councilman stated that the Landowners' principle is a "motherfucker" and that he will vote "against the whole thing." Finally, perhaps the best evidence of a categorical taking is the fact that these specific Landowners are well seasoned developers who have worked tirelessly to develop the 35 Acre Property, submitting all of the requisite development applications to the City, and the property lies vacant and useless today as a result of the City's actions. And, the reason the City will never allow development on the 35 Acre Property is because the City has a scheme to preserve the Landowners' property in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922*.

There is no genuine issue as to any of these material facts proving the categorical taking; they are all evidenced by the City's own documents. Therefore, summary judgment should be entered that the City has categorically taken the Landowners' 35 Acre Property.

2. THERE HAS BEEN A REGULATORY PER SE TAKING - Third Claim for Relief in Inverse Condemnation - Complaint, ¶ 77-84.

The Nevada Supreme Court has recognized two types of regulatory per se takings, both of which apply in this case.

a. There has been a Regulatory Per Se Taking as a Result of the City "Preserving" The Use of the 35 Acre Property

The Nevada Supreme Court held in the Sisolak, supra, case that a Per Se Regulatory Taking occurs where government action "preserves" property for future use by the government. Sisolak, supra, at 731. The facts of the Sisolak case are instructive. In Sisolak, the County of Clark (hereinafter "the County") adopted height restriction ordinance 1221 (hereinafter "Ordinance 1221") to provide a clear landing path for a newly expanded runway at McCarran International Airport.[61] After many years of litigation, the Nevada Supreme Court held that Ordinance 1221 was a taking of the landowners' airspace,[62] "because the right to fly through the airspace **is preserved** by the Ordinances [Ordinance 1221] and expected to continue into the future." Id. Relevant to this case, the Court determined that any physical invasion was "inconsequential" to the liability determination; rather the Court focused on how Ordinance 1221 "preserved" the airspace undeveloped.[63]

Here, the impact to the 35 Acre Property as a result of the City's actions is significantly more than the impact to the property surrounding the Airport as result of Ordinance 1221. As explained

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[61] Sisolak, at 1114-15.

[62] Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006). Landowners' counsel is very familiar with these cases as they litigated the airspace taking cases for nearly 14 years.

[63] Johnson v. McCarran Int'l Airport, Supreme Court Case No. 53677, *Exhibit 87* The Landowner understands that the Johnson case is unpublished. The case, however, is not cited for any specific rule, but rather to clarify the ruling by the Nevada Supreme Court in the Sisolak case. Also, the three main cases relied upon by the Court to find a taking in the Sisolak case were all non-physical taking cases. "[S]everal state supreme courts have concluded that height restriction ordinances, ***almost identical*** to the County's resulted in unconstitutional takings of property for public uses." Sisolak, at 668-69. The three cases relied upon by the Court for this position at footnote 72 of the opinion are all non-physical taking cases. *See* Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641, 646–47 (1964); Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237, 242 (1963); Yara Eng'g Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945).

above, the City is not only "preserving" the vacant nature of the 35 Acre Property, but it has entirely excluded the Landowners from using the property for any purpose whatsoever so the 35 Acre Property may be used for the City's future park. Accordingly, there has been a regulatory per se taking of the Landowners' Property under this Nevada Supreme Court standard.

b. There has been a Regulatory Per Se Taking as a Result of the City's Failure to Follow NRS Chapter 37

In the Sisolak case, supra, the Nevada Supreme Court held that a regulatory per se taking may also occur under Nevada's Constitution where the City seeks to acquire property for a public use listed in NRS 37.010, fails to follow the procedures set forth in NRS Chapter 37, and takes private property for a public use without paying just compensation for the taking. Id. Here, as explained above, the City actions have amounted to a de facto taking of the 35 Acre Property for a public park, a public use authorized in NRS 37.010(1)(j). The City, however, failed to follow any of the procedures set forth in NRS Chapter 37, which require the filing of a complaint to take the Property, the description in the complaint of the Property being taken, and a service of summons / lis pendens. NRS 37.060, 37.070, and 37.075. The City has also failed to offer just compensation for the taking. Instead, the Landowner has been forced to bring this inverse condemnation cause of action. Accordingly, there has been a regulatory per se taking under this Nevada Supreme Court standard.

The Landowners have properly pled this Regulatory Per Se Taking Claim and the above facts supporting the claim and, accordingly, the City's Motion to Dismiss the claim should be denied.

3. THERE HAS BEEN A NON-REGULATORY TAKING ALSO REFERRED TO AS A "DE FACTO" TAKING - Sixth Claim for Relief in Inverse Condemnation - Complaint, ¶ 85-93

Generally, a non-regulatory / de facto taking occurs when a government entity takes action that substantially deprives an owner of the use and enjoyment of his property.[64] In this connection, it is well settled that there does not have to be a physical invasion to establish a non-

[64] State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015); Envtl. Indus., Inc. v. Casey, 675 A.2d 392 (Pa. Commw. 1996).

regulatory / de facto taking.[65] Nichols on Eminent Domain,[66] the foremost authority on eminent domain law, generally describes this cause of action as follows: "[c]ontrary to prevalent earlier views, it is now clear that a de facto taking does **not** require a physical invasion or appropriation of property. Rather, a substantial deprivation of a property owner's use and enjoyment of his property may, in appropriate circumstances, be found to constitute a 'taking' of that property or of a compensable interest in the property..." 3A Nichols on Eminent Domain §6.05[2], 6-65 (3rd rev. ed. 2002). (emphasis supplied). Nevada law and the nearly unanimous law from other state and federal jurisdictions support a finding of a de facto taking in this case.

a. Nevada Law Supports a Finding of a Non-regulatory / De Facto Taking

The Nevada Supreme Court has recognized that Nevada "enjoys a rich history of protecting private property owners against Government takings," and, accordingly, has adopted expansive

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[65] Petition of Borough of Boyertown, 77 Pa. Commw. 357, 466 A.2d 239 (1983).

[66] Nichols is considered the foremost authority on eminent domain law in the country and the Nevada Supreme Court has repeatedly relied upon Nichols to adopt and support Nevada eminent domain law. *See e.g.* Buzz Stew v. City of North Las Vegas, 181 P.3d 670, 671, 672 (2008); State Dept. of Transp. v. Cowan, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004); County of Clark v. Sun State Properties Ltd., 119 Nev. 329, 336, 72 P.3d 954, 958 (2003); City of Las Vegas v. Bustos, 119 Nev. 360, 362, 75 P.3d 351, 352 (2003); City of Las Vegas v. Pappas, 119 Nev. 429, 441, 76 P.3d 1, 10 (2003); National Advertising Co. v. State, Dept. of Transp., 116 Nev. 107, 113, 993 P.2d 62, 66 (2000); Argier v. Nevada Power Co., 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998); Schwartz v. State, 111 Nev. 998, 1002, 900 P.2d 939, 942 (1995); Stagecoach Utilities Inc. v. Stagecoach General Imp. Dist., 102 Nev. 363, 365, 724 P.2d 205, 207 (1986); Manke v. Airport Authority of Washoe County, 101 Nev. 755, 759, 710 P.2d 80, 81 (1985); Sloat v. Turner, 93 Nev. 263, 268, 563 P.2d 86, 89 (1977); State v. Olsen, 76 Nev. 176, 187, 351 P.2d 186, 192 (1960).

property rights[67] in the context of inverse condemnation cases to protect Nevada landowners.[68] In this connection, the Court held that a non-regulatory / de facto taking occurs where the government has "taken steps that directly and substantially interfere with [an] owner's property rights to the extent of rendering the property unusable or valueless to the owner."[69] To support this rule, the Court cited to the Ninth Circuit Richmond Elks Hall case that holds "[t]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property rights."[70] In Richmond Elks Hall, the government action caused several of the landowner's tenants to vacate, leaving less than one-third of the property occupied. Id., at 1329-30. The Ninth Circuit held that this rendered the landowner's property "unuseable in the open market" and "severely limited" the property's use for its intended purposes, resulting in a de facto taking. Id., at 1330-31.

Here, the City actions and the impact to the Landowners' property is significantly more extreme than that which justified the taking in the Richmond Elks Hall case. In Richmond Elks Hall, the government action, although severe, still allowed the landowner to rent nearly 1/3 of the property. The aggregate of City actions in this case, listed above, have rendered the 35 Acre vacant property entirely useless and valueless. Accordingly, there has been a non-regulatory / de facto taking of the Landowners' property.

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[67] Further proof that Nevada has adopted "expansive" property rights for landowners in the context of eminent domain proceedings is the fact that in 2006 and 2008, the Nevada electorate voted overwhelmingly to expand Nevada Landowners' eminent domain rights by amending the Nevada Constitution through the initiative process to adopt the Peoples Initiative to Stop the Taking of Our Land (PISTOL), which was written by Landowners' counsel. PISTOL was approved by over 62% of the Clark County electorate in both 2006 and 2008. These PISTOL eminent domain amendments are now included as article 1, section 22 of the Nevada State Constitution.

[68] McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1126-27 (Nev. 2006).

[69] State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015).

[70] Richmond Elks Hall Assoc. v. Richmond Red. Agency, 561 F.2d 1327, 1330 (9th Cir. Ct. App. 1977).

b. Eminent Domain Law From Other State and Federal Jurisdictions Supports a Finding of a Non-regulatory / De Facto Taking

The great majority of other state and federal jurisdictions have adopted similar non-regulatory/de facto taking law that also supports a finding of a de facto taking in this case. Generally, these Courts hold that: 1) a non-regulatory/de facto taking occurs where a government entity substantially deprives an owner of the use and enjoyment of his property; and 2) there does not have to be a physical invasion to establish a de facto taking.[71] Two cases are instructive. In Citino v. Redevelopment Agency of City of Hartford,[72] the Court held that "[o]nce the results of the acts of the authority have made it clear that the property owner is no longer able to use its property as it had before, and the landowner's capacity to dispose freely of its property has been for all practical purposes arrested, property has been taken in the constitutional sense."[73] In McCracken v. City of Philadelphia, the Court held that a court should focus on the "cumulative effect" of government action and "[a] de facto taking occurs when an entity clothed with eminent domain power substantially deprives an owner of the use and enjoyment of his property" or where there is an "'adverse interim consequence' which deprives an owner of the use and enjoyment of the property."[74]

It cannot be disputed that the City action in this case is a substantial deprivation of the Landowners' use and enjoyment of their Property. The Landowners have diligently pursued development on the 35 Acre Property for which they have a "right to develop," only to be deprived by the City of all opportunities to use and enjoy their property. Therefore, the case law from other state and federal jurisdictions supports a finding of a non-regulatory / de facto taking in this case.

4. ADOPTING THE CROCKETT ORDER WILL ADD A JUDICIAL TAKING CLAIM

Finally, as explained above, if this Court elects to follow the Crockett Order that entirely ignore the Landowners' hard zoning and vested right to develop, this will add a judicial taking claim,

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[71] The de facto taking law from other state and federal jurisdictions is lengthy and, therefore, attached hereto as *Exhibit 86*

[72] Citino v. Redevelopment Agency of City of Hartford, 721 A.2d 1197 (Conn.App. 1998), o*verruled on other grounds*.

[73] Id., at 1209. Emphasis supplied.

[74] McCracken v. City of Philadelphia, 451 A.2d 1046, 1050 (1982).

because the Crockett Order recharacterize the Landowners' 35 Acre Property from a hard zoned residential property with the vested "rights to develop" to a public park / open space.

D. THE LANDOWNERS' TAKING CLAIMS ARE "MUCH MORE FORMIDABLE" AS: 1) THE CITY ACTION TARGETS THEIR SINGLE PROPERTY; 2) THE PROPERTY IS VACANT; AND 3) THE CITY'S ACTIONS ARE IN BAD FAITH

1. Courts are "Much More" Inclined to Find a Taking Where the Government Action Singles out and Targets One Property

It is well settled that where the government engages in taking actions that single out and target one particular property or one particular landowner, the taking claim becomes "much more formidable:"

> In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy. See, e.g., A.A. Profiles, Inc. v. Ft. Lauderdale, 850 F.2d 1483, 1488 (CA11 1988); Wheeler v. Pleasant Grove, 664 F.2d 99, 100 (CA5 1981); Trustees Under Will of Pomeroy v. Westlake, 357 So.2d 1299, 1304 (La.App.1978); see also Burrows v. Keene, 121 N.H. 590, 596, 432 A.2d 15, 21 (1981); Herman Glick Realty Co. v. St. Louis County, 545 S.W.2d 320, 324–325 (Mo.App.1976); *1074 Huttig v. Richmond Heights, 372 S.W.2d 833, 842–843 (Mo.1963). As one early court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be **much more formidable**." Commonwealth v. Alger, 61 Mass. 53, 102 (1851).[75]

Here, it is undisputed that all of the above cited City actions single out and target only the Landowners and their Property. For example, 1) the Bills to prohibit development on the 250 Acre Residential Zoned Land are referred to as the "Yohan Lowie Bill" by one of the City's own councilpersons; 2) another City councilperson says "over his dead body" will development be allowed on this one property; and 3) another City councilperson calls a Landowner representative a "motherfucker," is trying to get "dirt" on the Landowners so he can get "rough," and that he will "vote against the whole thing [related to this one property]." Accordingly, the City action in targeting solely the Landowners and their singular property makes the Landowners' taking claims "much more formidable."

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[75] Lucas, at 1074 (law cited in Justice Stevens dissent).

2. Courts are More Inclined to Find a Taking Where the Government Action Targets Vacant Property

A taking claim also becomes much more formidable when the government targets vacant land. Courts have recognized that "possession of unimproved and untenanted property is a desirable economic asset only if: '1) the property may appreciate in value; and, 2) the owner is afforded the opportunity to improve the property toward whatever end he might desire."[76] The Nevada Supreme Court recognizes that when vacant property is taken both the "investment value" and "development value" are "frozen" and the value of vacant and unimproved land to the owner is "destroyed."[77] The Federal Claims Court has held that where vacant land is targeted for a taking no prudent person would be interested in purchasing it and it would be futile to begin the development process.[78] The Washington Supreme Court has also acknowledged that the effect of condemnation activity targeting vacant land "chains" landowners to the property.[79] Finally, it has been recognized that these government acts result in improperly making the landowner an "involuntary lender" who is forced to finance public projects without the payment of just compensation.[80]

The Landowner's 35 Acre Property is vacant and unimproved with a "right to develop." Under Nevada law, the City's actions in denying this right to develop have "frozen" and "destroyed" the only use of this vacant property – its investment potential and development potential. Further, the City's actions forced the Landowners to be involuntary trustees and bear a disproportionate burden in financing the City park as the Landowners have been forced to hold their property in a vacant condition until the City gets around to formally taking the property for the park. Accordingly, the marketability and development potential of the Landowners' vacant property has been eliminated by the City's actions making the Landowners taking claims much more formidable.

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76 Ehrlander v. State, 797 P.2d 629, 634 (1990).

77 Manke v. Airport Authority, 101 Nev. 755, 757, 710 P.2d 80, 81 (1985).

78 Althaus v. U.S., 7 Cl.Ct. 688 at 695 (1985).

79 Lange v. State, 86 Wash.2d 585, 595, 547 P.2d 282, 288 (1976).

80 Community Redevelopment Agency of City of Hawthorne v. Force Electronics, 55 Cal.App.4th 622, 634, 64 Cal.Rptr.2d 209 (1997).

3. Although Not Necessary, Some Courts Consider the Government's Bad Faith Actions When Finding a Taking

"Whether the governmental entity acted in bad faith may also be a consideration in determining whether a governmental action gives rise to a compensable taking."[81] No reasonable person could possibly argue that the City's actions, described above, are anything but bad faith. Accordingly, this is another grounds for which the Landowners' taking claims are "much more formidable."

E. THE LANDOWNERS' CLAIMS ARE SUPPORTED BY ANOTHER EIGHTH JUDICIAL DISTRICT COURT ORDER

Although not binding on this Court, it is worth noting that another Eighth Judicial District Court Judge agrees with the Landowner's position in this case and found a taking under similar facts. In Boulder Karen, LLC v. County of Clark, Eighth Judicial District case number A-10-630446-C, the Honorable Judge Rob Bare not only held it was improper to dismiss inverse condemnation claims, but granted a motion for summary judgment finding a de facto taking where the County of Clark denied Boulder Karen's development request because a public roadway "will be going through the landowner's property."[82] Similar to the County in Boulder Karen, the City is denying all use of the Landowners' 35 Acre Property so the City can use it for a park in the future.

F. CONCLUSION RELATED TO SUMMARY JUDGMENT FOR LIABILITY

All of the above listed City actions are confirmed in the City's own documentation which cannot be disputed and these City actions clearly meet the elements of a taking. Accordingly, since liability for a taking is a question of law to be decided by this Court, it is respectfully requested that this Court grant the Landowners' Motion for Summary Judgment and enter an order that the Landowners' 35 Acre Property has been taken mandating payment of just compensation.

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[81] Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468, 487 (Tx. 2012). *See also* City of Austin v. Teacgue, 570 S.W.2d 389 (Tx. 1978) (recovery of damages warranted where the government's action against an economic interest of an owner is for its own advantage.).

[82] *Exhibit 88, page 3 lines 1-2.*

ARGUMENT REGARDING INDIVIDUAL ISSUES THE CITY MAY RAISE REGARDING LIABILITY

The City may raise several arguments to deny liability, nearly all of which have already been presented and rejected by the United States and Nevada Supreme Courts.

A. ARGUMENT REGARDING THE STATUTE OF LIMITATIONS AND WAIVER

The City may assert that the Landowners filed their claims too late, because, according to the City, a PR-OS (parks, recreation, open space) designation was written over the 35 Acre Property on the City's General "Plan" map in 1992 and the statute of limitations to challenge this designation is only 15 years, meaning the statute ran in 2007. This argument presupposes that merely writing "PR-OS" over the 35 Acre Property on the City's General Plan map amounts to a taking. Otherwise, the statute of limitations could not commence in 1992. This argument, however, has been repeatedly rejected by the Nevada Supreme Court.

1. Under Nevada Inverse Condemnation Law a Designation on the City's General Plan Map Does Not Amount to a Taking; Liability Does Not Arise Until the Government Implements the Plan

Well-settled Nevada inverse condemnation law holds that merely writing a land use designation over a parcel of property on a City land use plan is "insufficient to constitute a taking for which an inverse condemnation action will lie."[83] This rule and its policy are set forth by the Nevada Supreme Court as follows:

> If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of the several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no hyperbole to suggest that if every landowner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect

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[83] Sproul Homes of Nev. v. State ex rel. Dept of Highways, 96 Nev. 441, 443 (1980) *citing to* Selby Realty Co. v. City of San Buenaventura, 169 Cal.Rptr. 799, 514 P.2d 111, 116 (1973) (Inverse claims could not be maintained from a City's "General Plan" showing public use of private land). *See also* State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015) (City's amendment to its master plan to allow for a road widening project on private land did not amount to a regulatory taking).

> of the plan upon his land, the courts of this state would be inundated with futile litigation.[84]

Nevada law is very clear that the government cannot become liable for a taking until the government "takes steps" to implement or enforce the planning document against a particular parcel of property or otherwise takes action to acquire or preclude use of the property: "[t]he pivotal issue . . . is whether the public agency's activities have gone beyond the planning stage to reach the "acquiring stage.'"[85] Simply stated, it is the "government action" to enforce the land use designation on the general land use plan that is relevant; not what was written on the "planning" document.

Therefore, merely writing "PR-OS" over the 35 Acre Property on the City's 1992 general "plan" does not begin the commencement of the statute of limitations period for the Landowners' inverse condemnation claims. Instead, it is the aggressive and systematic actions taken by the City (listed above) to preclude any and all use of the 35 Acre Property in order to preserve the property for the City park that gives rise to the taking claims in this case. All of these City taking actions occurred in or after 2015.[86] Therefore, all City actions leading to the taking in this case have occurred within the 15-year statute of limitations period.

2. The Landowner Can Challenge a Pre-existing Regulation That Amounts to a Taking

The City may also assert that because the PR-OS was written on the City's 1992 "plan" prior to the Landowners purchasing the 35 Acre Property, the Landowners cannot now challenge as a taking the City's current aggressive and systematic actions to implement the PR-OS (park – open space) on the 35 Acre Property. As shown above, however, the inverse condemnation claims in this case are properly based on the City taking steps after 2015 to systematically and aggressively apply the PR-OS to the Landowners' Property. The claims are not based on the City writing "PR-OS" over the 35 Acre Property on a City land use map back in 1992. More importantly, in Palazzolo v. Rhode

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[84] Id., at 444.

[85] State v. Barsy, 113 Nev. 712, 720 (1997). *See also* State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015) (citing to federal law that even where there is no government regulation, if the government has "taken steps" that render the property useless or valueless to the landowner, there is a taking. Id., at 742).

[86] Further discovery may show other City actions that should be considered as part of the taking prior to this 2015 date.

Island, the United States Supreme Court rejected the following argument which is identical to the City's waiver argument in this case: "[a] purchaser or a successive title holder like petitioner is deemed to have notice of any earlier-enacted restriction and is barred from claiming that it effects a taking."[87] In rejecting this argument, the Court reasoned that "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."[88] Accordingly, the Landowners clearly have the right to challenge any and all restrictions placed on the 35 Acre Property by the City.

Moreover, a landowner's knowledge of a potential taking of property at the time he purchased the property is "totally irrelevant" in an eminent domain proceeding.[89] This is the case even if the landowner's claim is one in inverse condemnation.[90] The public policy reason for this rule is clear. First, it is well settled that condemnation "is not a taking of rights of persons in the ordinary sense but an appropriation of the land or **property** itself."[91] It is an in rem (property) proceeding that focuses on the use and value of the taken **property** to arrive at "just compensation."[92] The Nevada State Constitution recognizes this rule, providing that "[i]n all

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[87] Palazzolo v. Rhode Island, 533 U.S. 606, 626, 121 S.Ct. 2448, 2462 (2001).

[88] Palazzolo at 627.

[89] Depart. of Transp. V. Newmark, 34 Ill.App.3d 811, 814, 341 N.E.2d 133, 136 (Ill. App. 1975) ("[t]he admission of evidence and counsel's arguments on the question of defendants 'prior knowledge,' other property holdings, and business acumen, were improper because they were totally irrelevant to the issues before the jury" and manifestly prejudicial); See also Babinec v. State, 512 P.2d 563, 572 (Alaska 1973) (" evidence of prior knowledge is ordinarily irrelevant and inadmissible" to a claim for original property value and severance damages to property not taken.); and, Boehm v. Backs, 493 N.W.2d 671, 673(N.D. 1992) ("[t]he irrelevance of knowledge of the expected improvement is confirmed by precedents elsewhere" for recovery of business loss resulting from the government permanently impairing access to the business property).

[90] *See* Depart. of Transp. V. Newmark, 34 Ill.App.3d 811, 814, 341 N.E.2d 133, 136 (Ill. App. 1975).

[91] "It is well settled that 'a condemnation proceeding is a proceeding in rem." U.S. v. 6.45 Acres of Land, 409 F.3d 139, 145-46 (2005) (internal citations omitted). "In rem"- Latin for "against a thing" involving or determining the status of a thing and therefore the rights of person generally with respect to that thing." Blacks Law Dictionary, 797 (Bryan A. Garner ed., 7th ed., West 1999).

[92] Id.

eminent domain actions where fair market value is applied, it shall be defined as the highest price **the property** would bring on the open market" and that "the taken or damaged **property** shall be valued at **its** highest and best use."[93] Here, the res[94] (or property) that has been taken is the 35 Acre Property. This means that the only relevant inquiry in this "in rem" action is the "government action" that rises to the level of a taking of the Landowners' Property, not what the Landowners may have known about the taking.

Related to the statute of limitations argument, the City may also assert that the Landowners waived their property rights, because they "stepped into the shoes" of their predecessor. There is no waiver of property rights, because, as explained above, the entire 250 Acre Residential Zoned Land has been hard zoned residential since 1986, meaning the Landowners "stepped into" a residential hard zoned property with vested rights to develop.

3. Statute of Limitations and Waiver Do Not Apply as Any Land Use Designation for the Subject Property from the 1990's was "Repealed" by the City in 2001

The statute of limitations and waiver arguments fail for the additional reason that a PR-OS or other open space designation has not always been on the 35 Acre Property. City Ordinance 5353, which was "passed, adopted and approved" by the City Council on August 15, 2001, confirmed the hard zoning and the land use designation of R-PD7 and states unequivocally that: "all ordinances or parts of ordinances or sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Las Vegas, Nevada 1983 Edition **in conflict herewith are hereby repealed**." *Exhibit 2: 1 App LO 00000003.* This means that even if PR-OS, or some similar open space designation, was written over the 35 Acre Property on a City land use plan prior to August 15, 2001, it was repealed and replaced with hard zoning and a land use designation of R-PD7 (allowing 7 residential units per acre) going forward.[95]

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[93] Nev. Const., art. 1, sec. 22 (3), (5) (emphasis supplied).

[94] "Res" - Latin for "thing" an object, interest or status, as opposed to a person. Blacks Law Dictionary, 1307 (Bryan A. Garner ed., 7th ed., West 1999).

[95] It was discovered that sometime on or about 2005 a fugitive PR-OS (Parks Recreation/Open Space) designation appeared on the City's general plan over the Landowners' property. The Landowners demanded that the City remove the improper PR-OS designation, but the City refused even though they acknowledged that it was improperly placed on the Landowners' property. *Exhibit 9: 3 App LO 00000619-62.* "Brad Jerbic: If I can jump in too and just say that

B. ARGUMENT REGARDING A 25 DAY STATUTE OF LIMITATIONS

The City may additionally assert that the Landowners' inverse condemnation claims are barred, because, according to the City, the Landowners need to challenge the underlying City action before bringing inverse condemnation claims and this challenge is time barred under NRS 278.0235's 25 day time limit. First, the United States Supreme Court has pointedly rejected this City argument, holding that a landowner that alleges a taking as a result of government action / regulation is not required to challenge the underlying purpose or validity of the regulation as a precondition to bringing a taking action.[96] Instead, the landowner may in the first instance assert that the regulation or government action results in a taking of his property. Second, the Nevada Supreme Court has adopted a 15 year statute of limitations to bring an inverse condemnation action.[97] Finally, it is well settled Nevada law that the constitutional right to just compensation for a taking is a "self executing" right and cannot be preconditioned by a very short 25 day limitations period.[98] The Court has held

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everything Tom said is absolutely accurate. The R-PD7 preceded the change in the General Plan to PR-OS. There is absolutely no document that we could find that really explains why anybody thought it should be changed to PR-OS, except maybe somebody looked at a map one day and said, hey look, it's all golf course. It should be PR-OS. I don't know." *Exhibit 77: 12 App LO 00002924.*

[96] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (landowner may proceed with taking action based on adoption of Beachfront Management Act and impact from this Act to his property even though the landowner "believed it unnecessary to take issue with either the purpose behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes." Id., at 1020). *See also* Palazzolo, supra, ("The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the **Council** determining the permitted use for the land." . . . "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." . . . "While a landowner must give a **land-use authority** an opportunity to exercise its discretion, once […] the permissible uses of the property are known to a reasonable degree of certainty, a taking claim is likely to have ripened." Id. at 618, 620 (emphasis supplied)).

[97] White Pine Limber v. City of Reno, 106 Nev. 778 (1990).

[98] Alper v. Clark County, 93 Nev. 569, 572, 571 P.2d 810, 811 (1977) (County sought to dismiss inverse condemnation claims, claiming owner had failed to file its claim under a six month claim statute per NRS 244.245 and NRS 244.250. Court held government cannot impose a precondition of the federally created and protected right to receive just compensation when private property is taken for public use.). *See also* State v. Linnecke, 86 Nev. 257, 260, 468 P.2d 8, 9 (1970); and, Schwartz v. State, 111 Nev. 998, 1003, 900 P.2d 939 (1995).

that even a six month claims statute cannot be imposed on a landowner in a taking action, reasoning "to impose a requirement of compliance with our claims statutes would allow a state to impose a precondition to sue on a federally created and protected right."[99] The Court held that "the claims statutes should not be construed to apply to actions for inverse condemnation, for to do so would deny due process of a constitutionally guaranteed right."[100] The reason for this rule is:

> "The right to just compensation for private property taken for the public use is guaranteed by both the United States and the Nevada Constitutions. [Internal Citations omitted.] These provisions, as prohibitions on the state and federal governments, are self executing. The effect of this is that they give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one. As a corollary, such rights cannot be abridged or impaired by statute."[101]

The Court went on to hold that the "constitutional guaranty [of just compensation] needs no legislative support, and is beyond legislative destruction."[102] Accordingly, the Landowners were not required to bring a challenge to the City's actions within the NRS 278.0235 25 day limitations period.

C. ARGUMENT REGARDING EXHAUSTION OF ADMINISTRATIVE REMEDIES / RIPENESS

1. The Exhaustion of Administrative Remedies Requirement for Ripeness Does Not Apply to Four of the Landowners' Inverse Condemnation Claims

The City may allege that the Landowners' claims are not ripe in these proceedings. First, the Nevada Supreme court has held that a ripeness / exhaustion of administrative remedies argument does not apply to the four inverse condemnation claims for which the Landowners' are requesting summary judgment - regulatory per se, non-regulatory / def facto, categorical, or temporary taking of property.[103] The reason for this rule is that the taking is known in these type of inverse

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99 Id., at 574. Emphasis added.

100 Id. Emphasis added.

101 Id., at 572. Emphasis added.

102 Id., at 572, *internal citations omitted*. Emphasis added.

103 Hsu v. County of Clark, supra, ("[d]ue to the "per se" nature of this taking, we further conclude that the landowners were not required to apply for a variance or otherwise exhaust their administrative remedies prior to bringing suit." Id., at 732); McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006) ("Sisolak was not required to exhaust administrative remedies or obtain a final decision from the Clark County Commission by applying for a variance before bringing his inverse condemnation action based on a regulatory per se taking of his private property." Id. at 664).

condemnation claims and, once the taking is known, the payment of just compensation is "self-executing," meaning there can be no barriers or preconditions (such as exhaustion of administrative remedies) to this constitutional guarantee.[104]

2. Even if a Ripeness / Exhaustion of Administrative Remedies Analysis Applies, the Landowners' Have Met the Standard

Although the ripeness analysis does not apply to four of the Landowners' claims (it only applies to the Penn Central Regulatory Takings Claim that is not at issue in this motion), if this Court does apply the analysis, all claims are ripe[105]

a. The Landowners Made At Least One Meaningful Application and It Would be Futile to Seek Any Further Approvals From the City

"While a landowner must give a land-use authority an opportunity to exercise its discretion, once […] the permissible uses of the property are known to a reasonable degree of certainty, a [regulatory] taking claim [Penn Central claim] is likely to have ripened."[106] The purpose of this rule is to understand what the land use authority will and will not allow to be developed on the property at issue. But, "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[107] "[W]hen exhausting available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review."[108] In Del Monte Dunes[109] the United States Supreme Court held that a taking claim

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104 Alper v. Clark County, 571 P.2d 810, 811-812 (1977).

105 The Nevada Supreme Court has stated regulatory takings claims are generally "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. Adv. Op. 41 (2015) (*quoting* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)).

106 Palazzolo v. Rhode Island, 533 U.S. 606, 620, (2001) ("The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land." *Id.,* at 618.).

107 Palazzolo, at 621. *Citing to* Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed. 2d 882 (1999).

108 State v. Eighth Judicial Dist. Court of Nev., 351 P.3d 736, 742 (Nev. 2015). For example, in Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed. 2d 882 (1999) "[a]fter five years, five formal decisions, and 19 different site plans, [internal citation omitted] Del Monte Dunes decided the city would not permit development of the property under any circumstances." Id., at 698. "After reviewing at some length the history of

was ripe where the City of Monterey required 19 changes to a development application and then asked the landowner to make even more changes, causing the landowner to file inverse condemnation claims. The United States Supreme Court approved the Ninth Circuit opinion as follows: "to require additional proposals would implicate the concerns about repetitive and unfair procedures" and "the city's decision was sufficiently final to render [the landowner's] claim ripe for review."[110] The United States Supreme Court re-affirmed this rule in the Palazzolo case, holding the "Ripeness Doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted uses."[111]

Here, the Landowners already gave the City the opportunity to approve any use of the 35 Acre Property and the City denied each and every use. As explained above, the City denied the Landowners' applications to develop the 35 Acre Property, even though the applications met every City Code requirement and the City's own planning staff recommended approval. The Landowners also worked on a Master Development Agreement (MDA) with the City for over two years that would have allowed development of the 35 Acre Property with the other parcels included in the 250 Acre Residential Land. The City made over 700 changes to the MDA, sent the Landowners back to the drawing board at least 16 times to redo the MDA, and the Landowners agreed to more concessions than any landowner ever to appear before the City Council. The MDA even included the requirements for a major modification and the City denied the MDA altogether. *Exhibit 24: 5*

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attempts to develop the property, the court found that to require additional proposals would implicate the concerns about repetitive and unfair procedures expressed in MacDonld, Commer & Frates v. Yolo County, 477 U.S. 340, 350 n. 7, (1986) [*citing* Stevens concurring in judgment from Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 at 205-206, 105 S.Ct. 3108 at 3126 (1985)] and that the city's decision was sufficiently final to render Del Monte Dunes' claim ripe for review." Del Monte Dunes, at 698. The "Ripeness Doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted uses." Palazzolo v. Rhode Island, at 622.

109 526 U.S. 687, 119 S.Ct. 1624 (1999).

110 Del Monte Dunes, at 698.

111 Palazzolo, at 622.

App LO 00001128-112. The Landowners could not have submitted more comprehensive and detailed applications and made more concessions. Moreover, the Landowners cannot even get a permit to fence ponds on the 250 Acre Residential Zoned Land or a permit to access the property. The City adopted two Bills that effectively eliminate all use of the entire 250 Acre Residential Zoned Land. Councilman Seroka stated that "over his dead body" will development be allowed and Councilman Coffin referred to the Landowners' representative as a "motherfucker" and put in writing that he will vote against any development on the 35 Acre Property. The City has even sought funding to purchase the 250 Acre Residential Zoned Land for 1% of its fair market value[112] for a City Park thereby showing the motive to prevent any use of the property (which is not even a requirement to show a taking). Accordingly, the Landowners claims are ripe and it is futile to submit any further applications with the City. *Exhibits 25-33.*

b. Any Allegation that the MDA Application was Grandiose is Profoundly Disingenuous

The City may assert that the Landowners' MDA proposal was a "grandiose development proposal" and these are not the type of development applications that, when denied, can give rise to a taking claim. This would be a disingenuous argument. First, the City mandated that the Landowners develop the entire 250 Acre Residential Zoned Land under one development - the MDA.[113] Second, the MDA was, for the most part, drafted entirely by the City itself.[114] Third, when the Landowners filed an application to develop the 35 Acre Property as one parcel, apart from the

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[112] *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

[113] The Landowners explained that they were going through this process at the request of the City: "[w]e've been working on this agreement [MDA] at length for two years, because the direction of this Council was that you prefer to have a holistic, universal plan, and we have done that." *Exhibit 24: 4 App LO 00000990 lines 375-377.* Importantly, the Landowners expressed their concern that the time, resources, and effort it was taking to negotiate the MDA may cause them to lose the property. *Exhibit 5: 2 App LO 00000447-450.*

[114] The changes to the MDA were extensive and always at the request of the City: "[w]e have done that through many iterations, and those changes were not changes that were requested by the developer. They were changes requested by the City and/or through homeowners to the City." *Exhibit 24: 4 App LO 00000990 lines 378-380.* The MDA went through at least 16 versions, meaning that the City sent the Landowners back to the drawing board at least 16 times to give more concessions and revise the MDA. Exhibit 28, which consists of 16 versions of the MDA generated from January, 2016 to July, 2017. *Exhibit 28: 5 App LO 00001188- 8 App L0 00001835.*

MDA and the other 250 acres, the City rejected this application for only one reason - the City wanted one MDA that would cover any and all development of all parcels (17, 35, 65, or 133 acre parcels). *Exhibit 5: 2 App LO 00000363, 372, 376.* In denying the applications to develop the 35 Acre Property individually, the City assured the Landowners that the MDA would be approved, stating we are "very, very close" and "we are going to get there." *Exhibit 5: 2 App LO 00000367 line 336; 370 line 408; Exhibit 5: 2 App LO 00000466 lines:2987-2989; 475 lines 3251 to 476 line 3256; Exhibit 5: 2 app LO 00000467 lines 3020-3021.* As explained above, however, the City also flatly denied the MDA altogether.

c. The Crockett Order Does Not Defeat Ripeness

The City may also assert that the Crockett Order defeats ripeness as it holds a "major modification" application is necessary to develop and the Landowners never submitted a major modification application to the City. This argument, however, has been rejected in the two above cited Judge Smith Orders, which were affirmed by the Nevada Supreme Court. As explained, no "major modification" application is necessary - the property is already zoned residential, its intended use.

d. The Landowners' MDA Applications Exceeded Any Alleged Major Modification Requirements

Even if a "major modification" is required to exhaust administrative remedies / ripen the Landowners' taking claims (which it is not as explained above), the Master Development Agreement (MDA) the Landowners worked on with the City for over two years included and far exceeded all of the requirements of a major modification application. First, the MDA included over 55 pages of specific development standards for the 250 Acre Residential Zoned Land. *Exhibit 28: 5 App LO 00001188- 8 App L0 00001835.* Second, "Exhibit C" to several of the draft MDAs included the necessary application and documents for a Major Modification. *See e.g. Exhibit 28, 5 App LO 00001234, 00001236; 6 App LO 00001278, 00001280, 00001321, 00001323.* Third, as explained above, the City mandated the MDA and, for the most part, drafted the MDA and, therefore, the MDA included all of the City requirements. Fourth, the City gave the neighbors an unprecedented and

oppressive opportunity to participate in the MDA.[115] And, as explained, the City outright denied the MDA anyway.

D. THE CITY'S MAJOR MODIFICATION REQUIREMENT SUPPORTS THE TAKING

It is worth noting that any City argument that the Landowners need to file for a major modification fully supports the Landowners inverse condemnation claims. The argument presupposes that the City would be required to approve an application that included a major modification, otherwise, there would be no purpose in making the argument. Here, as explained above, the MDA (that included the 35 Acre Property) far exceeded and included the major modification requirements, the City's own Planning Staff recommended "approval" of the MDA,[116] and the City still denied the MDA altogether. Accordingly, any argument that a major modification is needed fully supports ripeness and liability for the taking, because the City denied all use even though the major modification requirements were met.

E. THE MAJOR MODIFICATION ARGUMENT MAKES NO COMMON SENSE

This Court should also consider the "practical reality"[117] facing landowners in inverse condemnation actions; the Court is not required to abandon all common sense and reason. Any argument that all the Landowners need to do is file a major modification with the City to be approved ignores reality. Simply put, the argument asserts that if the Landowners had written the

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[115] The City Attorney even commented on how oppressive the neighbors' involvement became: "So if anybody has a list of things they think should be in this agreement that are not, I say these words, speak now or forever hold your peace, because I will listen to you and we'll talk about it. And if it needs to be in that agreement, we'll do our best to get it in it. But I do not like the tactics that look like we're working, we're working, we're working and, by the way, here's something you didn't think of I could have been told about six months ago. So I understand Mr. Lowie's frustration. There's some of that going on. There really is. And that's unfortunate. I don't consider that good faith, and I don't consider it productive." Exhibit 5, LO 00000466.

[116] *Exhibit 24: 4 App LO 00000985 line 236 – 00000986 line 245; LO 00001071-00001073; and Exhibit 40: 9 App LO 00002047-2072.*

[117] City of Sparks v. Armstrong, 103 Nev. 619 (1987) (court upheld taking claim, explaining that the City of Sparks, in arguing that the taking did not occur earlier failed to recognize "the practical reality" the landowners faced as owner of the property).

words "major modification" at the top of its MDA or other applications,[118] then: 1) the City's councilmen would not have called the Landowners' representative a "motherfucker," would not have stated "over my dead body" will development ever be allowed, and would not have stated he will "vote against the whole thing;" 2) the City would not have adopted the "Yohan Lowie Bills" and would not have strategically adopted the Bills to deny all applications to develop; 3) the City would not have denied the 35 Acre Property applications and the MDA (that included significantly more than any major modification application); 4) the City would not have made it impossible to get a drainage study; 5) the City would not have denied the fence and access applications; 6) the City would not have denied the applications to develop the 133 Acre Property; 7) the City would not have identified $15 million of City funds to take over the property for a "park;" 7) the City would not be vehemently trying to claw back the 17 Acre Property approvals; and 8) the 35 Acre Property would be fully developed today. No reasonable person, considering the above cited facts, could possibly believe this argument.

F. ISSUE PRECLUSION DOES NOT APPLY

The City may also argue that issue preclusion requires application of the Crockett Order to this 35 Acre Property case. As recognized by the City, "the following factors are necessary for application of issue preclusion: '(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."[119]

These factors are conjunctive and the City cannot establish all four factors to apply the Crockett Order in this case. The issues in the Crockett Order are not identical, because both of those cases involved petitions for judicial review. The issue, therefore, was whether the City's zoning actions were based on substantial evidence. This issue in this case is different; it is whether the City's actions rise to the level of a taking. The ruling in the Crockett Order also was not on the

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[118] This is because the Landowners applications exceeded the City's major modification requirements.

[119] Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 714 (2008).

merits relevant to a taking in this case and they have not become final as the Nevada Supreme Court has not addressed either order. Finally, the constitutional taking issues present in this case were not actually nor necessarily litigated in the Crockett Order. Accordingly, issue preclusion does not apply.

Rather the preclusive effect of a prior order is more applicable to the Judge Smith Orders, because both orders directly address the underlying issue of the vested right to develop and they have become final as they have been affirmed by the Nevada Supreme Court. In fact, the Judge Smith orders are more than preclusive; they are the settled law on these issues.

CONCLUSION

Based on the foregoing, the Landowners respectfully request that this Court enter summary judgment on liability for three taking claims - categorical taking, regulatory per se taking, and non-regulatory / de facto taking.

Respectfully submitted this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*

KERMITT L. WATERS, ESQ.
Nevada Bar No. 2571
JAMES J. LEAVITT, ESQ.
Nevada Bar No. 6032
MICHAEL SCHNEIDER, ESQ.
Nevada Bar No. 8887
AUTUMN WATERS, ESQ.
Nevada Bar No. 8917
Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 11th day of December, 2018, a true and correct copy of the foregoing **PLAINTIFF LANDOWNERS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS** was made by electronic means pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and addressed to each of the following:

McDonald Carano LLP
George F. Ogilvie III
Debbie Leonard
Amanda C. Yen
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
dleonard@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Las Vegas City Attorney's Office
Bradford Jerbic
Philip R. Byrnes
Seth T. Floyd
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
pbyrnes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

Pisanelli Bice, PLLC
Todd L. Bice, Esq.
Dustun H. Homes, Esq.
400 S. 7th Street
Las Vegas, Nevada 89101
tlb@pisanellibice.com
dhh@pisanellibice.com

/s/ Evelyn Washington
An Employee of the Law Offices of
Kermitt L. Waters

OPPM
LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq., Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq., Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq., Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq., Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964

HUTCHINSON & STEFFEN, PLLC
Mark Hutchinson, Bar No. 4639
Joseph S. Kistler, Bar No. 3458
Matthew K. Schriever, Bar No. 10745
1008 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Telephone: (702) 385-2500
Facsimile: (702) 385-2086
mhutchinson@hutchlegal.com
jkistler@hutchlegal.com
mschriever@hutchlegal.co.

Attorneys for Plaintiff Landowners

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 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-17-758528-J Dept. No. XVI **PLAINTIFF LANDOWNERS' OPPOSITION TO THE CITY'S MOTION TO STRIKE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS ON ORDER SHORTENING TIME** OST Hearing Date: OST Hearing Time:

COMES NOW Plaintiffs, 180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, LTD, and SEVENTY ACRES, LLC, a Nevada limited liability company (hereinafter the "Landowners"), by and through their counsel of record, the Law Offices of Kermitt L. Waters, and hereby files Plaintiff's Opposition to the City's Motion to Strike Plaintiffs' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation Claims on Order Shortening Time.

This Opposition is made and based upon the Memorandum of Points and Authorities, Exhibits, and all papers and pleadings on file in this matter, and such oral arguments as this Court may allow.

DATED this 17th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *Kermitt L. Waters*
KERMITT L. WATERS, ESQ.
Nevada Bar No. 2571
JAMES J. LEAVITT, ESQ.
Nevada Bar No. 6032
MICHAEL SCHNEIDER, ESQ.
Nevada Bar No. 8887
AUTUMN L. WATERS, ESQ.
Nevada Bar No. 8917

Attorneys for Plaintiff Landowners

MEMORANDUM OF POINTS AND AUTHORITIES

The City fails to inform this Court that on December 11, 2018, the Landowners filed Plaintiff Landowners' Request for Rehearing/Reconsideration of Order/Judgment Dismissing Inverse Condemnation Claims because while this Court denied the Landowners' petition for judicial review, it then went one step further and also *sua sponte* dismissed the Landowners' inverse condemnation claims. Not only was the dismissal of the inverse condemnation claims without notice or an opportunity to be heard in *violation of the Landowners' due process rights*, but the decision is also clearly erroneous. As discussed in more detail in the Landowners' Motion for Rehearing/Reconsideration, this Court's Order is contrary to well established inverse condemnation

United States Supreme Court precedent. It is also contrary to very recent Nevada Supreme Court precedent involving the exact same property and the same parties.

I. This Court's Order is in Violation of United States Supreme Court Precedent

The United States Supreme Court has "establish[ed] the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." U.S. v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993). Here, the Landowners brought inverse condemnation claims for the taking of their property that are based in the Fifth Amendment to the United States Constitution. This Court first held these claims are properly pled and ripe, but stayed the claims. (Order filed February 1, 2018, ¶5). During the stay period, however, this Court *sua sponte* dismissed these property based Fifth Amendment claims without notice or even any opportunity whatsoever to be heard on the dismissal. This is a prima facie due process violation.

The United States Supreme Court has additionally held in the case of Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), that simply because government action is proper (or not arbitrary or capricious) does not mean it cannot amount to a taking. In Lucas, Mr. Lucas purchased two ocean front vacant lots in Charleston County, South Carolina to develop them residentially. Id., at 1006-07. Thereafter, the Beachfront Management Act (Act) was adopted that prevented the development on the two lots. Id., at 1008-09. Mr. Lucas conceded the validity of the Act as it was intended to protect the South Carolina beaches that were eroding, but challenged the Act as an uncompensated taking of his property and, after a bench trial, was awarded approximately $1,200,000.00 for the taking. Id., at 1009-10. On appeal to the United States Supreme Court, it was asserted that there was not a taking, because Mr. Lucas conceded to the validity of the Act and did not challenge it. Id, at 1044-46. The United States Supreme Court rejected this argument and found that even though it was conceded that the government action (the Beachfront Management Act) was valid (not arbitrary or capricious), the Act still amounted to a taking for which just compensation was constitutionally mandated. Further, the City's ripeness argument and basis for this Court's Dismissal does not apply to four of the Landowners' inverse condemnation claims.

Here, this Court dismissed the Landowners' inverse condemnation claims on the grounds

that "the Council properly exercised its discretion to deny the applications." This is not grounds to deny a taking. As held in Lucas, even if the Government "properly exercises its discretion," if, in exercising that discretion, the government action results in a taking, just compensation is still constitutionally mandated. Again, in the Lucas case, the landowner conceded that the government properly exercised its discretion in adopting the Beachfront Management Act, but the United States Supreme Court held this is not a defense to a taking. The Court still held the Act amounted to a taking, because it foreclosed the use of the landowners' property. Therefore, simply because the City "properly exercised its discretion" does not shield it from liability and it is error to hold otherwise.

II. This Court's Order is in Violation of Recent Nevada Supreme Court Precedent Specific to the Landowners' Property and the Parties Before this Court.

The pointed issue of whether the Landowners' entire 250 Acre Residentially Zoned Land (that includes the 35 Acre Property) is R-PD7 hard zoned which grants the Landowners a "right to develop" has been fully litigated before the Honorable Judge Douglas E. Smith **and affirmed by the Nevada Supreme Court**. *See Order entered November 30, 2016 in case # A-16-739654-C also attached as Exhibit 83 to the Landowners' Supplement to Motion for Rehearing/Reconsideration; see Order entered January 31, 2017 in case # A-16-739654-C also attached as Exhibit 7 to the Landowners' Supplement to Motion for Rehearing/Reconsideration; Exhibit 1 and Exhibit 2 attached hereto.* The Landowners' vested right to develop residentially is so irrefutable that Judge Smith found any challenge to this vested right is "frivolous" and "baseless," warranting an award of attorney fees which the Supreme Court upheld.[1] *Exhibit 1*.

The Nevada Supreme Court continued in its holding stating that "[b]ecause the record supports the district court's determination that the golf course [250 Acre Residential Zoned Land]

[1] Given this intervening ruling and now controlling law, this Court should reverse its order allowing the Intervenors participation in this litigation and strike all pleadings filed by the Intervenors as the Supreme Court has now ordered they do not have standing and any claim by the Intervenors regarding an interest in or right to control the 250 Acre Residential Zoned Land is "baseless."

was not part of the Queensridge community under the original CC&Rs and public map and records, regardless of the amendment, we conclude the district court did not abuse its discretion in denying appellants' motion for NRCP 60(b) relief." *Exhibit 1, p. 2.* The Court continued, "[a]ppellants filed a complaint alleging the golf course land [250 Acre Residential Zoned Land] was subject to the CC&Rs when the CC&Rs and public maps of the property demonstrated that the golf course land [250 Acre Residential Zoned Land] was not." Id., p. 4. The Supreme Court also upheld the award of $128,131.22 in attorney fees and costs. Id. The Court has denied rehearing, further holding the Queensridge Community has no control over the 35 Acre Property as it "was never annexed into the Queensridge master community." *Exhibit 2, Order Denying Rehearing, p. 2..*

Therefore, it is settled law that the Landowners have the vested right to develop the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) with a residential use, and the Intervenors/Queensridge owners have no right or standing to challenge because the Property has always been zoned residential, the intent was always to develop the Property residentially, and hard zoning trumps any other conflicting land use plan designation.

This Court's holding, without notice or a hearing, that the Landowners did not have the vested right to have their residential development applications approved clearly violates this controlling Nevada Supreme Court precedent specific to the 35 Acre Property.

III. The City's Request for Sanctions is Improper

The City's request for sanctions is improper. First, the City had a duty to inform this Court of the Landowners' Motion for Rehearing/Reconsideration and failed to do so. Second, the City had a duty to inform this Court that its Order is in violation of controlling precedent, especially the recent opinion from the Nevada Supreme Court and it failed to do so.

What the City is trying to do, in requesting that the Landowners' Motion for Summary Judgment (along with its **16 volumes** of Appendices) be stricken from the record, is prevent this Court and the Supreme Court from knowing the truth. The facts of this case show that the City has taken the Landowners' Property without payment of just compensation. That is a violation of the Constitution. The City clearly knows this and that is why it is trying to hide the truth from this

Court and the Supreme Court by requesting documents be stricken from the record. First, the City presented this Court with an Order that violates United States and Nevada Supreme Court precedent, deprives the Landowners of notice and a hearing, **now** the City wishes to have this Court purge the record, as well. This is grossly improper. The Landowners have a right to be heard on a full and complete record. Accordingly, this Court should deny the City's Motion to Strike and fairly consider the Landowners' Motion for Rehearing/Reconsideration and also the Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation Claims.

Clearly, the Landowners are not the party whose conduct necessitates sanctions. The City's presentation of an Order contrary to the law and recent Nevada Supreme Court precedent is what has multiplied the proceedings in this case as to increase costs unreasonably. [EDCR 7.60(b)(3)]. And certainly its Motion to Strike has unreasonably increased the costs in this matter.

IV. Conclusion

Based on the foregoing, the Landowners respectfully request that this Court deny the City's Motion to Strike.

Respectfully submitted this 17th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *Kermitt L. Waters*
KERMITT L. WATERS, ESQ.
Nevada Bar No. 2571
JAMES J. LEAVITT, ESQ.
Nevada Bar No. 6032
MICHAEL SCHNEIDER, ESQ.
Nevada Bar No. 8887
AUTUMN L. WATERS, ESQ.
Nevada Bar No. 8917
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964

Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employ of the Law Offices of Kermitt L. Waters; and that on the 17th day of December, 2018, I electronically filed the foregoing document(s): **DEFENDANT LANDOWNERS' OPPOSITION TO THE CITY'S MOTION TO STRIKE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS ON ORDER SHORTENING TIME** was made by electronic means pursuant to EDCR 8.05 and 8.05(f), to be electronically served substituted for the date and place of deposit in the mail and addressed to each of the following:

McDONALD CARANO, LLP
George F. Ogilvie III
Debbie Leonard
Amanda C. Yen
2300 W. Sahara Avenue, Suite 1200
Las Vegas NV 89102
Facsimile: (702) 388-6787
Email: *gogilvie@mcdonaldcarano.com*
dleonard@mcdonaldcarano.com
ayen@mcdonaldcarano.com

LAS VEGAS CITY ATTORNEY'S OFFICE
Bradford Jerbic, City Attorney
Philip R. Byrnes
Seth T. Floyd
495 S. Main Street, 6th Floor
Las Vegas, NV 89101
Email: *pbyrnes@lasvegasnevada.gov*
sfloyd@lasvegasnevada.gov

PISANELLI BICE, PLLC
Todd L Bice,
Dustun H. Holmes
400 S. 7th Street
Las Vegas, NV 89101
Email: tlb@pisanellibice.com
dhh@pisanellibice.com

/s/ Evelyn Washington
Evelyn Washington, an Employee of the
Law Offices of Kermitt L. Waters

Exhibit 1

Supreme Court Order of Affirmance

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT N. PECCOLE; AND NANCY A. PECCOLE, Appellants, vs. FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY; EHB COMPANIES, LLC, A NEVADA LIMITED LIABILITY COMPANY; YOHAN LOWIE, AN INDIVIDUAL; VICKIE DEHART, AN INDIVIDUAL; AND FRANK PANKRATZ, AN INDIVIDUAL, Respondents.	No. 72410
ROBERT N. PECCOLE; AND NANCY A. PECCOLE, INDIVIDUALS, Appellants, vs. FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY; EHB COMPANIES, LLC, A NEVADA LIMITED LIABILITY COMPANY; YOHAN LOWIE, AN INDIVIDUAL; VICKIE DEHART, AN INDIVIDUAL; AND FRANK PANKRATZ, AN INDIVIDUAL, Respondents.	No. 72455

FILED

OCT 17 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

These consolidated appeals are from district court orders awarding attorney fees and costs and denying NRCP 60(b) relief from a

dismissal order in a real property dispute.[1] Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

This case arises out of a dispute appellants have with respondents, who are planning to develop property on which a golf course is presently located, and which appellants argue is subject to development restrictions under the Master Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs) for the Queensridge community in Las Vegas where appellants reside. Appellants sued respondents for injunctive relief and damages based on theories of impaired property rights and fraud. The district court dismissed appellants' complaint and then denied appellants' motion for NRCP 60(b) relief. Additionally, the district court awarded respondents a total of $128,131.22 in attorney fees and costs. These appeals followed.

First, appellants argue that the district court abused its discretion in denying NRCP 60(b) relief by relying on an invalid amendment to the CC&Rs in concluding that the golf course property was not subject to the CC&Rs. Because the record supports the district court's determination that the golf course land was not part of the Queensridge community under the original CC&Rs and public maps and records, regardless of the amendment, we conclude the district court did not abuse its discretion in denying appellants' motion for NRCP 60(b) relief. *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996) (providing that the district court has

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

broad discretion in deciding whether to grant or deny an NRCP 60(b) motion to set aside a judgment, and this court will not disturb that decision absent an abuse of discretion).

Second, appellants contend that the district court violated their procedural due process rights by awarding respondents attorney fees and costs without first holding an evidentiary hearing. We disagree. An evidentiary hearing is not required before an award of attorney fees and costs. *See Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) (providing that the requirement of "an opportunity to be heard" before sanctions may issue "does not require [the court to hold] an oral or evidentiary hearing on the issue"). Appellants had notice of respondents' motions for attorney fees and costs and took advantage of the opportunity to respond to those requests in writing and orally. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (recognizing that due process requires notice and opportunity to be heard). Thus, we conclude the district court did not violate appellants' due process rights by failing to hold an evidentiary hearing before awarding respondents attorney fees and costs.

Lastly, appellants assert that appellant Robert Peccole's preparation, research, and 55-year legal career demonstrate that the attorney fees and costs award as a sanction was improper. NRS 18.010(2)(b) permits the district court to award attorney fees to a prevailing party when the court finds that the claim "was brought or maintained without reasonable ground or to harass the prevailing party." Additionally, EDCR 7.60(b) allows the district court to impose a sanction including attorney fees

and costs when an attorney or party "without just cause. . . [p]resents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted. . . [or] multiplies the proceedings in a case as to increase costs unreasonably and vexatiously."

Appellants filed a complaint alleging the golf course land was subject to the CC&Rs when the CC&Rs and public maps of the property demonstrated that the golf course land was not. Further, after the district court denied appellants' first motion for a preliminary injunction and explained its reasoning, appellants filed a second almost identical motion, a motion for rehearing of the denial of one of those motions, and a renewed motion for preliminary injunction, all of which included the same facts or argument. Additionally, the district court repeatedly warned appellants that they were too close to the issue to see it clearly or accept any of the court's decisions and despite this warning, they continued to file repetitive and meritless motions. The district court limited the award to fees and costs incurred in defending the repetitive motions and issued specific findings regarding each of the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), and the record supports the amount awarded. *See Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (requiring the district court to consider the *Brunzell* factors when awarding attorney fees). Further, Robert's extensive experience as an attorney is not a factor under *Brunzell* and because the district court was within its discretion to award attorney fees and costs for the repetitive and frivolous parts of the litigation, it is unclear how Robert's extensive legal career would make the award improper. Thus, we conclude the district court did not abuse its discretion in awarding respondents attorney fees and costs. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280,

1288 (2006) (explaining that this court will not overturn a district court's decision to award attorney fees and costs as a sanction absent a manifest abuse of discretion). Accordingly, we

ORDER the judgments of the district court AFFIRMED.

_____, C.J.
Douglas

_____, J.
Gibbons

_____, J.
Stiglich

cc: Hon. Douglas Smith, District Judge
Ara H. Shirinian, Settlement Judge
Peccole & Peccole, Ltd.
The Jimmerson Law Firm, P.C
Sklar Williams LLP
EHB Companies, LLC
Eighth District Court Clerk

Exhibit 2

Supreme Court Order Denying Rehearing

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT N. PECCOLE; AND NANCY A. PECCOLE, Appellants, vs. FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY; EHB COMPANIES, LLC, A NEVADA LIMITED LIABILITY COMPANY; YOHAN LOWIE, AN INDIVIDUAL; VICKIE DEHART, AN INDIVIDUAL; AND FRANK PANKRATZ, AN INDIVIDUAL, Respondents.	No. 72410
ROBERT N. PECCOLE; AND NANCY A. PECCOLE, INDIVIDUALS, Appellants, vs. FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY; EHB COMPANIES, LLC, A NEVADA LIMITED LIABILITY COMPANY; YOHAN LOWIE, AN INDIVIDUAL; VICKIE DEHART, AN INDIVIDUAL; AND FRANK PANKRATZ, AN INDIVIDUAL, Respondents.	No. 72455

FILED

NOV 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

SUPREME COURT
OF
NEVADA

(O) 1947A

18-905933

This is a petition for rehearing of the October 17, 2018, order affirming district court orders awarding attorney fees and costs and denying NRCP 60(b) relief from a dismissal order in a real property action.[1]

On rehearing, appellants argue that this court misconstrued the fact that the later-added 9 holes of the Badlands golf course were subject to the Queensridge Master Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs). Appellants' assertion, however, is not supported by the record on appeal as public maps and records listed the 9-hole property as annexable property that was never annexed into the Queensridge master community. Appellants also contend that this court overlooked the district court's reliance on the amendment to the CC&Rs to conclude that the 9-hole property was not subject to the Queensridge CC&Rs. But, as recognized by this court's order, the district court concluded that the 9-hole property was not subject to the CC&Rs, regardless of the amendment, and referenced the amendment as secondary support for its conclusion.

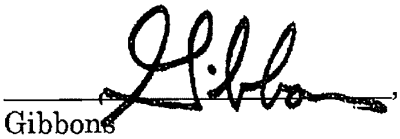
Regarding the attorney fees and costs award, appellants assert that this court misapprehended that the fees and costs awarded included two separate judgments, one of which was not granted as a sanction, and thus, there was no authority for the $30,000 award. Appellants' assertion is belied by the record as the district court specifically awarded the $30,000 as a sanction. Further, because appellants did not previously challenge the basis for the $30,000 award, they are precluded from doing so for the first

[1]To the extent appellants assert our failure to recuse ourselves in this matter created an appearance of impropriety, appellants failed to timely request we recuse ourselves and we issued a notice of voluntary disclosure before the entry of the order of affirmance.

time on rehearing. NRAP 40(c)(1) (providing that "no point may be raised for the first time on rehearing"). Accordingly, we deny rehearing. NRAP 40(c).

It is so ORDERED.[2]

_____, C.J.
Douglas



_____, J.
Gibbons

_____, J.
Stiglich

cc: Hon. Douglas Smith, District Judge
Peccole & Peccole, Ltd.
The Jimmerson Law Firm, P.C.
Sklar Williams LLP
EHB Companies, LLC
Eighth District Court Clerk

[2]We grant appellants' November 13, 2018, motion for leave to file a reply and direct the clerk of the court to file the reply submitted by appellants. We have considered the reply in reaching our decision.

NOAS
HUTCHISON & STEFFEN, PLLC
Mark A. Hutchison (4639)
Joseph S. Kistler (3458)
Robert T. Stewart (13770)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Telephone: (702) 385-2500
Facsimile: (702) 385-2086
mhutchison@hutchlegal.com
jkistler@hutchlegal.com
rstewart@hutchlegal.com

KAEMPFER CROWELL
Christopher L. Kaempfer (1264)
Stephanie H. Allen (8486)
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
Telephone: (702) 792-7000
Facsimile: (702) 796-7181
ckaempfer@kcnvlaw.com
sallen@kcnvlaw.com

LAW OFFICES OF KERMITT L. WATERS
Kermit L. Waters (2571)
James J. Leavitt (6032)
Michael Schneider (8887)
Autumn L. Waters (8917)
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964

Attorneys for Petitioner

DISTRICT COURT
CLARK COUNTY, 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, Petitioners, v.	Case No. A-17-758528-J Dept. No. XVI **NOTICE OF APPEAL**

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.	
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 BIGLER AND SALLY BIGLER, Intervenors.	

Notice is given that 180 LAND CO LLC, Petitioner in the above-captioned matter, appeals to the Supreme Court of Nevada from the Findings of Fact, Conclusions of Law on Petition for Judicial Review, and Order which was entered by the district court on November 21, 2018.

Petitioner notes that the matter in district court was severed between a petition for judicial review and several claims sounding in inverse condemnation. However, the Order of November 21, 2018, not only denies judicial review, it dismisses all of the claims for inverse condemnation, with no recognition that the matter had been severed into two actions, and that separate pleadings were filed. Therefore, petitioner, the only petitioner in the severed actions below, appeals from all aspects of the district court's Order with respect to all of the pleaded but severed matters.

DATED this 20 day of December, 2018.

HUTCHISON & STEFFEN, PLLC

Mark A. Hutchison (4639)
Michael K. Wall (2098)
Joseph S. Kistler (3458)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

KAEMPFER CROWELL
Christopher L. Kaempfer (1264)
Stephanie H. Allen (8486)
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135

LAW OFFICES OF KERMITT L. WATERS
Kermit L. Waters (2571)
James J. Leavitt (6032)
Michael Schneider (8887)
Autumn L. Waters (8917)
704 South Ninth Street
Las Vegas, Nevada 89101

Attorneys for Petitioner

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 20th day of December, 2018, I caused the above and foregoing document entitled **NOTICE OF APPEAL** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ to be served via facsimile; and/or

XXX pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

Bradford R. Jerbic (1056)
Philip R. Byrnes (166)
Seth T. Floyd (11959)
City Attorney's Office
495 S. Main Street, 6th Fl.
Las Vegas, NV 89101
Attorneys for City of Las Vegas

George F. Ogilvie III (3552)
Debbie Leonard (8260)
Amanda C. Yen (9726)
Christopher Molina (14092)
McDonald Carano LLP
2300 W. Sahara Ave., Suite 1200
Las Vegas, NV89102
Attorneys for City of Las Vegas

Todd L. Bice (4534)
Dustun H. Holmes (12776)
Pisanelli Bice PLLC
400 S. Seventh St., Suite 300
Las Vegas NV 89101
Attorneys for Intervenors

An employee of Hutchison & Steffen, PLLC

MSTR
George F. Ogilvie III (NV Bar #3552)
Debbie Leonard (NV Bar # 8260)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
gogilvie@mcdonaldcarano.com
dleonard@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 S. Main Street, 6th Floor
Las Vegas, NV 89101
Telephone: 702.229.6629
Facsimile: 702.386.1749
bjerbic@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
jdorocak@lasvegasnevada.gov

Attorneys for Defendants City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO 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,

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.: A-17-758528-J

DEPT. NO.: XVI

MOTION TO STRIKE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS ON ORDER SHORTENTING TIME

OST Hearing Date:
OST Hearing Time:

DEPARTMENT XVI
NOTICE OF HEARING
DATE 1-22-19 TIME 9:00 AM
APPROVED BY CH

DEC 17 2018

The City of Las Vegas, by and through its undersigned counsel, moves the Court for an Order on shortened time: (i) striking the Plaintiff Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation (the "Fugitive Document") since it is a fugitive document; (ii) directing the clerk to remove the Fugitive Document from the record; and (iii) vacating the February 6, 2019 hearing on the Fugitive Document.

In addition, because Plaintiffs, without just cause, have multiplied these proceedings and increased costs unreasonably and vexatiously, this Court, respectfully, should impose sanctions pursuant to EDCR 7.60(b).

This Motion is made and based on the following memorandum of points and authorities, the November 18, 2018 Findings of Fact and Conclusions of Law on Petition for Judicial Review ("Order"), the Declaration of George F. Ogilvie III and any argument the Court may entertain on this matter.

Because the City's opposition to the Fugitive Document is due on December 31, 2018, the City brings this Motion pursuant to EDCR 2.26 and requests the Court shorten the time on this instant Motion and set it for hearing well in advance of the December 31, 2018 deadline.

DATED this 14th day of December, 2018.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III (NV Bar #3552)
Debbie Leonard (NV Bar # 8260)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102

LAS VEGAS CITY ATTORNEY'S OFFICE
Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
495 S. Main Street, 6th Floor
Las Vegas, NV 89101

Attorneys for Defendants City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

ORDER SHORTENING TIME

Upon good cause shown, please take notice that the hearing before the above-entitled Court on the **MOTION TO STRIKE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS ON ORDER SHORTENTING TIME** is shortened to the 22 day of January, ~~2018~~ 2019, at 9:00 a.m., or as soon thereafter as counsel may be heard. ~~Any opposition to this Motion must be filed and served by the ____ day of ____, 2018 no later than ___: _____ p.m.~~

DATED this 17 day of December, 2018.

DISTRICT COURT JUDGE

CH

Submitted By:

McDONALD CARANO LLP

By: /s/ *George F. Ogilvie III*
George F. Ogilvie III (NV Bar #3552)
Debbie Leonard (NV Bar # 8260)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102

LAS VEGAS CITY ATTORNEY'S OFFICE
Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
495 S. Main Street, 6th Floor
Las Vegas, NV 89101

Attorneys for Defendants City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

DECLARATION OF GEORGE F. OGILIVIE III

George F. Ogilvie III, after being sworn, declares as follows:

1. I am an attorney licensed to practice law in the State of Nevada and am a partner in the law firm of McDonald Carano LLP. I am co-counsel for the City of Las Vegas in the above-captioned matter. I am over the age of 18 years and a resident of Clark County, Nevada. I make this declaration based upon personal knowledge, except where stated to be upon information and belief, and as to that information, I believe it to be true. If called upon to testify as to the contents of this declaration, I am legally competent to do so in a court of law.

2. This declaration is made in support of the City of Las Vegas' Motion to Strike Plaintiffs' Motion for Summary Judgment on Liability for the Landowner's Inverse Condemnation Claims on Order Shortening Time.

3. On October 11, 2018, the Court issued its Minute Order on Plaintiffs' Petition for Judicial Review. *See* Minute Order.

4. Relevant to the instant Motion, the Court stated that, after consideration, the "impact of Judge Crockett's Order, which the City of Las Vegas accepted and did not appeal, would require both the 180 Land Co., LLC and Seventy Acres, LLC's parcels of land to apply to the Las Vegas City Council for an amendment to the Master Plan before development of the entire Badlands properties." *Id.* at 3.

5. The Court further noted that "the issue raised by Intervenor, which once again challenges whether any attempt to develop part of the Badlands properties without first applying for and addressing a major modification to the Master Plan, is identical to the issues litigated before Judge Crockett." *Id.*

6. The Court determined that issue preclusion applies to the instant matter: "the Doctrine of Issue Preclusion controls and it would be improper after a determination of substantial identity between 180 Land Co., LLC and Seventy Acres, LLC, to permit the Petitioner to circumvent the decision of Judge Crockett on issues that were fully adjudicated." *Id.* at 3-4.

7. The Petitioner did not file an objection to the Minute Order.

8. On November 18, 2018, the Court signed Findings of Fact, Conclusions of Law on Petition for Judicial Review ("Order"), which was filed on November 21, 2018 and entered on November 26, 2018.

9. The Order incorporates the findings of the Minute Order, and specifically states, "Petitioner failed to apply for a major modification, a prerequisite to any development of the Badlands Property. Having failed to comply with this necessary prerequisite, Petitioner's alternative claims for inverse condemnation are not ripe and must be dismissed." *Id.*, ¶ 66.

10. The Order further states, "IT IS FURTHER ORDERED, ADJUDGED and DECREED that Petitioner's alternative claims in inverse condemnation are hereby DISMISSED." *Id.* at 24.

11. The Order concludes that the Doctrine of Issue Preclusion applies (Order, ¶¶ 56-65); thus, "Petitioner failed to apply for a major modification, a prerequisite to any development of the Badlands Property. Having failed to comply with this necessary prerequisite, Petitioner's alternative claims for inverse condemnation are not ripe and must be dismissed." *Id.*, ¶ 66.

12. Accordingly, the Court dismissed Plaintiffs' Complaint in its entirety. *Id.* at 24 ("IT IS FURTHER ORDERED, ADJUDGED and DECREED that Petitioner's alternative claims in inverse condemnation are hereby DISMISSED.").

13. Despite the Court's Order dismissing Plaintiffs' claims for inverse condemnation, on December 11, 2018, Plaintiffs filed Plaintiff Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation Claims (the "Fugitive Document") seeking summary judgment as to liability on their dismissed inverse condemnation claims.

14. On December 12, 2018, the Court, confirming that Plaintiffs' Complaint has been dismissed in its entirety, filed its Civil Order to Statistically Close Case. *See* Civil Order to Statistically Close Case.

15. Because the Court dismissed Plaintiffs' inverse condemnation claims, Plaintiffs' motion for summary judgment on those claims is a fugitive document that must be stricken.

. . .

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

16. Presently, the Fugitive Document is set for hearing on February 6, 2019. In addition to striking the Fugitive Document and removing the same from the record, the City requests the Court vacate the hearing.

17. Because the City's opposition to the Fugitive Document is due on December 31, 2018, the City brings this Motion pursuant to EDCR 2.26 and requests the Court shorten the time on this instant Motion and set it for hearing well in advance of the December 31, 2018 deadline.

18. This Declaration is made in good faith and not for the purpose of delay.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on: December 14, 2018.

GEORGE F. OGILVIE III

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

A. Plaintiffs' Fugitive Document Must Be Stricken.

Pursuant to the Order, the Court dismissed Plaintiffs' claims for inverse condemnation. *See* Order at 24. As such, Plaintiffs' Complaint is no longer actionable, and Plaintiffs do not have any claims pending against the City in this matter. Regardless, and contrary to the Court's Order, on December 11, 2018, Plaintiffs filed the Fugitive Document seeking summary judgment as to liability on their dismissed claims. Plaintiffs' Fugitive Document should not have been filed, does not have any legal effect and must be stricken.

Pursuant to Rule 56 of the Nevada Rules of Civil Procedure, a party may only bring a motion for summary judgment on a pending claim, counterclaim or cross-claim. NRCP 56(a). Plaintiffs do not have any pending claims against the City. Accordingly, the Fugitive Document should be stricken, the clerk should be directed to remove it from the record, and the hearing set for February 6, 2019 should be vacated. Because the City should not be required to respond to a Fugitive Document, the City requests the Court issue an order striking the document *before* December 31, 2018.

B. Plaintiffs Are Subject To Sanctions.

EDCR 7.60(b)(3) states:

> The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:
>
> * * *
>
> (3) So multiples the proceedings in a case as to increase costs unreasonably and vexatiously.

EDCR 7.60(b)(3).

The Court dismissed Plaintiffs' claims in their entirety. *See* Order at 24. And it is beyond argument that a party may not obtain summary judgment on dismissed claims. Accordingly, because Plaintiffs have multiplied these proceedings and increased costs and the City's (and the taxpayers') fees unreasonably and vexatiously, the City respectfully requests it

be awarded its fees and costs for having to bring the instant Motion.

II. CONCLUSION

Plaintiffs filed the Fugitive Document contrary to the Court's Order, and the Fugitive Document must be stricken. Accordingly, the City requests the Court enter an Order: (i) striking the Plaintiff Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation since it is a fugitive document; (ii) directing the clerk to remove the Fugitive Document from the record; (iii) vacating the February 6, 2019 hearing on the Fugitive Document; and (iv) awarding the City all associated fees and costs with this Motion pursuant to EDCR 7.60(b).

DATED this 14th day of December, 2018.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III (NV Bar #3552)
Debbie Leonard (NV Bar # 8260)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102

LAS VEGAS CITY ATTORNEY'S OFFICE
Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
495 S. Main Street, 6th Floor
Las Vegas, NV 89101

Attorneys for Defendants City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 21st day of December, 2018, a true and correct copy of the foregoing **MOTION TO STRIKE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS ON ORDER SHORTENTING TIME** 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

OPPM
George F. Ogilvie III (NV Bar #3552)
Debbie Leonard (NV Bar #8260)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
gogilvie@mcdonaldcarano.com
dleonard@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 S. Main Street, 6th Floor
Las Vegas, NV 89101
Telephone: 702.229.6629
Facsimile: 702.386.1749
bjerbic@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

Attorneys for City of Las Vegas

DISTRICT COURT

CLARK COUNTY, 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, 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, Respondents.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **CITY OF LAS VEGAS' OPPOSITION TO PLAINTIFF LANDOWNERS' REQUEST FOR REHEARING/RECONSIDERATION OF ORDER/JUDGMENT DISMISSING INVERSE CONDEMNATION CLAIMS** Hearing Date: January 17, 2019 Hearing Time: 9:00 a.m.

Defendant City of Las Vegas, through its counsel, McDonald Carano LLP, opposes the Plaintiff Landowners' Request for Rehearing/Reconsideration of Order/Judgment Dismissing Inverse Condemnation Claims (the "Request for Rehearing") filed by 180 Land Company, LLC ("the Developer"). This opposition is based on the following points and authorities, oral argument and such other matters as the Court may wish to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court dismissed the inverse condemnation claims based on two independent legal grounds, either of which prevents the Court from disturbing its final judgment. First, the Developer has no vested rights to have its development applications approved, and where the Council properly exercised its discretion to deny the applications, there can be no taking as a matter of law. Second, because Judge Crockett's Decision held that the Developer must apply for a major modification of the Peccole Ranch Master Development Plan in order to redevelop the golf course property, which has preclusive effect here, the inverse condemnation clams are not ripe and must be dismissed. The Developer's Request for Rehearing fails to identify any error in these legal conclusions, much less a "clear error" that would warrant relief under EDCR 2.24 or NRCP 52(b), 59 or 60.

The Court properly dismissed the inverse condemnation claims *sua sponte* because no notice or opportunity to be heard is required when a court dismisses for lack of subject matter jurisdiction. Even if they were, the Developer had ample opportunity to present opposing arguments to the Court's grounds for dismissal. No due process violation occurred here.

To circumvent the shortcomings in its arguments, the Developer improperly threatens the Court with a "judicial taking" (which is not recognized by Nevada law), cites to material that was not before the Council at the time it denied the 35-Acre Applications, relitigates arguments it already litigated and lost, and fails to identify a single factual finding or legal conclusion that is incorrect. In short, the Developer simply fails to meet its burden for reconsideration. Recognizing that it cannot demonstrate any grounds to set aside the judgment, the Developer has already filed a notice of appeal prior to the Court even considering its

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Request for Rehearing. For the reasons stated herein, the Court should deny the Request for Rehearing and allow the Developer to proceed with its appeal.

II. LEGAL ARGUMENT

A. The Court Lacks Jurisdiction to Consider a Post-Dismissal Summary Judgment Motion.

Because the Request for Rehearing is premised on the Defendant's post-dismissal summary judgment motion, it is outside the bounds of the Court's subject matter jurisdiction to consider it. The Court may not consider a summary judgment motion on already-dismissed claims as a basis for reconsideration of its FFCL because once a district court enters a final judgment, it loses "all jurisdiction concerning that judgment, except to alter, set aside, or vacate its judgment in conformity with the Nevada Rules of Civil Procedure." *SFPP, L.P. v. Second Jud. Dist. Ct.*, 123 Nev. 608, 609, 173 P.3d 715, 715 (2007). An order of dismissal is a final judgment that cuts off the district court's "jurisdiction to conduct any further proceedings with respect to the matters resolved in the judgment unless it was first properly set aside or vacated." *Id.* at 612, 173 P.3d at 718. "[A] district court is prohibited from retaining jurisdiction over [a] dismissed case." *Id.* at 611, 173 P.3d at 717.

Here, the Court entered its FFCL, which was a final judgment, on November 21, 2018. The Developer then filed a summary judgment motion on the already-dismissed inverse condemnation claims ("the Fugitive Document"), followed by the instant Request for Rehearing. The Developer supplemented its Request for Rehearing with the Fugitive Document and cites to the Fugitive Document extensively therein. *See* Request for Rehearing at 4:5-7, 8:24-27, 10:7-18, n.7, 12:11-12, n.9, 13:2-3, 13:9-10, 15:6-7, 17:11-15. The City moved to strike the Fugitive Document, which is set to be heard on January 17, 2019, the same date as the Court's hearing on the Request for Rehearing.

The Court has no jurisdiction to consider the Fugitive Document unless and until it sets aside the final judgment. *SFPP, L.P.*, 123 Nev. at 609, 173 P.3d at 715. Only if the Court were to first reach the conclusion that its judgment dismissing the Developer's inverse condemnation claims should be set aside for a reason independent of any argument advanced in the Fugitive

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Document could the Court even allow for the filing of future documents related to those claims. *See id*. A summary judgment motion filed on already-dismissed claims cannot be considered. *See id.* Because the Request for Rehearing is improperly based on a document the Court lacks jurisdiction to consider and does not stand on its own without the Developer's fugitive filing, it must be denied.

The Developer should be prevented from circumventing this jurisdictional bar by appending the Fugitive Document to its Request for Rehearing and including references to the Fugitive Document therein. The Court's lack of jurisdiction to consider a summary judgment motion on already-dismissed claims cannot be manipulated by the *manner* in which it was filed or referenced in other filings. Whether as an exhibit, a supplement or a stand-alone filing, the summary judgment motion is a rogue document that the Court is devoid of jurisdiction to consider.

B. The Court Properly Dismissed the Inverse Condemnation Claims for Lack of Subject Matter Jurisdiction

1. Ripeness is a Threshold Jurisdictional Requirement

The Court correctly dismissed the inverse condemnation claims on jurisdictional grounds because, once the Court determined that Judge Crockett's Order had preclusive effect on this case, the Developer needed to allow the Council to consider a major modification application before those claims could ripen. If a party's claims are not ripe for review, they are not justiciable, and the Court lacks subject matter jurisdiction to review them. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010); *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988). Where the Court lacks subject matter jurisdiction, dismissal is required. Nev. Const. art. 6, § 6; *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). Because a district court cannot second guess another court's final judgment, the Developer must comply with Judge Crockett's Order unless and until it is reversed on appeal. *See Rohlfing v. Second Jud. Dist. Ct.*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990) (*citing* Nev. Const. art. 6, § 6; NRS 3.220).

. . .

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Here, the Court carefully analyzed the elements of issue preclusion and the pertinent Nevada Supreme Court case law to conclude that Judge Crockett's Order has preclusive effect on this case. 10.11.2018 Minute Order at 3; FFCL ¶¶56-62. Nowhere in its Request for Rehearing does the Developer take issue with the Court's analysis of issue preclusion or cast any doubt on the correctness of the Court's conclusion that Judge Crockett's Order has preclusive effect. Indeed, the Developer does not even mention issue preclusion in its Request for Rehearing. Nor does the Developer contest that ripeness is a threshold jurisdictional issue or that the Court cannot proceed in the absence of subject matter jurisdiction.

In making these concessions, the Developer acquiesces to the Court's conclusion that Judge Crockett's Order has preclusive effect and has waived any right to challenge that conclusion. *See* EDCR 2.20(c) ("The absence of [a] memorandum [of points and authorities in support of each ground] may be construed as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds not so supported."). Because unripe claims are not justiciable, the Court correctly dismissed the Developer's inverse condemnation claims for lack of subject matter jurisdiction.

2. The January 11, 2018 Hearing and January 25, 2018 Order Have No Effect on the Court's Ability to Dismiss the Inverse Condemnation Claims on Ripeness Grounds

The Developer's reliance on the January 11, 2018 hearing transcript and the January 25, 2018 Order (at 4:14-6:26) is misplaced because Judge Crockett's Decision, and the Court's determination of its preclusive effect on this case, occurred thereafter. A court may reconsider its earlier rulings any time prior to final judgment. *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). Here, the Court's order on which the Developer relies was issued on January 25, 2018. Judge Crockett issued his decision on March 6, 2018. And this Court did not determine that Judge Crockett's Decision had preclusive effect until it entered its Minute Order on October 11, 2018. The FFCL, which was the final judgment entered in this action, then incorporated that conclusion. It is black letter law that the Court was free to revisit its ripeness analysis until it entered the final judgment. *See Rust*, 103 Nev. at 688, 747 P.2d at 1382.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Moreover, contrary to the Developer's misleading statements, the Court never previously reached any conclusion regarding the effect that denial of the petition for judicial review would have on the inverse condemnation claims. The discussion regarding a temporary versus total taking to which the Developer refers (at 4:22-28) was simply the Developer's erroneous argument to the Court, not any statement of law made by the Court. The Court provided no analysis of that issue and certainly gave no indication whatsoever that it accepted the Developer's arguments. *See id.* The Developer's assertion is contrary to takings jurisprudence, which holds that no taking can occur, as a matter of law, when the Developer lacks a vested property right. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994). The Developer cannot put words in the Court's mouth, particularly ones that are so far afield from what the law provides.

3. The Developer Cannot Circumvent the Ripeness Requirements Established by the Supreme Court.

The very authorities cited by the Developer confirm that the Court reached the correct conclusion by requiring the Developer to allow the Council to consider a major modification application before its claims could ripen.

> [A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon ***the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property***, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

Palazzolo v. Rhode Island, 533 U.S. 606, 620-21 (2001) (emphasis added); *see also MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 351-53 (1986) (holding that taking claim is not ripe where "the possibility that some development will be permitted" remains open); *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-90 (1985) (holding that landowner's failure to follow county's procedures rendered its taking claim unripe).

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Submission of a major modification application for decision is exactly the type of procedure with which the Developer needs to comply before any claims could ripen. *See MacDonald, Sommer & Frates*, 477 U.S. at 347, 351-53; *Williamson Cnty.*, 473 U.S. at 186-90. Simply because the Developer may not agree with this requirement does not excuse the Developer from complying with it. The Developer does not get to unilaterally make that determination and, in any event, Judge Crockett's Decision, as confirmed by this Court, unequivocally requires the Developer to submit a major modification application. Because the Developer has not obtained a decision from the City on a major modification, its claims for inverse condemnation are not ripe and the Court was correct to dismiss them on jurisdictional grounds. *See Palazzolo*, 533 U.S. at 618.

4. The Developer's Futility Argument is Speculative.

The Developer's assertion that its submission of a major modification would be futile (at 15:7-9) is pure speculation, which is insufficient to satisfy the futility exception to the ripeness doctrine. *See Freeman v. United States*, 875 F.3d 623, 630-31 (Fed. Cir. 2017); *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 830 (9th Cir. 2004); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir.), *amended*, 830 F.2d 968 (9th Cir. 1987). Futility is not established simply because the Developer says so. "The futility exception is narrow, and mere uncertainty does not establish futility." *Manufactured Home Cmtys. Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005). A plaintiff's assertion that the land use authority's position is unreasonable or amounts to mistreatment, without pursuing the formal application requirements, "hardly…establish[es]…the narrow futility exception." *Shaw v. Cty. of Santa Cruz*, 88 Cal. Rptr. 3d 186, 209 (Cal. Ct. App. 2008). Because it is undisputed that the Developer has not filed a major modification application, no matter what the Developer may argue, the Developer does not fit within the narrow futility exception.

In support of its futility argument, the Developer improperly cites actions taken by the Council that post-date the Council's denial of the 35-Acre Property applications. Request for Rehearing at 15:12-16:1. The Court may only evaluate futility, however, based upon the record before the Council *at the time* of the challenged action. *See State v. Eighth Jud. Dist. Ct.*, 131

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Nev. Adv. Op. 41, 351 P.3d 736, 742 (2015); *see also Aloisi v. United States*, 85 Fed. Cl. 84, 92 (2008) (evaluating futility as of the time of the action challenged as a taking); *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (review of a land use decision is based on the record before the land use authority).

Moreover, because the Council takes actions by majority vote, futility cannot be established based on the alleged statements of two individual council members, particularly those made prior to the council member ever being elected to office. *See State*, 131 Nev. at __, 351 P.3d at 742.[1] By the Developer's own admission, therefore, a majority of the Council – which is all that would be required to approve future applications – made no such statements. So long as the decision-making body retains discretion to approve a development application, as exists here, the plaintiff is required to submit one in order for a takings claim to ripen. *See Barlow & Haun, Inc. v. United States*, 118 Fed. Cl. 597, 619 (2014), *aff'd*, 805 F.3d 1049 (Fed. Cir. 2015), *citing Palazzolo*, 533 U.S. at 620.

In addition to post-dating the Council's June 21, 2017 Decision, the Developer's reference to the Council's August 2, 2017 vote to deny its 2017 proposed master development agreement is misplaced for a number of reasons. Request for Rehearing at 15:9-12 and 16:1-4. First, the Developer never sought judicial review of that decision within 25 days, as required by NRS 278.0235. Second, NRS 278.0203 requires any development agreement to be consistent with the master plan, so the Developer would still need a major modification and general plan amendment before the Council could approve any development agreement. Third, the Council's denial of the 2017 master development agreement application does not foreclose the possibility that other applications would be granted. As a result, the futility exception simply does not apply here.

[1] Notably, the Developer only takes issue with the statements made by two of the seven council members (at 15:14-18), both of whom the Developer unsuccessfully sued in federal court. In dismissing the claims against those council members and the City, the U.S. District Court reached the same conclusion as this Court that the Developer has no constitutionally protected property interest because neither the Las Vegas Unified Development Code nor NRS Chapter 278 "contain language that significantly limits the City Council's discretion" to deny development applications. *See* Order granting motion to dismiss at 5:26-7:4, Case No. 2:18-cv-00547-JCW-CWH (Dec. 21, 2018), attached hereto as **Exhibit A**. Pursuant to NRS 47.130 and 47.150, the City requests that the Court take judicial notice of this federal court order.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

C. Sua Sponte Dismissal Did Not Violate The Developer's Due Process Rights.

1. The Court May Sua Sponte Dismiss a Case Where it Lacks Subject Matter Jurisdiction.

The Court had no duty to provide notice and opportunity to be heard before it dismissed the Developer's inverse condemnation claims on jurisdictional grounds. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." NRCP 12(h)(3). The Court need not provide notice and an opportunity to respond when a dismissal is for lack of subject matter jurisdiction. *Scholastic Entm't, Inc. v. Fox Entm't Grp., Inc.*, 336 F.3d 982, 985 (9th Cir. 2003). "It has long been held that a judge can dismiss sua sponte for lack of jurisdiction." *Cal. Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280 (9th Cir. 1974); *see S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990); *accord Royal Ins. v. Eagle Valley Constr.*, 110 Nev. 119, 120, 867 P.2d 1146, 1147 (1994) (district court, *sua sponte*, dismissed a complaint for lack of subject matter jurisdiction). Because ripeness is a threshold jurisdictional matter, the Court's *sua sponte* dismissal was appropriate. *See S. Pac. Transp.*, 922 F.2d at 502; *Chandler*, 598 F.3d at 1122; *Resnick*, 104 Nev. at 65-66, 752 P.2d at 233.

2. The Developer Received Notice And An Opportunity To Be Heard On The Application Of Issue Preclusion And The Requirement Of A Major Modification.

Even if notice and opportunity to be heard were required before the Court could dismiss on jurisdiction grounds (they are not), the Developer received both in spades. The Intervenors raised the doctrine of issue preclusion and/or the requirement of a major modification in their (i) Motion to Intervene on Order Shortening Time; (ii) Answering Brief; (iii) oral argument at the June 29, 2018 hearing; and (iv) Post-Hearing Brief. The City also raised the issue that the Developer needed to comply with Judge Crockett's Order and apply for a major modification on the 35-Acre Property before it could redevelop the property. *See* Ansr. Br. at 26:22-27:15; *see* City of Las Vegas' Post-Hearing Sur-Reply Brief. The City expressly argued that the "rationale of Judge Crockett's Order would require that the Council approve a major modification before it could approve any applications for development of the Badlands

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Property." Ansr. Br. at 27:5-7.

The Developer also had ample opportunity to address both issue preclusion and the requirement of a major modification (i) in its Opposition to Motion to Intervene; (ii) during the May 8, 2018 hearing; (iii) during the June 29, 2018 hearing; and (iv) in its Post-Hearing Reply Brief. In fact, Developer's counsel repeatedly argued against the requirement of a major modification and acceptance of Judge Crockett's Decision during the June 29, 2018 hearing. *See* 6.29.2018 Hrg. Trans. at 59:10-60:11; 66:5-14; 76:23-77:2; 218:20-220:20; 225:21-226:9 and 237:3-20, **Exhibit B**.[2] In other words, the Developer received notice of the arguments and numerous opportunities to argue against those arguments well in advance of the Court's issuance of its October 11, 2018 Minute Order. In that Minute Order, the Court held, among other things, that the "impact of Judge Crockett's Order … would require both the 180 Land Co., LLC and Seventy Acres, LLC's parcels of land to apply to the Las Vegas City Council for an amendment to the Master Plan ***before development of the entire Badlands properties***." Minute Order at 3 (emphasis added). The Developer did not object to the Minute Order.

Thereafter, the City submitted its Findings of Fact, Conclusions of Law, which incorporated the Minute Order's legal analysis of issue preclusion and the preclusive effect of Judge Crockett's Order: "Petitioner failed to apply for a major modification, a prerequisite to any development of the Badlands Property. Having failed to comply with this prerequisite, Petitioner's alternative claims for inverse condemnation are not ripe and must be dismissed." *Id*. at ¶¶56-66. As this procedural history shows, and notwithstanding that notice and opportunity to be heard were not required for dismissal on jurisdictional grounds, the Developer received plenty of both.

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[2] The City received the June 29, 2018 hearing transcript from the court reporter without an executed signature page and is attempting to obtain the executed page from the court reporter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

D. The Court Correctly Concluded That The Developer Has No Vested Rights To Redevelop The Golf Course.

1. The Developer Fails to Identify Any Error in the Court's Vested Rights Analysis.

The Court also correctly dismissed the inverse condemnation claims on the independent ground that the Developer has no vested right to have development applications approved. In arguing to the contrary, the Developer simply rehashes its erroneous contention that a zoning designation alone confers vested rights. Request for Rehearing at 9:1-10:9. As the Court aptly held in its conclusions of law, a zoning designation does not give the developer a vested right to have its development applications approved. "In order for rights in a proposed development project to vest, zoning or use approvals ***must not be subject to further governmental discretionary action affecting project commencement***, and the developer must prove considerable reliance on the approvals granted." *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (emphasis added); *see also Stratosphere Gaming*, 120 Nev. at 527–28, 96 P.3d at 759–60 (holding that because City's site development review process under Title 19.18.050 involved discretionary action by Council, the project proponent had no vested right to construct). The Court correctly concluded that the Council properly exercised its discretion to deny the 35-Acre Applications.

"[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*, 106 Nev. at 311, 792 P.2d at 31-32 (affirming county commission's denial of a special use permit even though property was zoned for the use). Because the four Applications submitted to the Council for a general plan amendment, tentative map, site development review and waiver were all subject to the Council's discretionary decision making, no matter the zoning designation, the Developer has no vested right to have them or any other discretionary change to existing land conditions, approved. *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112; *Doumani*, 114 Nev. at 53, 952

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

P.2d at 17; *Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nevada, Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983).[3]

In its Request for Rehearing, the Developer does not identify any error in the Court's application of these authorities. Indeed, other than the *Stratosphere* case, the Developer's Request for Rehearing does not even mention them. And as to *Stratosphere*, the Developer only regurgitates (in a footnote) the same erroneous argument it raised previously and that the Court soundly and correctly rejected. Request for Rehearing at 9, n.5. This does not satisfy the standards under EDCR 2.24 or NRCP 52(b), 59 or 60.

2. Nevada Law Does Not Give the Developer A "Vested Right" to Redevelop Open Space Into Residential Uses.

The Developer's erroneous contention that landowners have vested rights under Nevada law to change the use of their property from open space to residential uses is not supported by the authorities the Developer cites and is no different than the argument it advanced earlier and lost. *See* Request for Rehearing at 9:2-3 (*citing McCarran Intl. Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006); *Schwartz v. State*, 111 Nev. 998, 900 P.2d 939 (1995)). In *Sisolak*, the Nevada Supreme Court simply interpreted the word "vested" in NRS 493.040, which states that "[t]he ownership of the space above the lands and waters of this state *is declared to be vested* in the several owners of the surface beneath." *Sisolak*, 122 Nev. at 659, 137 P.3d at 1120 (emphasis added). In other words, the vested right discussed in *Sisolak* derived from statutory language. *Id.*, quoting NRS 493.040. Based on that statute, which does not apply here, the Court concluded that physical invasion by airplanes flying below the minimum altitudes needed for flight established by the FAA warranted compensation for a physical invasion. *Id.* at 658-59, 137 P.3d at 1119-20.

Schwartz also involved a physical invasion in which the state condemned the landowner's easement to access its property, which the Court deemed a special class of property

[3] This is not just the law in Nevada but nationwide. *See*, *e.g.*, *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 872 (11th Cir. 2007) (interpreting Florida law); *Ellentuck v. Klein*, 570 F.2d 414, 429 (2d Cir. 1978) (interpreting New York law); *Aquino v. Tobriner*, 298 F.2d 674, 677 (D.C. Cir. 1961) (interpreting D.C. law); *City of Ann Arbor, Mich. v. Nw. Park Const. Corp.*, 280 F.2d 212, 221 (6th Cir. 1960) (interpreting Michigan law).

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

right protected by NRS 37.110(3). *Schwartz*, 111 Nev. at 1003, 900 P.2d at 942. Neither of these cases alters the well-established case law that there can be no vested right to develop property where further governmental approvals are discretionary. *See Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60 (post-dating *Sisolak*); *Foothills of Fernley, LLC v. City of Fernley,* 355 Fed.Appx. 109, 111, 2009 WL 3602019 at *1 (9th Cir. 2009) (continuing to cite *Am. W. Dev.* for that proposition even after the *Sisolak* decision). The Developer's reliance on *Sisolak* and *Schwartz* is misplaced.

3. The Supreme Court's Affirmance of Judge Smith's Interpretation the Queensridge CC&R's Did Not Create Any Vested Rights for the Developer

The Developer's misleading assertion (at 10:12-13:20) regarding Judge Smith's interpretation of Queensridge CC&R's does not create vested development rights where none exist under Nevada law. Judge Smith's interpretation of a contractual agreement among private parties has no bearing on the City's open space designation, the requirements of the City Code or the mandates of NRS Chapter 278, nor diminish the Council's discretion to deny land use applications. "[C]ontracts between private parties cannot create vested rights which serve to restrict and limit an exercise of a constitutional power of [government]." *Guar. Tr. Co. of New York v. Henwood*, 307 U.S. 247, 258-59 (1939).

Judge Smith described the matter before him as claims by the Queensridge homeowners that their "vested rights" in the CC&Rs were violated; whether the Developer had vested rights under state law was not at issue. *See* 11.30.16 Smith FFCL in Case No. A-16-739654-C at ¶¶2, 7, 29, 108, Supp. Ex. 17, Volume 13 at Ex. 83. Indeed, Judge Smith confirmed that, notwithstanding the zoning designation for the golf course property, the Developer is nonetheless "***subject to City of Las Vegas requirements***" and that the City is not obligated to make any particular decision on the Developer's applications. 1.31.17 FFCL ¶¶9, 16-17, 71, Supp. Ex. 7, Volume 3 at Ex. 7 (emphasis added). In other words, Judge Smith's orders undermine the very argument the Developer now advances.

Moreover, when affirming Judge Smith's orders, the Supreme Court simply stated that Judge Smith did not abuse his discretion when "concluding that the golf course property was

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

not subject to the CC&Rs." Request for Rehearing, Supp. Ex. 17, Volume 13 at Ex. 84. The Developer's leap from that language to the assertion that these decisions affirmatively state, as a matter of law, the Developer has "vested rights" to have the 35-Acre Applications granted (at 9:2-3) has no foundation in reality, much less the law or the record. Nothing stated in the Supreme Court's order of affirmance broadened the limited scope of the underlying orders being affirmed.

In any event, the language on which the Developer relies is, at best, dictum from an unpublished order of affirmance regarding interpretation of the Queensridge CC&R's and an order denying rehearing of a fee award. Under no circumstance could this be deemed "controlling Nevada Supreme Court precedent" over whether the Council properly exercised its discretion under NRS Chapter 278 and the Las Vegas Unified Code to deny the 35-Acre Applications because "[d]ictum is not controlling." *See St. James Vill., Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009). The "controlling Nevada Supreme Court precedent" that guides this case is *Stratosphere*. The Developer's argument as to the purported import of the unpublished Nevada Supreme Court order of affirmance takes overreach to a whole new level. Req. R'hrg 13:16-18.

Moreover, nothing about the Queensridge CC&Rs overcomes the fact that the Developer's predecessor sought and obtained the open space designation in order to comply with the City's park requirement and provide an amenity for the Peccole Ranch development. The Developer has therefore waived any rights to now challenge it. *See* NRS 278.0205 (a development restriction (such as the open space designation) created by a predecessor landowner binds successors); *Tompkins v. Buttrum Const. Co. of Nevada*, 99 Nev. 142, 146, 659 P.2d 865, 868 (1983); *Gladstone v. Gregory*, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979). Nothing about the Queensridge CC&Rs alters the City's land use authority under NRS Chapter 278. And nothing about the Queensridge CC&Rs gives the Developer a vested right to redevelop the golf course property. Judge Smith's Orders, and the affirmance of those orders by the Nevada Supreme Court, had nothing to do with the law regarding when development rights vest. *See Stratosphere Gaming Corp.*, 120 Nev. at 527–28, 96 P.3d at 759–60.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Although Judge Smith made a finding that the property is zoned RPD-7, nowhere did he even suggest, much less hold, that zoning alone creates a vested right to develop. *See* Request for Rehearing, Supp. Ex. 7, Volume at Ex. 7 and Supp. Ex. 17, Volume 13 at Ex. 83. To the contrary, Judge Smith expressly held that the Developer must submit development applications to the City for consideration and approval. Supp. Ex. 7, Volume at Ex. 7, ¶¶ 9 and 12; Supp. Ex. 17, Volume 13 at Ex. 83, ¶¶ 9, 50 and 86. As the Court correctly concluded, Nevada law is clear that a zoning designation does not confer a vested right nor overcome the requirement that zoning must conform to the master plan. NRS 278.250(2); *Stratosphere Gaming Corp.*, 120 Nev. at 527–28, 96 P.3d at 759–60. Judge Smith's decisions and the Nevada Supreme Court's order of affirmance do not hold otherwise.

Although the Developer blows a lot of hot air about Judge Smith's orders and the Supreme Court's order affirming them, it effectively concedes they are inapplicable here by failing to even assert they have preclusive effect. This omission requires that the Court ignore the Developer's entire discussion of Judge Smith's orders. *See* EDCR 2.20(c) ("The absence of [a] memorandum [of points and authorities in support of each ground for a motion] may be construed as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds not so supported."). Without the Developer having proven that Judge Smith's orders have any preclusive effect to the instant matter, this Court need not consider them.

E. Absent a Vested Right, There Can Be No Taking.

1. The Council's Proper Exercise of Its Discretion Required The Developer's Takings Claims to be Dismissed, As a Matter of Law.

Because neither mere ownership of property, nor a zoning designation, creates a vested right to redevelop it, the Council's discretionary actions do not constitute a taking as a matter of law. "The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons ***of vested property rights***…." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994) (emphasis added). Under Nevada law, a vested property right is something that is "fixed and established." *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

535, 537 (1949); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715, (2010) (noting a property right must be "established" for a taking to occur). As the Court correctly concluded, absent a vested right to redevelop the golf course into something other than open space, the Developer cannot state a legally cognizable constitutional claim. FFCL ¶63.

The Developer's purchase of the Property on speculation that the Council *might* exercise its discretion to allow for redevelopment of the golf course/open space into some other use does not alter this conclusion.

> [Property interests are] of course ... not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understanding that secure certain benefits and that support claims of entitlement to those benefits. [To have such a property interest], "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Stated simply, when evaluating a takings claim, "the question is, [w]hat has the owner lost?" *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). If the landowner retains the same interests it had previously, there is no taking. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1937 (2017).

Here, the Developer's predecessor sought and obtained the open space designation for the golf course as an amenity to and to add value to the surrounding properties. *See* Peccole Ranch Master Plan at 2658-60. At the urging of the Developer's predecessor, the City incorporated the open space designation into its master plan. *Id.* The Developer bought the golf course on speculation that the City might exercise its discretion to allow another use. The City's rejection of the 35-Acre Applications leaves the Developer in the exact position it held previously.

In other words, the Developer does not identify anything that has been *taken*. The Developer's unilateral decision to abandon the golf course use does not create a taking. Rather, where the developer still has the same "bundle of sticks" it had previously, there is no taking, as a matter of law, and the Court's dismissal of the inverse condemnation claims was proper.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

2. The Developer Misrepresents the *Lucas* Decision.

a. *Lucas* Does Not Create The Blanket Rule the Developer Asserts.

The language from *Lucas* on which the Developer relies is from the background facts and a dissenting opinion, not the holding of the Supreme Court's majority. And the facts from *Lucas* are not analogous to this case. Unlike the denial of specific development applications, which is the issue presented here, the plaintiff in *Lucas* claimed a taking simply through the government agency's enactment of a statute that rendered his land "valueless." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006 (1992).

> Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives.

Id. at 1009. The Developer erroneously construes these background facts as creating a "holding" that any proper exercise of governmental discretion is subject to an inverse condemnation claim. Request for Rehearing at 8:8-13. That is not what *Lucas* says. Indeed, to support that untenable assertion, the Developer cites to Justice Blackman's ***dissenting opinion***. *Id.* at 8:6-13, *citing* 505 U.S. at 1044-46, J. Blackman, dissenting.

In *Lucas*, the petitioner purchased two residential lots on a barrier island east of Charleston, South Carolina. 505 U.S. at 1006-1007. Approximately two years later, the state legislature passed the Beachfront Management Act, which absolutely prohibited construction of "habitable improvements" on the Lucas' lots. *Id.* at 1008-1009. *Lucas* sued, contending that the outright ban on development constituted a taking without just compensation. *Id.* at 1009. The trial court agreed, finding that the act rendered his lots valueless. *Id.*

On appeal to the South Carolina Supreme Court, the Coastal Council argued that "no compensation is due a landowner whose private use threatens serious public harm." *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992). Lucas argued that if a regulation deprives a landowner of "all economically viable use" of its property, it works a "taking" for which compensation is due, regardless of any other consideration. *Id.* at

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

898. The South Carolina Supreme Court treated Lucas' argument as a *de facto* concession that the Act was necessary to protect a valuable public resource. *Id.* at 902. It reversed the trial court, citing *Mugler v. Kansas*, 123 U.S. 623 (1887) for the proposition that, "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking...." *Id.* at 900-02.

The Supreme Court granted certiorari to address the issue of whether the Act's total wipeout of the economic value of the property accomplished a taking of private property. *Lucas,* 505 U.S. at 1007. The Supreme Court did not, however, reach the ultimate issue of whether a taking occurred. Instead, the Court established a framework for identifying property interests that qualify for protection under the Fifth and Fourteenth Amendments using state law "background principles" to analyze regulations that deprive land of *all* economically beneficial use. *See id.* at 1027-1032. Nowhere in the Court's holding is there any discernable language that states the purported proposition for which the Developer cites the case here.

b. *Lucas* Involved a Facial Attack on a Statute, Not As-Applied Claims as Exist Here

The Developer's reliance on *Lucas* is also misplaced because the Developer does not assert a facial challenge to any land use regulation. A facial challenge involves "a claim that the ***mere enactment of a statute*** constitutes a taking," while an as-applied challenge involves "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir. 1993) (emphasis added), *citing Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). Unlike *Lucas*, the Developer's inverse condemnation claims are necessarily "as-applied" claims since they challenge the City's application of existing regulations to a specific piece of property, namely the denial of the 35-Acre Applications.

The Developer's reliance on *Lucas* ignores the critical distinction between facial and as-applied takings claims, which dictates the applicable standards for determining whether a taking has occurred and is dispositive of this case. Since a facial takings claim presents no concrete

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

controversy concerning the application of regulations to a specific piece of land, the only issue is whether the mere enactment of a regulation deprives an owner of all economic use of its land. *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981). That is not what the Developer asserts here.

Here, the Developer challenges the Council's denial of specific development applications for the 35-Acre Property, which the Court correctly concluded was a proper exercise of the Council's discretion. When the government acts within the bounds of its discretion as to specific development applications, as-applied takings claims necessarily fail as a matter of law.[4] This is because "[l]ocal zoning authorities must have the ability to protect important natural resources and the interests of their local communities through reasonable land use restrictions without being forced … to pay compensation to every frustrated developer that had hoped to maximize its bottom line." *Pulte Home Corp. v. Montgomery Cty., Maryland*, 909 F.3d 685, 696 (4th Cir. 2018). As the Supreme Court succinctly stated, "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). Where, as here, the Council properly exercised its discretion to deny the 35-Acre Applications, the Court correctly dismissed the Developer's inverse condemnation claims because no taking occurred, as a matter of law.

F. The Developer Fails to Satisfy The Standards For Reconsideration.

In support of its Request for Rehearing, the Developer cites EDCR 2.24 and NRCP 52(b), 59 and 60 but, as the foregoing analysis demonstrates, does not meet its burden to obtain reconsideration under those rules. Such rules "offer[] an 'extraordinary remedy, to be used

[4] The distinction between facial challenges and as-applied claims is also important because facial challenges "are generally ripe the moment the challenged regulation or ordinance is passed," *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, n. 10 (1997), whereas as-applied challenges must satisfy the ripeness requirements of *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), as the Court correctly concluded in its FFCL. As discussed *supra*, the Court correctly concluded that Developer's claims are not ripe until the Developer receives a final decision on an application for a major modification to the master plan designation of the golf course property. *See id.*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

sparingly in the interests of finality and conservation of judicial resources.'" *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000), quoting 12 Moore's Federal Practice §59.30[4] (3d ed. 2000) (discussing the federal corollary of NRCP 59(e)). The Developer presents no grounds for the Court to provide such an "extraordinary remedy." *See id.*

1. The Developer Does Not Demonstrate That The Judgment Is Clearly Erroneous

The only basis for reconsideration claimed by the Developer is "clear error." Request for Rehearing at 17:7. The Request for Rehearing fails to identify a single error that could justify setting aside the Court's dismissal of the inverse condemnation claims. As set forth herein, the Court made numerous findings, none of which has the Developer challenged as incorrect, and went through a detailed analysis of the pertinent legal authorities to reach the correct legal conclusions.

2. The Developer's Regurgitation of its Previous Arguments is Not Grounds for Reconsideration

Because the Developer simply regurgitates arguments the Court has already considered and rejected, the Request for Rehearing must be denied. A motion for reconsideration may not be used "to relitigate old matters." 11 Fed. Prac. & Proc. Civ. §2810.1 (3d ed.); *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008); *see also Geller v. McCowan*, 64 Nev. 106, 108, 178 P.2d 380, 381 (1947) (noting that re-argument is prohibited in a petition for rehearing of appellate decision).

Here, the Developer's assertions regarding vested rights and a major modification relitigate matters it already litigated extensively and lost. *See*, *generally*, Pet.'s P&A; Post-Hearing Reply Br..; Opp. to Motion to Intervene; 6.29.2018 Hrg. Trans. at 59:10-60:11; 66:5-14; 76:23-77:2; 218:20-220:20; 225:21-226:9 and 237:3-20, attached as **Exhibit B**. The Court correctly rejected those arguments before and should not revisit them now.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

3. The Developer May Not Rely on Materials That Post-Dated the Council's Decision Because They Are Outside the Record

The Request for Rehearing must also be denied because the Developer improperly cites to matters that post-dated the Council's June 21, 2017 Decision and that are otherwise outside the record on review. The scope of the Court's review is limited to the record made before the administrative tribunal. *Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982). That scope cannot be expanded with a motion for reconsideration. *See id.*

Here, the Developer cites to and attaches documents that were not part of the record on review at the time the Council rendered its June 21, 2017 Decision. *See* Request for Rehearing at 10:12-18, 12:9-16, 13:1-10, 15:10-19, n.16, citing Exs. 84, 98. For example, the two ordinances that allegedly "solely target the 250 Acre Residential Zone Land" (at 15:14-15) post-dated the Council's denial of the 35-Acre Applications and are therefore outside the record. *See C.A.G.*, 98 Nev. at 500, 654 P.2d at 533. Similarly, the Developer's attacks on Councilmember Seroka (at 15:15-16 and n.16) cannot be considered because he was not even on the Council at the time of the June 21, 2017 Decision. *See* 6.29.2018 Hrg. Trans. at 132:24-133:24, **Exhibit B**.[5] Likewise, the Supreme Court's order of affirmance and order denying rehearing related to Judge Smith's orders (Exs. 84 and 98) were entered on October 17, 2018 and November 27, 2018, respectively, long after the Council's June 21, 2017 Decision. The Developer may not use a motion for reconsideration to expand the record beyond that which the Council considered because the Court may only judge the Council's decision based on what had occurred at that time and not thereafter. *See C.A.G.*, 98 Nev. at 500, 654 P.2d at 533.

4. NRCP 52(b) Does Not Apply Where the Developer Does Not Identify Any of the Court's Findings of Fact That Warrant Amendment

Although it brings its Request for Rehearing pursuant to NRCP 52(b), that rule is directed only at amendment of factual "findings," and the Developer does not identify any

[5] Notably, the federal court recently dismissed the Developer's due process and equal protection claims against the City, Councilmember Seroka and another Council member. *See* **Exhibit A**.

errors in the Court's findings of fact. *See id.* "Rule 52(b) merely provides a method for amplifying and expanding the lower court's findings, and is not intended as a vehicle for securing a re-hearing on the merits … [and is not the] proper rule to invoke when seeking a re-trial or a re-hearing." *Matter of Estate of Herrmann*, 100 Nev. 1, 21 n.16, 677 P.2d 594, 607 n.16 (1984). Here, because there is no reference in the Request for Rehearing to a single factual finding, denial of the Developer's Rule 52(b) motion is warranted.

5. The Developer May Not Present Arguments and Materials it Could Have Presented Earlier But Did Not

The Developer's Request for Rehearing also must be denied because it advances arguments the Developer could have raised earlier but chose not to. "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters.*, 229 F.3d at 890. "Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing." *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996).

That is precisely what the Developer does here. Judge Smith's findings of fact and conclusions of law on which the Developer rests its current Motion were issued on November 30, 2016, long before the Council's June 21, 2017 Decisions that the Developer challenges in this case. And the Developer repeatedly cited to Judge Smith's order both before the Council and before this Court, ***but not for the proposition it now advances***. *See* Pet.'s P&A at 9:5-10:10, 17:1-2; 6.29.18 Hrg. Trans. at 109:6-110:13, **Exhibit B**. Up until now, the Developer cited Judge Smith's decision for the unremarkable and irrelevant propositions that the golf course property is not part of the Queensridge Common Interest Community; the Queensridge homeowners have no rights in the golf course property; and the golf course property is zoned R-PD7. *See id.* Contrary to the Developer's baseless assertion now (at 13:16-20), the Court ***did*** consider those arguments. *See id.* Although Judge Smith noted that the property is zoned R-PD7, the Court correctly rejected Judge Smith's orders as having any importance in this matter because Judge Smith's interpretation of the Queensridge CC&R's does not affect the Council's

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

discretion under NRS Chapter 278 and the City's Unified Development Code to deny the 35-Acre Applications.

At no point previously did the Developer ever assert as it does now that Judge Smith "held" the Developer had vested rights to have its development applications approved. Nor could it because the matter before Judge Smith had nothing to do with that question. Moreover, the Developer never presented Judge Smith's January 31, 2017 findings of fact and conclusions of law to the Council that it includes as Exhibit 7 to its Request for Rehearing (even though it presented his November 30, 2016 findings of fact and conclusions of law), which prohibits the Court from reviewing it on reconsideration. *See C.A.G.*, 98 Nev. at 500, 654 P.2d at 533. The Developer also did not challenge the Court's Minute Order, even though it was issued prior to the Court's entry of its findings of fact and conclusions of law. Because the Developer could have advanced its arguments regarding Judge Smith's orders earlier but did not, they must be disregarded. *See Kona Enters.*, 229 F.3d at 890.

6. Rule 60 is Inapplicable.

Although the Developer did not identify under what part of Rule 60 it requests relief, nothing in that rule justifies reconsideration of the dismissal. NRCP 60 allows relief from a final judgment, order, or proceeding only for the following reasons: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud. . .misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable than an injunction should have prospective application." NRCP 60(b).[6] The Developer failed to provide any analysis of this standard, which requires that the Rule 60 motion be denied. *See* EDCR 2.20.

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[6] Rule 60(a) also provides relief based on a clerical mistake, which is inapplicable here. NRCP 60(a).

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

G. The Developer's Judicial Taking Argument is an Improper Attack on the Independent of the Judicial Branch

In the absence of any viable legal arguments, the Developer resorts to threatening the Court with a "judicial takings," something that does not exist under Nevada law. There is no Nevada Supreme Court decision that recognizes a judicial taking. Even if this Court were to look for guidance in federal law, the Developer's judicial taking theory fails as a matter of law because the United States Supreme Court has never recognized the concept of a judicial taking in a majority opinion.

Once, in a concurring opinion, Justice Potter Stewart wrote that a judicial taking could only occur where a judicial decision "constitutes a sudden change in state law, unpredictable in terms of relevant precedents." *Hughes v. Washington*, 389 U.S. 290, 296 (1967). As set forth in the legal authorities cited *supra*, the Court's dismissal of the Developer's claims is well grounded in Nevada law. The circumstance described by Justice Stewart, even if it were binding precedent (it is not), is inapplicable here.

Second, in the case cited by the Developer, Justice Antonin Scalia wrote in a plurality opinion that a state court of last resort could be found to have "taken" property for public use where its decision contravened an established right of private property. *Stop The Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010). This district court is not a Nevada court of last resort and therefore could never effectuate a taking even under the case cited by the Developer. Moreover, as set forth in the legal authorities cited *supra*, the Developer has no "established" right to change the use of the golf course from open space to anything else. Indeed, as Justice Scalia notes, "A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court." *Id.* at 726 n.9.

The Developer bought the golf course knowing that it was designated open space by the City's General Plan and the Peccole Ranch Master Development Plan. Changes to these documents are within the sole discretion of the City Council. As a result, even if a judicial taking were recognized in Nevada (it is not), the Court has done nothing that could be construed

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

as one. The Court should therefore disregard the Developer's threats and deny the Request for Rehearing.

III. CONCLUSION

The Court lacks jurisdiction to consider the Developer's fugitive summary judgment motion and properly dismissed the inverse condemnation claims for lack of jurisdiction because they are not ripe. The Court also properly dismissed the inverse condemnation claims, as a matter of law, because the Developer has no vested rights. Nothing was "taken" when the Council properly exercised its discretion to deny the Developer's request to change open space into residential uses. Because the Developer does not meet the standards of EDCR 2.24 or NRCP 52(b), 59 or 60, the Request for Rehearing must be denied.

Respectfully submitted this 7th day of January, 2019.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III, Esq. (NV Bar #3552)
Debbie Leonard (NV Bar #8260)
Amanda C. Yen (NV Bar #9726)
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102

LAS VEGAS CITY ATTORNEY'S OFFICE
Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
495 S. Main Street, 6th Floor
Las Vegas, NV 89101

Attorneys for City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 7th day of January, 2019, a true and correct copy of the foregoing **CITY OF LAS VEGAS' OPPOSITION TO PLAINTIFF LANDOWNERS' REQUEST FOR REHEARING/RECONSIDERATION OF ORDER/JUDGMENT DISMISSING INVERSE CONDEMNATION CLAIMS** 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

EXHIBIT “A”

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

180 LAND CO LLC, et al., Plaintiff(s), v. CITY OF LAS VEGAS, et al., Defendant(s).	Case No. 2:18-CV-547 JCM (CWH) ORDER

Presently before the court is defendants City of Las Vegas, James Coffin, and Steven Seroka's (collectively "defendants") motion to dismiss. (ECF Nos. 14, 17). Plaintiffs 180 Land Co LLC ("180 Land"); Fore Stars, Ltd ("Fore Stars"); Seventy Acres LLC ("Seventy Acres"); and Yohan Lowie (collectively "plaintiffs") filed a response (ECF No. 24), to which defendants replied (ECF Nos. 30, 36).

Also before the court is defendants' second motion to dismiss. (ECF Nos. 16, 23). Plaintiffs' filed a response (ECF No. 27), to which Coffin and Seroka replied (ECF No. 37).

Also before the court is plaintiffs motion to consider supplemental documents. (ECF No. 64). Defendants filed two responses (ECF Nos. 65, 68, 69), to which plaintiffs replied (ECF No. 70).

I. Facts

Fore Stars, 180 Land, and Seventy Acres ("plaintiff landowners") collectively own approximately two hundred and fifty (250) acres of real property ("the Badlands property") within the boundaries of the City of Las Vegas. (ECF No. 1). Plaintiff landowners originally operated, through a lease, a golf course on the property. *Id.* On December 1, 2016, plaintiff landowners shut down the golf course and began converting the land for residential and commercial use. *Id.*

On November 30, 2017, the State of Nevada State Board of Equalization approved the Clark County Assessor's determination that plaintiff landowners converted the property to a "higher use" for residential and commercial development in accordance with NRS 261A.031. *Id.*

Plaintiffs allege that Coffin and Seroka, who are council members on the Las Vegas City Council ("City Council"), have used and continue to use their official capacity to oppose plaintiffs' numerous applications to develop the Badlands property. *Id.* Plaintiffs further allege that Coffin and Seroka have remarkable animus and bias against plaintiffs, which renders their participation on the City Council unlawful. *Id.*

The complaint contains a number of details pertaining to Coffin and Seroka's bias. *See id.* Plaintiffs primarily allege that Coffin categorically refused to allow development of the Badlands property unless plaintiffs met the demands of Coffin's longtime friend, Mr. Binions. *Id.* At the time Coffin purportedly imposed this precondition, Mr. Binion was demanding plaintiffs to hand over one hundred and eighty-three (183) acres of the Badlands property. *Id.* Plaintiffs further alleged that Coffin made various statements to Lowie, who is of Jewish descent, that compared Lowie's actions to develop the Badlands Property to Israel's treatment of Palestinians. *Id.* The complaint contains a letter that Coffin sent to Todd Polikoff, the president and CEO of Jewish Nevada, in which he confirms making such statements to Lowie. (ECF No. 1-4).

As to Seroka, plaintiffs allege that Seroka attended a town hall meeting at the Queensridge Common Interest Community Clubhouse, which is located in a community that contains wealthy, influential homeowners that oppose development of the Badlands property. (ECF No. 1). In that town hall meeting, Seroka purportedly stated that it would be "the stupidest thing in the world" for the City Council to follow the letter of the law in adjudicating plaintiffs' applications. *Id.*

On March 26, 2016, plaintiffs filed a complaint alleging four causes of action: (1) violation of equal protection under the Fourteenth Amendment of the United States Constitution pursuant to 42 U.S.C. § 1983; (2) violation of procedural due process under the Fourteen Amendment of the United States Constitution pursuant to § 1983; (3) violation of equal protection under Article Four, Section Twenty-one of the Nevada Constitution; (4) violation of procedural due process under Article One, Section Eight, Subsection Five of the Nevada Constitution. (ECF No. 1).

Now, defendants move to dismiss all four of plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6). (ECF No. 16).

II. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.*

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged – but it has not shown – that the pleader is entitled to relief." *Id.* at 679. When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

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The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court held,

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

III. Discussion

As a preliminary matter, the court will deny plaintiffs' motion to consider supplemental documents (ECF No. 64). At this stage in litigation, the court is under no obligation to consider additional substantive evidence because courts primarily examine the allegations in the complaint to determine whether a plaintiff has filed a proper pleading. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Moreover, considering the additional documents would unfairly prejudice the defendants because plaintiffs filed the respective evidence after the parties fully briefed the motions to dismiss (ECF Nos. 14, 16). Therefore, the fair administration of justice requires the court to proceed without relying on the additional evidence in the record. *See, e.g., Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (holding that district courts have inherent power to control their own dockets).

The court will also deny without prejudice defendants' first motion to dismiss (ECF No. 14). Pursuant to Local Rule IC 2-2(b), a separate document must be filed on the docket for each purpose. Defendants' motion is a non-compliant document under this rule as it consists of three distinct motions: (1) a motion to dismiss, (2) a motion for more definite statement, and (3) a motion to stay. *See* (ECF No. 14). The court will not consider defendants' motions unless they are filed as separate documents. *See* LR IC 7-1 ("The court may strike documents that do not comply with these rules.").

As to defendants' second motion to dismiss (ECF No. 16), the court hereby addresses each cause of action in turn.

i. Equal protection under the United States Constitution

The United States Supreme Court has recognized that the Equal Protection Clause may, in some circumstances, afford individuals relief from intentional, irrational, and differential treatment at the hands of the Government. *E.g., Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam). To state a "class of one" claim, plaintiffs must allege that the City Council: "(1) intentionally (2) treated [plaintiffs] differently than other similarly situated property owners, (3) without rational basis." *Gerhart v. Lake Cnty., Montana*, 637 F.3d 1013, 1019 (9th Cir. 2011) (citing *Willowbrook*, 528 U.S. at 564).

Here, the complaint does not provide any details regarding similarly situated landowners, other than stating that those landowners submitted applications that "conformed with all relevant laws and regulation and were approved by the Staff and Planning Commission." (ECF No. 1). However, a plaintiff cannot assert a valid equal protection claim by placing "all persons not injured into a preferred class receiving better treatment than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quotes and citation omitted). Without greater similarities between plaintiffs and the preferred class of similarly situated landowners, the allegations in the complaint cannot "plausibly suggest an entitlement to relief." *Starr*, 652 F.3d at 1216; *see also Thornton*, 425 F.3d at 1167–68 (9th Cir. 2005) (holding that different land uses, or even an identical use in a different zone, do not qualify as similarly situated). Therefore, the court will dismiss without prejudice plaintiffs' equal protection claim.

ii. Procedural due process under the United States Constitution

To state a claim for procedural due process, a plaintiff must allege: "(1) a liberty or property interest protected by the constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

Defendants argue that the court should dismiss plaintiffs' procedural due process claim because plaintiffs' alleged right to develop the Badlands property is not a constitutionally protected property interest. (ECF No. 16). The court agrees.

A government benefit, such as a license or permit, may give rise to a protectable property interest where the recipient has a "legitimate claim of entitlement to it." *Gerhart v. Lake Cnty., Montana*, 637 F.3d 1013, 1019 (9th Cir. 2011). A legitimate claim of entitlement can exist where state law significantly limits the decision maker's discretion or where the decision maker's policies and practices create a de facto property interest. *Gerhart*, 637 F.3d at 1021; *see Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2007) ("Vested rights in a land development permit . . . 'are created and their dimensions are defined by existing rules or understandings that stem from . . . state law.'") (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

Plaintiffs cite various provisions of the Las Vegas Unified Development Code (Title 19.16.030, 090, 100, and 130) and NRS 278.349 in support of their claim that state law significantly limits the City Council's discretion. (ECF No. 27). These laws impose procedural constraints on the City Council in considering various land development applications.

"[P]rocedural requirements ordinarily do not transform a unilateral expectation into a protected interest. . . ." *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994). However, when procedural requirements amount to a "significant substantive restriction on . . . decision making[,]" a protected property interest arises. *Id.*

The court has reviewed the Las Vegas Unified Development Code and NRS 278. The pertinent provisions do not contain language that significantly limits the City Council's discretion. *See* NRS 278.349(1) ("the governing body . . . shall . . . approve, conditionally approve or disapprove a tentative map . . ."); *see also* NRS 278.349(3) (providing factors the planning commission considers in reviewing tentative maps); *see also* Title 19.16.030(H)(2)(a) ("The City Council may approve or deny a proposed General Plan Amendment."); *see also* Title 19.16.090(B) ("the City Council may . . . rezone any parcel or area of land within the City from one zoning district to another . . ."); *see also* Title 19.16.100(G)(2)(h) ("The city Council may approve,

approve with conditions, or deny an application . . ."); *see also* Title 19.16.130(B) ("[T]he city council may affirm, modify or reverse the decision of the planning commission.")[1]

Accordingly, the court will dismiss with prejudice plaintiffs' second cause of action for procedural due process.

iii. Equal protection under the Nevada Constitution

Because the Equal Protection Clause of the Nevada Constitution mirrors its federal counterpart, Nevada courts "have interpreted the standard of the Equal Protection Clause of the Nevada Constitution to be the same as the federal standard. . . ." *Armijo v. State*, 904 P.2d 1028, 1029 (Nev. 1995); *In re Candelaria*, 245 P.3d 518, 523 (Nev. 2010). Accordingly, the court will dismiss without prejudice plaintiffs' Nevada equal protection claim for the same reason that it will dismiss plaintiffs' federal equal protection claim. *See Cinque v. Ward*, No. 3:09-cv-00229-ECF (RAM), 2010 WL 3312608 at *5 (D. Nev. July 28, 2010).

iv. Procedural due process under the Nevada Constitution

The Due Process Clause of the Nevada Constitution also requires the same analysis as its federal counterpart. *In re Candelaria*, 245 P.3d at 523; *Reinkemeyer v. Safeco Ins. Co. of Am.*, 16 P.3d 1069, 1072 (Nev. 2001). Therefore, the court will dismiss with prejudice plaintiffs' Nevada procedural due process claim for the same reason that it will dismiss plaintiffs' federal procedural due process claim. *See Cinque*, 2010 WL 3312608 at *4.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion to dismiss (ECF No. 14) be, and the same hereby is, DENIED without prejudice.

IT IS FURTHER ORDERED that defendants' second motion to dismiss (ECF No. 16) be, and the same hereby is, GRANTED, consistent with the foregoing.

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[1] Plaintiffs do not reference any specific provisions in support of their contention that the Las Vegas Uniform Development Code and NRS 278 substantially limit the City Council's discretion. *See* (ECF No. 27).

IT IS FURTHER ORDERED that plaintiffs' motion to consider supplemental documents (ECF No. 64) be, and the same hereby is, DENIED.

DATED December 21, 2018.

UNITED STATES DISTRICT JUDGE

EXHIBIT “B”

CASE NO. A-17-758528-J

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

180 LAND COMPANY LLC,
Plaintiff,
vs.
LAS VEGAS CITY OF,
Defendant.

REPORTER'S TRANSCRIPT
OF
PETITION FOR JUDICIAL REVIEW

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED FRIDAY, JUNE 29, 2018

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

APPEARANCES:

FOR THE PETITIONERS:

HUTCHISON & STEFFEN, LLC
BY: MARK A. HUTCHISON, ESQ.
BY: JOSEPH KISTLER, ESQ.
10080 ALTA DRIVE
SUITE 200
LAS VEGAS, NV 89145
(702) 385-2500
(702) 385-2086 Fax
MHUTCHISON@HUTCHLEGAL.COM

KAEMPFER CROWELL, LTD.
BY: STEPHANIE ALLEN, ESQ.
BY: CHRISTOPHER KAEMPFER, ESQ.
1980 FESTIVAL DRIVE
SUITE 650
LAS VEGAS, NV 89135
(702) 792-7000
(702) 796-7181 Fax
SALLEN@KCNVLAW.COM

APPEARANCES CONTINUED:

EHB COMPANIES LLC
BY: TODD DAVIS, ESQ.
BY: ELIZABETH HAM, ESQ.
1215 SOUTH FORT APACHE
SUITE 120
LAS VEGAS, NV 89117
(702) 940-6930
(702) 940-6938 Fax
TDAVIS@EHBCOMPANIES.COM

KERMITT L. WATERS
BY: JAMES J. LEAVITT, ESQ.
704 SOUTH NINTH STREET
LAS VEGAS, NV 89101
(702)733-8877
(702)731-1964
JIM@KERMITTWATERS.COM

APPEARANCES CONTINUED:

FOR THE CITY OF LAS VEGAS:

MCDONALD CARANO WILSON, LLP
BY: GEORGE F. OGILVIE, III, ESQ.
BY: AMANDA YEN, ESQ.
2300 WEST SAHARA AVENUE
SUITE 1000
LAS VEGAS, NV 89102
(702) 873-4100
(702) 873-9966 Fax
GOGILVIE@MCDONALDCARANO.COM

FOR THE INTERVENORS:

PISANELLI BICE PLLC
BY: DUSTUN HOLMES, ESQ.
BY: KIRILL V. MIKHAYLOV, ESQ.
400 SOUTH SEVENTH STREET
SUITE 300
LAS VEGAS, NV 89101
(702) 214-2100
(702) 214-2101 Fax
DHOLMES@DHH@PISANELLIBICE.COM

ALSO PRESENT:

JIMMERSON HANSEN, P.C.
BY: JAMES J. JIMMERSON, ESQ.
415 SOUTH SIXTH STREET
SUITE 100
LAS VEGAS, NV 89101
(702) 388-7171
(702) 380-6406 Fax
KS@JIMMERSONLAWFIRM.COM

LAS VEGAS CITY ATTORNEYS OFFICE
BY: PHILIP R. BYRNES, ESQ.
BY: SETH FLOYD, ESQ.
495 SOUTH MAIN STREET
6TH FLOOR
LAS VEGAS NV 89101
(702) 229-6629
PBYRNES@LASVEGASNEVADA.GOV

* * * * *

10:38:15 you look at the city's master plan, you've got this golf course area that's drainage or that's set aside for open space or that is designated a golf course or that is what's called PROS, which is open space recreation.

THE COURT: I understand.

MR. HUTCHISON: So --

THE COURT: I saw that.

MR. HUTCHISON: Right, so you saw it.

10:38:34 And what they say is, Now, wait a minute. You guys are trying to come in here on this golf course, build residential. You can't do that. You got to go with a major modification of those master plans, or you got to go with some major general plan amendment. 10:38:48 NRS 278.349, subsection 3(e) is dispositive, your Honor. It says when you're looking at a tentative map like we are here, like with the application is, consider all these factors, including conformity with the master plan. But if there's a conflict between the 10:39:06 master plan and zoning, zoning wins. That's what it says. I mean, it's dispositive.

All their arguments about master plans and how you got to modify them and you got to amend them because we've got residential development here and the 10:39:22 master plan doesn't say residential development is

absolutely dispositively answered by NRS 278.349 3(e).

Talk about being a judge who will make a decision that will cut the intervenors off that fast, you don't have to even listen after that point because their whole basis of their arguments are you got to amend the master plan, you got to have a major modification of the master plan. Really? We're building residential houses on a RPD-7 zoning district, and we've got 278.349 3(e) which tells us if there's a conflict between the two, zoning wins. We're done. Judge, that is dispositive.

And if you write anything down from what we just spent an hour doing, write down NRS 278.349 3(e) trumps the master plan. It wins. You got a conflict, the state legislature already took care of that all the way back in 1979. Passed two houses by the majority. The governor signed it. That's law.

Judge, it's dispositive of just about everything you're going to hear from the intervenors. When they get up and start talking about master plan, ask them about that. You know what, it wasn't even cited in their brief. Wasn't even cited in their brief.

Your Honor, would you like me to continue or --

what? Or --

MR. HUTCHISON: Oh, I see what you're saying.

THE COURT: You see where I'm going?

MR. HUTCHISON: Okay. Sure. Sure.

To the extent, then, that the city argues now, or certainly the intervenors argue now that you've got to have a major modification before you can actually go build residential single-family homes, your impact is no, that's incorrect. And you can't force the applicant to go through a major modification process or even a general plan amendment to match the residential with your -- with your master plan. You can't force them to do that. Because we already have a statute, legislature says we're already resolved the conflict.

I hope that -- I hope I'm getting to your points.

THE COURT: I understand what you're saying.

MR. HUTCHISON: Yeah, but I can tell you're still kind of wondering, what's this impact going to be?

THE COURT: Yeah. I mean, what's the impact on the decision? I see -- at one level, you said, Look, you can't force --

MR. HUTCHISON: Oh, yeah, sure.

THE COURT: I get that. You know --

were in the CC&Rs. They said, Look, Chapter 116 trumps that; right?

MR. HUTCHISON: Right?

THE COURT: I understand the policy reason why it was done, but nonetheless, they looked at the statute, what does the statute provide.

MR. HUTCHISON: That's right. That's what it says, your Honor.

THE COURT: Right.

MR. HUTCHISON: That's what it says.

So to summarize in terms of your questions, master plan discussion, master plan argument, majorly modifying master plans, including general plan amendments for master plans, are irrelevant if you accept that the controlling law in this case is NRS 278.349, subsection 3(e).

And there's -- there's no question to that. There's no other way to read that statute. That's one of the reasons why you probably fundamentally disagree with Judge Crockett.

THE COURT: Well, I haven't agreed or disagreed. Understand that.

MR. HUTCHISON: I'm just telling you -- I'm just telling you. That can't be squared with saying you're to -- you got to have a major modification on

RPD-7 zoning. You can't square that. That's what I'm telling you.

THE COURT: I understand.

MR. HUTCHISON: So, Judge -- so, Judge, but while -- while -- I'm sorry.

MS. ALLEN: I was just going to clarify again. The difference, though, was Judge Crockett, we were asking for a zoning change. So it was a more discretionary type --

MR. HUTCHISON: Okay.

MS. ALLEN: -- approval. It doesn't matter the major mod, it was an error. But just to clarify, here it's even more clear.

THE COURT: Well, I guess, and ultimately it's like going back to the Olive Branch case. Once the zone change is made, then the focus as far as conformity concern is the new zoning for the property.

MS. ALLEN: Right.

MR. HUTCHISON: That's correct.

MS. ALLEN: Yes.

MR. HUTCHISON: That's exactly right, your Honor. That's exactly right. How else could you have certainty with property that you're purchasing? How else could you have certainty when you're going to spend millions -- as in this case, your Honor. When

11:56:29 complete abuse of discretion, arbitrary and capricious to say when these homeowners come marching in before us, we're going to make sure we do everything that they want us to do and maintain those views of the golf
11:56:40 course.

Judge, I'd also point you to Judge Smith's findings of fact and conclusions of law No. 53. And Judge Smith's findings of fact and conclusions of law No. 81. They're both included within our -- within our
11:56:59 briefing about Queensridge is not -- the golf course isn't part of Queensridge. It's not subject to CC&Rs. And, in fact, Judge Smith found that the developer defendants, clearly the petitioner, had the right to develop the golf course land.

11:57:15 I will tell you, you can take a look yourself at that, but that was after a very, very heated proceeding. I think there were like 90 contested matters on that. Over the course of months and months and months, evidentiary hearings, that was fully
11:57:33 litigated, Judge, with causes of action. It wasn't a petition for judicial review. And at the end of the day -- and, by the way, you know who lives right by -- right by the development where we're at? If you can pull up -- do we have a development -- that one you had
11:57:46 Stephanie that kind of showed the 61 lots.

11:57:48 MS. ALLEN: Yes.

MR. HUTCHISON: Here's, Judge Smith, takes all the testimony, all the evidence, and finds that the developer can -- has the right to develop that golf
11:57:55 course property. I believe that Mr. Peccole who was a plaintiff in that case, his house is -- was -- did you see that? It was touch -- I don't know if you can see the screen or not.

THE COURT: I can see it. You can see where
11:58:09 his house -- that was where it was litigated, and that's the property that Judge Smith talked about, exactly in the area that my client submitted a series of applications for development as well.

So, Judge, that's what we have to say in terms
11:58:25 of -- in terms of opposition. But if you'll just allow me, for just a minute, I didn't -- I didn't want to, you know, take a ton of time, but what I'd like to do is just have you hear what Planning Commissioner Trowbridge said about all these objections from -- from
11:58:43 the -- from the homeowners. This will take maybe just two minutes.

MS. ALLEN: I need the volume up.

MR. HUTCHISON: I'm sorry.

UNIDENTIFIED FEMALE: The volume.

11:58:55 (Video played.)

You know what, part of this is that my client was reducing density zoning, was going from RPD-7 to a much lower density. Some of their land use issues needed to be addressed. You address that in a development agreement.

When we found out that it just futile to continue on with that development agreement, that's when my client said, I just want the zoning. I just want my rights under the zoning, and we're going to file the applications consistent with what we've talked about today. I've RPD-7 zoning. I've got permitted uses for single-family residential. I've complied in every way with state and local laws, and I'm conforming to adjoining property. That's what I want to do. And that's their right? They've got property rights to do that.

And when you've got, Judge -- when you've got members of the city council who have said publicly that they could no longer be fair, that was Mr. Coffin, and this is in the record, because Mr. Jimmerson sent a letter asking him to recuse himself because he admitted that he could no longer be objective in this application process.

When you got another council member, Mr. Seroka, who said that he would be running and

campaigning and did, that this development would happen over his, quote/unquote, dead body. And he said that before the planning commission on this application. I'm not talking about some other application somewhere else. On this application he appeared before the planning commission and told them that.

At some point you just realize you're getting played. It's a futile act and it's fruitless. And at that point, your Honor, that's when my client said, I don't need a zoning change. I don't need a comprehensive plan. I'm going to just go with my zoning and my entitlements under our zoning under -- our zoning rights.

Your Honor, so that's --

MR. OGILVIE: Your Honor, I have to object to that entire argument as well. These are comments outside of the process. Mr. Seroka wasn't even a councilman at the time of the -- the applications were heard on June 21, 2017. He didn't vote on these.

MR. HUTCHISON: Judge --

MR. OGILVIE: I move to strike that.

MR. HUTCHISON: Judge --

THE COURT: All right.

MR. HUTCHISON: -- here's --

THE COURT: Everyone's getting far afield and

continue to develop it.

What they're saying here is you're shut down. We denied all the applications. There's only one permitted use under our RPD-7, and that's residential. We're shut down. So there's not that level of discretion that the Stratosphere city council was dealing with here, your Honor.

Judge, am I hitting any other point that you'd like me to hit here in terms of what else you're concerned about or any other points?

THE COURT: I'm listening --

MR. HUTCHISON: Okay. Okay. So, Judge, let me -- let me just say a couple of things.

First off, can I walk you through a little bit here of these -- with these -- with these exhibits, very, very quickly, just to make -- I just find this is going to be the fastest way for us to make our points. Let's go to Tab 50 and 37. Let me take you to Tab 50.

Where's my Tab 50 here? You got it?

Judge, you heard repeatedly counsel say that the city has required a major modification every step of the way. Well, here is the city council meeting June 21, 2017, a transcript for this matter. Not this 17 acres that Judge Crockett was talking about where you had to have a zoning change and it was condensed

with all the commercial condensation down there on that corner of the development. This is this application, 35 acres.

Brad Jerbic says, "But let me ask a question of the planning director. Do you believe a major modification is required for this application? And if so, why or why not?"

Context, this is right after the Queensridge opponents got up and said major mod, major mod, major mod, just like we heard.

Tom Perrigo, longtime director of the planning department, "Staff spent quite a bit of time looking at this, and we don't believe a major modification is required as part of this application. First and foremost, the master plan adopted by the city council specifically calls out those master planned areas that are required to be changed through a major modification. This Peccole Ranch is not one of those.

"Yes, some of the exhibits you've seen show and discuss the Peccole Ranch and a whole bunch of other areas as being master planned areas. But it also specifically calls out only those that require a major modification. So that's first. Peccole Ranch is not one of them.

"Second, there have been and some of the

exhibits you've seen shown where parcels have been changed from commercial to multifamily, from multifamily to residential" -- those are zoning changes -- "and so on.

"There have been six actions on this property" -- meaning the Queensridge property area -- "that were done without a major modification for the very reason that it's not required. Those actions were done through a general plan amendment and a rezoning. What's before you now that you're considering is a general plan amendment, and just like those other previous actions, they did not require a major modification."

I don't know what counsel's referring to when he said that the city has always required a major modification for this property. It's inaccurate. There was no major modification required here. There was no application for it. And from the beginning, they -- they've required just the opposite. No major modification -- no major modification.

Now, if I could turn to, Judge, Tab 12 with you. This is -- this is a letter that we've seen repeatedly. Counsel wants you to think that there's some question about RPD-7 zoning. I don't understand why. The city has conceded this repeatedly.

You can just take a look at that. This is -- this is -- this is the golf course area.

You can see where it has different indicators of different parcels and different types of development. You can see, for example, the far right-hand side says "Commercial Center."

You see that?

THE COURT: I see it.

MR. HUTCHISON: Now, go to the far left-hand side. What does that say? "Single-family." Now, this is Peccole Ranch Master Plan 1990.

If you turn the page, Judge -- excuse me. Turn over now to Tab 35. What do you see there? That's where they -- that's where the 16 lots are.

MS. ALLEN: Sixty-one.

MR. HUTCHISON: What did I say? Sorry. That's where --

THE COURT: Sixty-five.

MR. HUTCHISON: That's where the 61 lots are.

THE COURT: Sixty-one.

MR. HUTCHISON: And what's right next to those 61 lots? There's something that says "Single-family."

So even if the master -- the Peccole Ranch Master Plan applied, we're building single-family residences right where the master plan says we can do

it. So if we're supposed to modify this map somehow, please tell me how I'm supposed to modify it. Am I supposed to pick a little different word, really good-looking single-family homes? Or is it supposed to be single-family, you know, that are only two story?

This is the Peccole Ranch Master Plan map. And you've hard repeatedly you got to major modify it. What am I supposed to modify it to? I'm building single-family residences.

Judge, if you'd turn with me, when you're ready, to Tab 41. I think you've already seen this, but just want to make a note of it, because counsel had made a big deal out of this site development review and, hey, you got broad discretion here, we got to make sure that the general plan complies, and that -- that -- that the 278.249 -- 349, subsection 3(e) doesn't really apply to anything else other than tentative maps. Well, lo and behold, according to the planning staff, their findings on the site development review says under their Finding 2 that, in fact, the proposed development is consistent with the general plan. So the real experts already did that work.

Now, your Honor, I'd like to just maybe hit a few points that the city made. They kept pointing to this 278.020, this general statute of the health and

MR. HUTCHISON: There are just different issues. It just -- it just shouldn't be.

So if the Court were to adopt the Crockett order for that 17-acre case -- I mean, this 35-acre cases, it would implicate a judicial taking. And here's how: The United States Supreme Court has held that the judicial branch can engage in action that amounts to a taking. The cite for that is Stop the Beach, 2010 Supreme Court case. The Supreme Court identified one example of where a court order can amount time a taking. That is where an order "holds what once a property right to no longer exist." The Crockett order meets this taking standard by changing the character of the 17-acre property from residential-zoned property with residential development rights to a park, open space property with no residential units possible. Therefore, if the Court were to adopt the Crockett order, it would implicate a judicial taking in this case. I just give that to you for the record, your Honor.

Lastly, your Honor, let me just sum it up this way: If you are to accept the city and the intervenor's argument or either one of their arguments as correct, then the following all have to be wrong: The recorded statutes, NRS 278.349; the city's

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF NEVADA.

_____
PEGGY ISOM, RMR, CCR 541

Todd L. Bice, Esq., Bar No. 4534
tlb@pisanellibice.com
Dustun H. Holmes, Esq., Bar No. 12776
dhh@pisanellibice.com
Kirill V. Mikhaylov, Esq., Bar No. 13538
kvm@pisanellibice.com
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
Telephone: 702.214.2100
Facsimile: 702.214.2101

Attorneys for Intervenors

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X,

Petitioners,

v.

THE 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,

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

Case No.: A-17-758528-J

Dept. No.: XVI

OPPOSITION TO MOTION FOR A NEW TRIAL PURSUANT TO NRCP 59(e); MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND/OR RECONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND MOTION TO STAY PENDING NEVADA SUPREME COURT DIRECTIVES

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,

Intervenors.

I. INTRODUCTION

The Developer's request to alter or amend the Court's judgment is nothing more than rehashed versions of the arguments the Court has already rejected.[1] The Court's findings and conclusions were sound, supported by the record, and entered only after full consideration of the parties' significant briefing, extensive oral arguments, and competing proposed orders. There is no basis in law or fact to alter the Court's decision.

Notably, the Developer does not claim the Court's ultimate application of issue preclusion to Judge Crockett's decision was clear error. Instead, the Developer seeks to reargue the merits of Judge Crockett's decision, falsely claiming an unpublished disposition in an unrelated proceeding from the Nevada Supreme Court contradicts Judge Crockett's decision. It does no such thing. Telling, the Developer has not made this dubious contention in front of the Nevada Supreme Court. That is because this contention is groundless. The Court need only read the unpublished disposition to confirm as much.

Besides, the Developer has already raised these arguments and the Court after careful consideration rejected each of them. While the Developer may disagree with the Court's decision, it presents nothing more than hollow complaints that it believes the Court got it wrong the first time. The Court did not and the Developer's motion to amend or alter should be denied. Indeed, the only new developments that bear on the Developer's claims is the recent Federal Court

[1] Intervenors will not burden the Court with rearguing the true facts giving rise to this matter. As the Court knows those facts directly contradict the litany of factual (mis)representations presented by the Developer in seeking reconsideration. The Court is intimately familiar with the facts having entered a detailed Findings of Fact and Conclusions of Law denying the Developer's petition for judicial review and dismissing alternative claims for inverse condemnation on November 26, 2018. (*See* Findings of Fact and Conclusions of Law on Petition for Judicial Review, on file, dated November 26, 2018).

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

decision in the action styled *180 Land Co., LLC, et al v. City of Las Vegas, et al.* Case No. 2:18-cv-547-JCH-chw (the "Developer's Federal Action"), where that Court has similarly rejected the Developer's claims to "vested rights" to develop the former golf course property. That Court has similarly rejected the Developer's claims including its reliance on NRS 278.3493(3) as somehow giving rise to a claim. (Ex. A hereto).

II. ARGUMENT

A. Altering or Amending the Court's Decision is an Extraordinary Remedy.

The purpose of Rule 52(b) and Rule 59(e) is to allow a party "to seek correction at the trial court level of an erroneous order or judgment, thereby initially avoiding the time and expense of appeal." *Chiara v. Belaustegui*, 86 Nev. 856, 859, 477 P.2d 857, 858 (1970). As courts have noted, altering or amending a judgment is an "extraordinary remedy which should be used sparingly." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011), quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (en banc) (per curiam); s*ee Greene v. Eighth Jud. Dist. Ct.*, 115 Nev. 391, 393, 990 P.2d 184, 185 (1999) (noting that federal courts' interpretations of the analogous FRCP 59(e) are persuasive when construing NRCP 59(e)). As an extraordinary remedy, the Developer here has a "high hurdle" to overcome in convincing the court to exercise its discretion to alter its judgment. *Teamsters Local 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 220 (D. Ariz. 2012), citing *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001).

However, a motion to alter or amend may not be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *See* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir.2009). "Ultimately, a party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision" as such an argument "fails to carry the moving party's burden." *Teamsters Local 617*, 282 F.R.D. at 220, quoting *Cachil Dehe Band of Wintun Indians v. California*, 649 F.Supp.2d 1063, 1070 (E.D. Cal. 2009) (emphasis added).

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400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

Here, the Developer does not present any newly discovered or previously unavailable evidence, any change in controlling law, nor does it argue there is any manifest injustice relating to this Court's findings and conclusions. Instead, the Developer apparently solely relies upon a vague and unsupported claim of error. The Court made no such errors and the findings of fact and conclusions of law are appropriate and should not be altered.

B. The Nevada Supreme Court's Unpublished Disposition Changes Nothing.

Not liking the outcome of the Court's decision, the Developer seeks to relitigate the same facts and arguments the Court has already rejected. For the most part, the Developer's substance (or lack thereof) remains the same and it does not present any new evidence or binding case law that would warrant any alteration of the Court's decision. Instead, the Developer argues the Court purportedly "erroneously failed to consider" two District Court Orders issued by Judge Smith, and a subsequent unpublished disposition from the Nevada Supreme Court of those two Orders. But, of course, the Court has already considered and rejected these arguments as the Developer raised this argument in its briefing, during oral arguments, and in its proposed order. (*See* Developer's Memo. in Support of Second Amended Petition for Judicial Review, 9:6-14:18, 39:6-12, on file, dated April 17, 2018; Developer's Request for Judicial Review, on file, dated June 28, 2018; Hearing Tran., 109:6-110:21, on file, dated June 29, 2018)

Notably, the Developer does not contend the Court erred in applying issue preclusion to Judge Crockett's decision. Instead, the Developer once again seeks to reargue the merits of that decision. But, of course, the Court has already rejected the Developer's attempts to circumvent and relitigate Judge Crockett's decision in this forum.

In any event, as the two Orders and unpublished disposition make clear, they all relate to a lawsuit between Robert and Nancy Peccole and various other entities, including the Developer. Notably, none of the Intervenors or the City are a party to those decisions. The first Order was issued on November 30, 2016 and the second Order was issued on January 31, 2017. The Nevada Supreme Court issued an unpublished disposition on October 17, 2018 from the appeal of these two Orders, with a subsequent Order denying rehearing issued on November 27, 2018. *See*

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PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

Peccole v. Fore Stars, Ltd., No. 72410, 2018 WL 5095923, at *1, (Nev. Oct. 17, 2018)("Unpublished Disposition")

Contrary to the Developer's noise, all of those matters have no bearing on the issues the Court determined. Indeed, as the law provides the Unpublished Disposition does not establish any sort of mandatory precedent. *See* NRAP 36(c)(2)("An unpublished disposition, while publicly available, does not establish mandatory…"). Moreover, even a rudimentary review of the Unpublished Disposition confirms it has no value, persuasive or otherwise, on the issues the Court decided. As the Nevada Supreme Court indicates in the Unpublished Disposition, that case arose from a dispute where the surrounding homeowner argued the former Badlands golf course was "subject to development restrictions under the Master Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs) for the Queensride community," and sued based on theories of "impaired property rights and fraud." *Id*. at *1. The District Court, Judge Smith, dismissed the complaint, denied a motion for injunctive relief, and awarded attorneys' fees and costs to the Developer. *Id*. The two issues presented where whether the district court abused its discretion in deny the preliminary injunction and granting attorneys' fees and costs. In its Unpublished Disposition, the Nevada Supreme Court ruled that the District Court did not abuse its discretion in denying the preliminary injunction because "the golf course land was not part of the Queensridge community under the original CC&Rs and public maps and records, regardless of the amendment." *Id*.

Notably, the Nevada Supreme Court made *no reference* to any of the following, the Peccole Ranch Master Plan, a Major Modification, "RP-D7 zoning," vested rights, residential zoning, "hard zoning," PR-OS, or the City's Master Plan. Instead, the sole issue the Nevada Supreme Court spoke upon was to confirm that Badlands golf course was not part of the Queensridge CC&Rs. That is it; nothing more. This issue is not disputed by anybody in this proceeding. Simply put, whether the Badlands golf course is part of the Queensridge CC&Rs is of no moment to whether a Major Modification of the Peccole Ranch Master Plan is legally required as determined by Judge Crockett, and binding upon the Developer, or whether the City Council abused its discretion in denying the Developer's applications.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

In fact, the Nevada Supreme Court's silence on the issues relevant to this case is perhaps most telling. Had the Nevada Supreme Court believed a Major Modification was not required or that the Developer was somehow granted unfettered rights to develop the property with residential use, then presumably it would have expressly stated as much. But, the Nevada Supreme Court did not and this fact is fatal to the Developer's dubious reliance.

In short, the Court has already considered and rejected the Developer's attempt to rely upon the Unpublished Disposition. Indeed, the Developer confesses that the Unpublished Disposition was issued prior to the Court's judgment in this matter. As the Court has already determined, the Unpublished Disposition has no effect upon this Court's judgment. It is not mandatory, or even persuasive authority for that matter, and it provides no grounds for the Court to alter or amend its judgment.

In truth, the only intervening decision that concerns the Developer's claims is the recent dismissal of the Developer's Federal Action where that court rejected arguments similar to those advanced here. The Developer's federal action was filed on March 26, 2018 against the City of Las Vegas, Councilman Coffin and Councilman Siroka, alleging among other things, that the Developer's purported right to develop the former golf course has been violated. There, the court rejected the Developer's arguments that it had somehow had "vested" or otherwise legally protected rights to develop the property. (Ex. A at pg. 5) ("Plaintiff's alleged right to develop the Badlands property is not a constitutionally protected property"). The court likewise rejected the Developer's arguments about NRS 278.349(3) because that statute merely provided factors to be considered in reviewing a tentative map, not a substantive law that zoning takes over a master plan, as the Developer has erroneously been claiming. *Id. at 6-7.* Federal Judge Mahan's ruling is now the third court to reject the Developer's claims. The Developer's claimed "right" to develop property specifically developed for parks/recreations/open space fails yet again.

C. The Developer Erroneously Seeks to Re-litigate the Merits.

The Developer's remaining two arguments – regarding public opposition and comprehensive development - are *verbatim* of those the Court already rejected. Demonstrating as

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PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

much, the Developer's arguments are largely a *cut-and-paste job* from its Post-Hearing Reply Brief. For example, in the Developer's Post-Hearing Reply Brief it argued the following:

> Public opposition is an insufficient basis for a denial of an application that is consistent with current zoning, in compliance with all applicable land use laws and ordinances, and is compatible with surrounding property, particularly when the opposition is self-serving, not based on specific and substantiated objections, and not supported by the evidence…
> …
> The "Public Opposition" in this case, in large part, concerned the entire 250 acres (formerly "land banked" as the Badlands Golf Course) and the lack of a Development Agreement (discussed *infra*), not the very specific 35 Acre Property at issue…
> …
> "Public Opposition" in this case was not supported by substantial evidence and was an arbitrary and capricious reason for denying the Applications…

(*See* Petitioner's Post-Hearing Reply Brief, 7:20-11:17, on file, dated July 31, 2018). Despite the Court considering and properly rejecting these arguments, the Developer simply recapitulates them in its motion to alter or amend:

> The Court should also reconsider its Decision because public opposition is an insufficient basis for striking a land-use application that is consistent with current zoning, in compliance with all applicable land use laws and ordinances, and is compatible with surrounding property, particularly when the opposition is self-serving, not based on specific and substantiated objections, and not supported by evidence….
> …
> The "Public Opposition" in this case, in large part, concerned the entire Residential Zoned Property and the lack of a master development agreement (discussed *infra*), not the very specific 35 Acre Property at issue…
> …
> "Public Opposition" in this case was not supported by substantial evidence and was an arbitrary and capricious reason for denying the Applications…

(*See* Motion to Alter/Amend, 20:10-22:2). "[R]ecapitulation of the cases and arguments considered by the court before rendering its original decision," is insufficient to warrant alteration of the Court's decision. *Weeks v. Bayer*, 246 F.3d 1231, 1236–37 (9th Cir. 2001). The Developer is simply attempting to gain an inappropriate second bit at the apple. *Id.* The Court should reject the Developer's arguments - for a second time.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

Citing to binding Nevada case law the Court correctly found that "[p]ublic opposition to a proposed project is an adequate basis to deny a land use application." (*See* Findings of Fact and Conclusions of Law on Petition for Judicial Review, on file, dated November 26, 2018, ¶13)(citations omitted). Moreover, the Court properly applied this case law to the record in concluding that "[t]he considerable public opposition to the Applications that was in the record before the Council meets the substantial evidence standard." (*Id*. at ¶ 17). The Court then made detailed findings based upon the record that supported the "substantial and specific" concerns raised by the public opposition. (*Id*.). The Developer fails to offer anything that would remotely warrant reconsideration on this front. Rather, it merely seeks to rehash arguments considered and rejected by the Court.

Nor is there any merit to the Developer's argument that the Court "clearly erred" in upholding the Council's decision to request a comprehensive developmental plan. Contrary to the Developer's argument, and as the Court noted in its decision, "[t]he City's Unified Development Code seeks to, among other things, promote orderly growth and development in order to maintain…the character and stability of present and future land use and development." (*Id.* at ¶26)(quotations and citations omitted). Accordingly, the Court properly found that "[t]he Council was within the bounds of its discretion to request a development agreement for the Badlands Property before allowing a General Plan Amendment to change a portion of the property from Parks, Recreation, and Open Space to residential uses." (*Id*. at ¶28)(citations omitted). As the Court observed, "[a] comprehensive plan already exists for the Badlands Property," and the Developer was seeking to change this plan. (*Id*.). Thus, "[u]nder these circumstances, it was reasonable for the Council to expect assurances that the Developer would create an orderly and comprehensive plan for the entire open space property moving forward." (*Id*.). These findings were not made in error.

Moreover, the Court has already rejected the Developer's dubious contention that it was somehow being singled out for "special treatment." As the Court found "[t]here is no evidence to support" this contention. (*Id*. at ¶31). There still is no evidence to support this contention. Instead, as the Court recognized it was the Developer who sought special treatment as "the golf

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course." (*Id*. at ¶43). The Developer has failed to show any basis for the Court to alter or amend its judgment and its motion should be denied.

D. The Developer's Request for a Stay Should be Rejected.

The Developer devotes all of one sentence to its purported stay request. The Developer's conclusory request void of any legal authority or argument whatsoever proves its requested stay has no merit. A stay can only be sought upon a clear showing that (1) the object of the appeal will be defeated if the stay is denied; (2) the party seeking a stay will suffer irreparable or serious injury if the stay is denied; (3) the party opposing a stay will not suffer irreparable harm if the stay is granted; and (4) the party is likely to prevail on the merits of the appeal. NRAP 8(c); *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). Confirming that it cannot satisfy this criteria, the Developer does not even attempt to do so. The Developer has made no showing that it is likely to prevail on the merits of its appeal from this Court's decision or Judge Crockett's decision. Moreover, as discussed below the equities weigh heavily against a stay. *Id*. at 659, 987.

The object of the Developer's appeal will not be defeated if a stay is denied and the Developer will not suffer irreparable or serious injury absent a stay. Confirming as much the Developer does not even claim otherwise. On the other hand, all other parties will suffer irreparable and serious harm from a stay. A stay is an intrusion into the finality of judgments and disserves the integrity of the judicial proceedings. *Nken v. Holder*, 556 U.S. 418, 427, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). The Developer's conclusory request for a stay should be denied.

III. CONCLUSION

The Developer has failed to show any justification for the Court to amend or alter its judgment. Instead, it merely attempts to reargue the merits and arguments the Court has already rejected. After extensive briefing, oral arguments, consideration of the matter while under submission, and review of competing orders, the Court entered findings of fact and legal determinations that are properly supported by the record and the law. The Developer cannot demonstrate otherwise and its motion should be denied.

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

DATED this 7th day of January, 2019.

PISANELLI BICE PLLC

/s/ Todd L. Bice

By: _____

Todd L. Bice, Esq., Bar No. 4534
Dustun H. Holmes, Esq., Bar No. 12776
Kirill V. Mikhaylov, Esq., Bar No. 13538
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Intervenors

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

PISANELLI BICE PLLC
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101
702.214.2100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 7th day of January, 2019, I caused to be served via the Court's E-Filing system true and correct copies of the above and foregoing **OPPOSITION TO MOTION FOR A NEW TRIAL PURSUANT TO NRCP 59(e); MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND/OR RECONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND MOTION TO STAY PENDING NEVADA SUPREME COURT DIRECTIVES** to the following:

Mark A. Hutchison, Esq.
Joseph S. Kistler, Esq.
Robert T. Stewart, Esq.
HUTCHISON & STEFFEN, PLLC
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135

Attorneys for 180 Land Company, LLC

Christopher L. Kaempfer, Esq.
Stephanie Allen, Esq.
KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135

Attorneys for 180 Land Company, LLC

Kermitt L. Waters, Esq.
James J. Leavitt, Esq.
Michael A. Schneider, Esq.
Autumn L. Waters, Esq.
LAW OFFICES OF KERMITT L. WATERS
704 South Ninth Street
Las Vegas, Nevada 89101

Attorneys for 180 Land Company, LLC

Bradford R. Jerbic, Esq.
Phil Byrnes, Esq.
Jeffry M. Dorocak, Esq.
LAS VEGAS CITY ATTORNEY'S OFFICE
495 South Main Street, Sixth Floor
Las Vegas, NV 89101

Attorneys for the City of Las Vegas

George F. Ogilvie III, Esq., Bar No. 3552
Debbie Leonard, Esq., Bar No. 8260
McDONALD CARANO LLP
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102

Attorneys for the City of Las Vegas

/s/ Christi Colucci

An employee of PISANELLI BICE PLLC

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

180 LAND CO LLC, et al., Plaintiff(s), v. CITY OF LAS VEGAS, et al., Defendant(s).	Case No. 2:18-CV-547 JCM (CWH) ORDER

Presently before the court is defendants City of Las Vegas, James Coffin, and Steven Seroka's (collectively "defendants") motion to dismiss. (ECF Nos. 14, 17). Plaintiffs 180 Land Co LLC ("180 Land"); Fore Stars, Ltd ("Fore Stars"); Seventy Acres LLC ("Seventy Acres"); and Yohan Lowie (collectively "plaintiffs") filed a response (ECF No. 24), to which defendants replied (ECF Nos. 30, 36).

Also before the court is defendants' second motion to dismiss. (ECF Nos. 16, 23). Plaintiffs' filed a response (ECF No. 27), to which Coffin and Seroka replied (ECF No. 37).

Also before the court is plaintiffs motion to consider supplemental documents. (ECF No. 64). Defendants filed two responses (ECF Nos. 65, 68, 69), to which plaintiffs replied (ECF No. 70).

I. Facts

Fore Stars, 180 Land, and Seventy Acres ("plaintiff landowners") collectively own approximately two hundred and fifty (250) acres of real property ("the Badlands property") within the boundaries of the City of Las Vegas. (ECF No. 1). Plaintiff landowners originally operated, through a lease, a golf course on the property. *Id.* On December 1, 2016, plaintiff landowners shut down the golf course and began converting the land for residential and commercial use. *Id.*

On November 30, 2017, the State of Nevada State Board of Equalization approved the Clark County Assessor's determination that plaintiff landowners converted the property to a "higher use" for residential and commercial development in accordance with NRS 261A.031. *Id.*

Plaintiffs allege that Coffin and Seroka, who are council members on the Las Vegas City Council ("City Council"), have used and continue to use their official capacity to oppose plaintiffs' numerous applications to develop the Badlands property. *Id.* Plaintiffs further allege that Coffin and Seroka have remarkable animus and bias against plaintiffs, which renders their participation on the City Council unlawful. *Id.*

The complaint contains a number of details pertaining to Coffin and Seroka's bias. *See id.* Plaintiffs primarily allege that Coffin categorically refused to allow development of the Badlands property unless plaintiffs met the demands of Coffin's longtime friend, Mr. Binions. *Id.* At the time Coffin purportedly imposed this precondition, Mr. Binion was demanding plaintiffs to hand over one hundred and eighty-three (183) acres of the Badlands property. *Id.* Plaintiffs further alleged that Coffin made various statements to Lowie, who is of Jewish descent, that compared Lowie's actions to develop the Badlands Property to Israel's treatment of Palestinians. *Id.* The complaint contains a letter that Coffin sent to Todd Polikoff, the president and CEO of Jewish Nevada, in which he confirms making such statements to Lowie. (ECF No. 1-4).

As to Seroka, plaintiffs allege that Seroka attended a town hall meeting at the Queensridge Common Interest Community Clubhouse, which is located in a community that contains wealthy, influential homeowners that oppose development of the Badlands property. (ECF No. 1). In that town hall meeting, Seroka purportedly stated that it would be "the stupidest thing in the world" for the City Council to follow the letter of the law in adjudicating plaintiffs' applications. *Id.*

On March 26, 2016, plaintiffs filed a complaint alleging four causes of action: (1) violation of equal protection under the Fourteenth Amendment of the United States Constitution pursuant to 42 U.S.C. § 1983; (2) violation of procedural due process under the Fourteen Amendment of the United States Constitution pursuant to § 1983; (3) violation of equal protection under Article Four, Section Twenty-one of the Nevada Constitution; (4) violation of procedural due process under Article One, Section Eight, Subsection Five of the Nevada Constitution. (ECF No. 1).

Now, defendants move to dismiss all four of plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6). (ECF No. 16).

II. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.*

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged – but it has not shown – that the pleader is entitled to relief." *Id.* at 679. When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

. . .

. . .

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court held,

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

III. Discussion

As a preliminary matter, the court will deny plaintiffs' motion to consider supplemental documents (ECF No. 64). At this stage in litigation, the court is under no obligation to consider additional substantive evidence because courts primarily examine the allegations in the complaint to determine whether a plaintiff has filed a proper pleading. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Moreover, considering the additional documents would unfairly prejudice the defendants because plaintiffs filed the respective evidence after the parties fully briefed the motions to dismiss (ECF Nos. 14, 16). Therefore, the fair administration of justice requires the court to proceed without relying on the additional evidence in the record. *See, e.g., Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (holding that district courts have inherent power to control their own dockets).

The court will also deny without prejudice defendants' first motion to dismiss (ECF No. 14). Pursuant to Local Rule IC 2-2(b), a separate document must be filed on the docket for each purpose. Defendants' motion is a non-compliant document under this rule as it consists of three distinct motions: (1) a motion to dismiss, (2) a motion for more definite statement, and (3) a motion to stay. *See* (ECF No. 14). The court will not consider defendants' motions unless they are filed as separate documents. *See* LR IC 7-1 ("The court may strike documents that do not comply with these rules.").

As to defendants' second motion to dismiss (ECF No. 16), the court hereby addresses each cause of action in turn.

i. Equal protection under the United States Constitution

The United States Supreme Court has recognized that the Equal Protection Clause may, in some circumstances, afford individuals relief from intentional, irrational, and differential treatment at the hands of the Government. *E.g., Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam). To state a "class of one" claim, plaintiffs must allege that the City Council: "(1) intentionally (2) treated [plaintiffs] differently than other similarly situated property owners, (3) without rational basis." *Gerhart v. Lake Cnty., Montana*, 637 F.3d 1013, 1019 (9th Cir. 2011) (citing *Willowbrook*, 528 U.S. at 564).

Here, the complaint does not provide any details regarding similarly situated landowners, other than stating that those landowners submitted applications that "conformed with all relevant laws and regulation and were approved by the Staff and Planning Commission." (ECF No. 1). However, a plaintiff cannot assert a valid equal protection claim by placing "all persons not injured into a preferred class receiving better treatment than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quotes and citation omitted). Without greater similarities between plaintiffs and the preferred class of similarly situated landowners, the allegations in the complaint cannot "plausibly suggest an entitlement to relief." *Starr*, 652 F.3d at 1216; *see also Thornton*, 425 F.3d at 1167–68 (9th Cir. 2005) (holding that different land uses, or even an identical use in a different zone, do not qualify as similarly situated). Therefore, the court will dismiss without prejudice plaintiffs' equal protection claim.

ii. Procedural due process under the United States Constitution

To state a claim for procedural due process, a plaintiff must allege: "(1) a liberty or property interest protected by the constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

Defendants argue that the court should dismiss plaintiffs' procedural due process claim because plaintiffs' alleged right to develop the Badlands property is not a constitutionally protected property interest. (ECF No. 16). The court agrees.

A government benefit, such as a license or permit, may give rise to a protectable property interest where the recipient has a "legitimate claim of entitlement to it." *Gerhart v. Lake Cnty., Montana*, 637 F.3d 1013, 1019 (9th Cir. 2011). A legitimate claim of entitlement can exist where state law significantly limits the decision maker's discretion or where the decision maker's policies and practices create a de facto property interest. *Gerhart*, 637 F.3d at 1021; *see Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2007) ("Vested rights in a land development permit . . . 'are created and their dimensions are defined by existing rules or understandings that stem from . . . state law.'") (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

Plaintiffs cite various provisions of the Las Vegas Unified Development Code (Title 19.16.030, 090, 100, and 130) and NRS 278.349 in support of their claim that state law significantly limits the City Council's discretion. (ECF No. 27). These laws impose procedural constraints on the City Council in considering various land development applications.

"[P]rocedural requirements ordinarily do not transform a unilateral expectation into a protected interest. . . ." *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994). However, when procedural requirements amount to a "significant substantive restriction on . . . decision making[,]" a protected property interest arises. *Id.*

The court has reviewed the Las Vegas Unified Development Code and NRS 278. The pertinent provisions do not contain language that significantly limits the City Council's discretion. *See* NRS 278.349(1) ("the governing body . . . shall . . . approve, conditionally approve or disapprove a tentative map . . ."); *see also* NRS 278.349(3) (providing factors the planning commission considers in reviewing tentative maps); *see also* Title 19.16.030(H)(2)(a) ("The City Council may approve or deny a proposed General Plan Amendment."); *see also* Title 19.16.090(B) ("the City Council may . . . rezone any parcel or area of land within the City from one zoning district to another . . ."); *see also* Title 19.16.100(G)(2)(h) ("The city Council may approve,

approve with conditions, or deny an application . . ."); *see also* Title 19.16.130(B) ("[T]he city council may affirm, modify or reverse the decision of the planning commission.")[1]

Accordingly, the court will dismiss with prejudice plaintiffs' second cause of action for procedural due process.

iii. Equal protection under the Nevada Constitution

Because the Equal Protection Clause of the Nevada Constitution mirrors its federal counterpart, Nevada courts "have interpreted the standard of the Equal Protection Clause of the Nevada Constitution to be the same as the federal standard. . . ." *Armijo v. State*, 904 P.2d 1028, 1029 (Nev. 1995); *In re Candelaria*, 245 P.3d 518, 523 (Nev. 2010). Accordingly, the court will dismiss without prejudice plaintiffs' Nevada equal protection claim for the same reason that it will dismiss plaintiffs' federal equal protection claim. *See Cinque v. Ward*, No. 3:09-cv-00229-ECF (RAM), 2010 WL 3312608 at *5 (D. Nev. July 28, 2010).

iv. Procedural due process under the Nevada Constitution

The Due Process Clause of the Nevada Constitution also requires the same analysis as its federal counterpart. *In re Candelaria*, 245 P.3d at 523; *Reinkemeyer v. Safeco Ins. Co. of Am.*, 16 P.3d 1069, 1072 (Nev. 2001). Therefore, the court will dismiss with prejudice plaintiffs' Nevada procedural due process claim for the same reason that it will dismiss plaintiffs' federal procedural due process claim. *See Cinque*, 2010 WL 3312608 at *4.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion to dismiss (ECF No. 14) be, and the same hereby is, DENIED without prejudice.

IT IS FURTHER ORDERED that defendants' second motion to dismiss (ECF No. 16) be, and the same hereby is, GRANTED, consistent with the foregoing.

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. . .

[1] Plaintiffs do not reference any specific provisions in support of their contention that the Las Vegas Uniform Development Code and NRS 278 substantially limit the City Council's discretion. *See* (ECF No. 27).

IT IS FURTHER ORDERED that plaintiffs' motion to consider supplemental documents (ECF No. 64) be, and the same hereby is, DENIED.

DATED December 21, 2018.

UNITED STATES DISTRICT JUDGE

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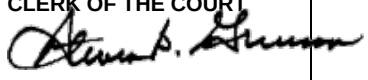

RIS

George F. Ogilvie III (NV Bar #3552)
Debbie Leonard (NV Bar # 8260)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
gogilvie@mcdonaldcarano.com
dleonard@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 S. Main Street, 6th Floor
Las Vegas, NV 89101
Telephone: 702.229.6629
Facsimile: 702.386.1749
bjerbic@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

Attorneys for City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO 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, 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.: A-17-758528-J DEPT. NO.: XVI **REPLY IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS** Hearing Date: January 17, 2019 Hearing Time: 9:00 a.m.

I. INTRODUCTION

The Developer's opposition to the City's motion to strike is non-responsive as to the primary argument the City presented; namely, that a plaintiff cannot seek summary judgment on already-dismissed claims. The Developer's silence constitutes an admission that the motion to strike is meritorious and should be granted. *See* EDCR 2.20(e). The Court lacks jurisdiction to consider the summary judgment motion because a final judgment has already issued.

The Developer's filing of the summary judgment motion (the "Fugitive Document") disregards this jurisdictional defect and needlessly protracts the proceedings. Because the summary judgment motion violates the Rules of Civil Procedure and seeks to interject arguments that the Developer failed to present earlier, sanctions are appropriate. As a result, the City respectfully asks the Court to grant its motion to strike and sanction the Developer in the amount of fees and costs incurred to address the Developer's improper conduct.

II. ARGUMENT

A. The Developer's Opposition Did Not Address the Fact That the Summary Judgment Motion is a Fugitive Document That Must be Stricken.

The Developer's Opposition is notably silent on the dispositive issue raised in the City's motion to strike: a plaintiff cannot seek summary judgment on claims that are no longer actionable. *See* NRCP 56(a). The Developer's failure to even address this issue requires that the motion to strike be granted. *See* EDCR 2.20(e) (failure to file opposing points and authorities "may be construed as an admission that the motion … is meritorious and a consent to granting the same"). Rather than file opposing points and authorities regarding the procedural impropriety of its post-dismissal summary judgment motion, the Developer simply regurgitates the same arguments it raises in its post-judgment motion for new trial and request for rehearing (collectively, the "Post-Judgment Motions for Reconsideration"). Because the Developer offers no justification for filing a fugitive document on already-dismissed claims, the Developer concedes that its summary judgment motion is unauthorized and must be stricken.

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. . .

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

B. The Court Has No Jurisdiction to Consider a Post-Dismissal Summary Judgment Motion.

Nevada Supreme Court precedent is clear that the district court lacks jurisdiction to consider the Fugitive Document such that it must be stricken. Once a district court enters a final judgment, it loses "all jurisdiction concerning that judgment, except to alter, set aside, or vacate its judgment in conformity with the Nevada Rules of Civil Procedure." *SFPP, L.P. v. Second Jud. Dist. Ct.*, 123 Nev. 608, 609, 173 P.3d 715, 715 (2007). An order of dismissal is a final judgment that cuts off the district court's "jurisdiction to conduct any further proceedings with respect to the matters resolved in the judgment unless it was first properly set aside or vacated." *Id.* at 612, 173 P.3d at 718. "[A] district court is prohibited from retaining jurisdiction over [a] dismissed case." *Id.* at 611, 173 P.3d at 717.

Here, the Court entered a final judgment on November 21, 2018. The Developer filed two motions to set the judgment aside, one of which attacked the Court's dismissal of the Developer's inverse condemnation claims. The Court has yet to consider that motion, much less set aside the final judgment. As a result, the Court is without jurisdiction to consider the Fugitive Document. *See id.* at 609, 173 P.3d at 715.

Contrary to the Developer's assertion, the arguments raised in its Post-Judgment Motions for Reconsideration are entirely irrelevant to the fact that the Fugitive Document was improperly filed. Only if the Court were to reach the erroneous conclusion that its judgment dismissing the Developer's inverse condemnation claims should be set aside could the Court even allow for the filing of future documents related to those claims. *See id.* at 609, 173 P.3d at 715. A summary judgment motion filed on already-dismissed claims cannot be considered. *See id.*

Further, the Developer should be prevented from circumventing this jurisdictional bar by appending the Fugitive Document to its Post-Judgment Motions for Reconsideration and including references to the Fugitive Document therein. The Court's lack of jurisdiction to consider a summary judgment motion on already-dismissed claims cannot be manipulated by the *manner* in which it was filed or referenced or brought before the Court in other filings.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Whether as an exhibit, a supplement or a stand-alone filing, the summary judgment motion is a rogue filing that the Court is devoid of jurisdiction to consider. Accordingly, all submissions and references to it must be stricken from the record.

C. The Court Cannot Consider the Purported "Merits" of the Developer's Requests for Reconsideration in the Context of the City's Motion to Strike.

The Developer cannot rescue its improperly filed Fugitive Document by rehashing the same arguments it raises in its Post-Judgment Motions for Reconsideration. The Supreme Court specifically addressed this issue, holding that a district court may only address claims that were dismissed by a final judgment *if* it first grants "a proper and timely motion under the Nevada Rules of Civil Procedure" to set the final judgment aside. *See id.* at 612, 173 P.3d at 717-18. That has not occurred here. As a result, the Developer's arguments as to why the judgment should be set aside cannot be addressed in the context of the City's motion to strike. Because the motion to strike is not the place to address those arguments, the City refers the Court to its oppositions to the Post-Judgment Motions for Reconsideration for its response to the purported "merits" of the Developer's arguments.

D. The Developer's Vexatious Conduct Warrants Sanctions.

Not only has the Developer filed a rogue document, but it continues to needlessly multiply the proceedings by filing voluminous, repetitive and redundant submissions and attaching numerous documents that are not part of the record. The latest example of the Developer's vexatious conduct is the filing of a notice of appeal while its Post-Judgment Motions for Reconsideration are still pending. Now, the Developer is simultaneously proceeding in two courts rather than first waiting for the disposition of its Post-Judgment Motions for Reconsideration.

Because the Post-Judgment Motions for Reconsideration are already in the Court's docket and set for hearing, it is not the City's responsibility to "inform" the Court of them. *See* Developer's Opposition at 5:19-20. In any event, the fact that the Developer has filed the Post-Judgment Motions for Reconsideration does not somehow erase the impropriety of it filing a summary judgment motion on already-dismissed claims. The law is clear that such a motion

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

cannot be filed unless and until a judgment dismissing those claims is "first properly set aside or vacated." *SFPP*, 123 Nev. at 612, 173 P.3d at 718.

Notwithstanding the Developer's baseless accusations, the City is not asking the Court to "purge the record" or obfuscate "the truth." *See* Developer's Opposition at 5:19-6:5. The "record" consists only of what the Court relied upon to reach its decision to deny the petition for judicial review and dismiss the inverse condemnation claims. *See Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988); *Fergason v. LVMPD*, 131 Nev. Adv. Op. 94, 364 P.3d 592, 598 n.4 (2015). "Papers submitted to the district court *after* the ruling that is challenged on appeal should be stricken from the record…." *Kirshner*, 842 F.2d at 1077 (emphasis in the original). And that is precisely posture of this matter.

The Developer filed the summary judgment motion after the Court entered its Findings of Fact and Conclusions of Law. It therefore is not part of the "record." *See id.* Because the summary judgment motion is not part of the record, the Developer's attempt to shield itself from sanctions should be rejected. The Developer's filing of the Fugitive Document in violation of the procedural rules is precisely the situation in which sanctions are appropriate. *See* EDCR 7.60(b)(3).

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

III. CONCLUSION

The Developer's opposition fails to respond to the arguments made in the City's motion to strike. It is black letter law that a plaintiff cannot seek summary judgment on dismissed claims. The Court lacks jurisdiction to consider the Developer's unauthorized summary judgment motion. Because the Developer's conduct violates the procedural rules and needlessly multiplies the proceedings, it is sanctionable. As a result, the City requests that the Fugitive Document be stricken from all parts of the docket in which it was filed and that the Developer be sanctioned with the fees and costs incurred to file this motion to strike.

DATED this 10th day of January, 2019.

McDONALD CARANO LLP

By: /s/ *George F. Ogilvie III*
George F. Ogilvie III (NV Bar #3552)
Debbie Leonard (NV Bar # 8260)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102

LAS VEGAS CITY ATTORNEY'S OFFICE
Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
495 S. Main Street, 6th Floor
Las Vegas, NV 89101

Attorneys for City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 10th day of January, 2019, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS** 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966