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. 5**

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, Ltd, SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **PLAINTIFF LANDOWNERS' OPPOSITION TO CITY'S MOTION FOR JUDGMENT ON THE PLEADINGS ON DEVELOPER'S INVERSE CONDEMNATION CLAIMS** **AND** **COUNTERMOTION FOR JUDICIAL DETERMINATION OF LIABILITY ON THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS** **AND** **COUNTERMOTION TO SUPPLEMENT/AMEND THE PLEADINGS, IF REQUIRED** Hearing date: March 19, 2019 Hearing time: 9:00 a.m.

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' Opposition to City of Las Vegas' Motion For Judgment on the Pleadings On Developer's Inverse Condemnation Claims and Counter-Motion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims and To Supplement/Amend the Pleadings, If Required. This Opposition and Countermotion 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 4th day of March, 2019.

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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. Contrary to well-established Nevada Supreme Court precedent[1] and its ethical duty to develop a full and fair record, the City is making every effort to prevent this case from being heard on the merits by filing a motion for judgment on the pleadings, which it concedes is tantamount to a motion to dismiss.[2] City Mot. 4:24-25. This pleading requests that the City's Motion to Dismiss be denied, that this matter be heard on the merits, and that a judicial determination on liability for the taking of the 35 Acre Property be granted. This pleading exceeds the 30 page limit for several reasons. First, this pleading is both an opposition and two countermotions. Second, to determine liability for the City's actions, "[a]ll actions by the [City], in the aggregate, must be analyzed,"[3] meaning these City actions must be set forth in detail. Third, this is an immensely important case for the Landowners, an active developer, as the City has entirely prevented them from using their 35 Acre Property. 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

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[1] Schulman v. Bongberg-Whitney Elec., Inc., 98 Nev. 226 (1982) ("It is the policy of this state that cases be heard on the merits, whenever possible." Id., at 228); City of Los Angeles v. Decker, 18 Cal.3d 860 (Calif. 1977) (citing to high ethical duty government has in inverse condemnation proceedings to seek justice and develop a full and fair record.)

[2] The City's Motion For Judgment on the Pleadings on Developer's Inverse Condemnation Claims will be referred to herein as the "Motion to Dismiss."

[3] Merkur v. City of Detroit, 680 N.W.2d 485, 496 (Mich. App. 2004); *see also* 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).

and fairly presented to the Court.[4]

PROCEDURAL POSTURE OF THIS CASE

As this Court will recall, this matter was commenced with a joint complaint filed by the Landowners that included: 1) a Petition for Judicial Review (PJR); and 2) a complaint in inverse condemnation. On October 30, 2017, the City filed a motion to dismiss the Landowners' inverse condemnation claims. On January 25, 2018, this Court made two rulings: 1) it **denied** the City's motion to dismiss; 2) held the inverse condemnation claims were "ripe for review;" 3) "severed" the inverse condemnation claims from the PJR; and, 4) stayed the inverse condemnation claims until a decision on the PJR. *See Order Denying Motion to Dismiss and Countermotion to Stay Litigation, filed February 1, 2018.* This Court then denied the Landowners' PJR and asked the City to prepare the Findings of Fact and Conclusions of Law (FFCL). As this Court will recall, the City prepared a lengthy FFCL for the petition for judicial review, but then improperly inserted four paragraphs at the end of the FFCL that also dismissed the Landowners' inverse condemnation claims. These four paragraphs dismissing the inverse condemnation claims were a complete surprise to Landowners' counsel, because this Court already denied the City's motion to dismiss the inverse condemnation claims, held the inverse condemnation claims were ripe, and severed the claims entirely from the petition for judicial review claim. Moreover, the Landowners' inverse condemnation claims were not addressed directly or even indirectly in the briefs or the hearing on the PJR. Not realizing the City improperly included these paragraphs in the FFCL, this Court signed the City's FFCL.

Landowners' inverse condemnation counsel then filed a motion for rehearing or reconsideration of the dismissal of the inverse condemnation claims, explaining the error. The Landowners also concurrently filed a motion for summary judgment on liability for the taking of the Landowners' 35 Acre Property so the inverse condemnation claims can be heard on the merits. Shockingly, the City filed a 25-page opposition, contending it was legally proper to dismiss the Landowners' constitutionally based inverse condemnation claims without a hearing, filed a motion

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[4] McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1126-27 (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." (emphasis supplied)).

to strike the Landowners' motion for summary judgment on liability for the taking, and asked the Court to sanction the Landowners for filing the motion for summary judgment.

On January 17, 2019, the parties appeared before this Court on the Landowners' motion for rehearing or reconsideration and the City's countermotion to strike and for sanctions. The Court called the case up first in time, stating the matter "is going to be uncontested because I'm going to issue a - - have someone issue a nunc pro tunc order." *Exhibit 103, 4:6-9,16 App. LO 00003928.*[5] This Court expressly stated "I never intended on any level for that to be included in the order" and ordered the four paragraphs that dismissed the inverse condemnation claims removed *nunc pro tunc*. *Exhibit 103, 6:9-10, 16 App LO 00003930*. This Court stated in the *nunc pro tunc* order that "this Court had no intention of making any findings of fact, conclusions of law or orders regarding the landowners severed inverse condemnation claims as part of the Findings of Fact and Conclusions of Law entered on November 21, 2018, ("FFCL") [the petition for judicial review FFCL]." *Exhibit 101, 16 App LO 00003889-91.*

Prior to the January 17, 2019 hearing, this Court entered an order stating as follows: "In the event that this Court grants Plaintiff Landowners' Request for Rehearing / Reconsideration of Order / Judgment Dismissing Inverse Condemnation Claims and denies the City's Motion to Strike, the Court shall continue the February 6, 2019 hearing on Plaintiff Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation ("Motion for Summary Judgment") and set a briefing schedule and a new hearing date for Plaintiff's Motion for Summary Judgment." *See Stipulation and Order, filed January 10, 2019.* In fact, the City stipulated to this procedure. Id. This meant that, if this Court granted the motion for rehearing or reconsideration and did not strike the Landowners' Motion for Summary Judgment, the Landowners' Motion would be the next motion for this Court to decide. And, this Court clearly anticipated this manner of proceeding, stating at the January 17, 2019 hearing as follows:

> And I have - - I realize potentially in the inverse condemnation case there's going to be some unique issues. I don't know. **Hypothetically, the entire conduct of the city council could impact that.** I don't know. I'm pretty good at issue spotting. But my mind is completely open. I just want to tell everybody that. *Exhibit 103, 9:10-17, 16 App LO 00003933. (emphasis supplied).*

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[5] *Exhibits 1-98* are contained in Appendix of Exhibits Volumes 1-16 which were filed on December 12, 2018. *Exhibits 99 - 107* are filed herewith.

On February 6, 2019, the original date set for the Landowners' Motion for Summary Judgment on liability for the City's taking, counsel for both parties appeared before this Court. Consistent with the above referenced Stipulation and Order, this Court and the parties discussed the briefing schedule and hearing date for Landowners' pending Motion for Summary Judgment on liability for the taking. This Court asked if the parties wanted to put a briefing schedule and a hearing date on the record at that time, to which both counsel stated they would work out a briefing schedule for the Landowners' Motion for Summary Judgment and submit it to the Court. At the February 6, 2019 hearing, Landowners' counsel requested a full day to argue the Motion for Summary Judgment on liability for the taking as there is significant law and facts that need to be addressed at the hearing. The Court stated it would accommodate this request, if possible. Thereafter, Landowners' counsel contacted this Court's JEA and obtained three dates the Court can hold a one day hearing on the Landowners' Motion for Summary Judgment - April 11, April 25, and May 2.

In compliance with the Court's orders, Landowners' counsel sent a proposed briefing schedule for the Landowners' Motion for Summary Judgment to the City's counsel using April 25, 2019, as the hearing date. The City entirely ignored the request for one week. During that week, the City then filed yet another motion to dismiss – the motion for judgment on the pleadings at issue here. Thereafter, the City's counsel sent Landowners' counsel an email clearly stating the City's intent to violate this Court's orders by filing the Motion to Dismiss and refusing to agree upon a briefing schedule and hearing date on the Landowners' Motion for Summary Judgment.

The Landowners, to assure this matter is heard on the merits, now oppose the City's third attempt to dismiss the Landowners' inverse condemnation claims in this matter and hereby files the countermotion for a judicial determination on liability for the taking of the 35 Acre Property.

OPPOSITION TO MOTION TO DISMISS

There are four reasons the City's third attempt at dismissal should be denied.

1. Reason #1 the City's Motion to Dismiss Should be Denied: Three Courts have Declined the City's Request to Dismiss Similar Inverse Condemnation Claims.

As this Court is aware, 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.* There are currently four Inverse Condemnation lawsuits pending in four different departments in the Eighth Judicial District for each of these parcels: 17 Acre Property (Judge Bixler), 35 Acre Property (Judge Williams - the pending case), 65 Acre Property (Judge Israel), and 133 Acre Property (Judge Sturman). Three of these Courts have already declined the City's request to dismiss the Landowners' inverse condemnation claims.

35 Acre Property Order (Judge Williams). As explained above, this Court already entertained two attempts to dismiss the Landowners inverse condemnation claims, denied both attempts, and ordered a briefing schedule on the Landowners' Motion for Summary Judgment on liability for the taking.

133 Acre Property Order (Judge Sturman). The City filed a motion to dismiss the Landowners' inverse condemnation claims, which is nearly identical to the Motion to Dismiss it has filed in this 35 Acre Property case. The Landowners filed a very lengthy opposition, which includes nearly identical arguments to those presented in this 35 Acre Property case. On January 15, 2019, Judge Sturman conducted a hearing and considered lengthy oral arguments on the City's motion to dismiss. The argument this Court will entertain at the March 19, 2019 hearing will be nearly identical to those presented to Judge Sturman in the 133 Acre Property case. Judge Sturman took the matter under advisement, and on February 15, 2019, denied the City's motion to dismiss, holding "the Complaint on file herein states alternative claims for Inverse Condemnation **which may proceed in the ordinary course**." *Exhibit 102, 16 App LO 00003892 (emphasis supplied)*.

17 Acre Property Order (Judge Bixler). The City filed a motion to dismiss the Landowners' inverse condemnation claims and the Landowners filed a very lengthy opposition. On January 23, 2019, Judge Bixler conducted a hearing and took lengthy oral argument on the City's motion to dismiss. Judge Bixler ruled from the bench. He did not grant the City's Motion Dismiss, but, instead, stayed the matter until such time that an appeal currently pending before the Nevada Supreme Court on the 17 Acre Property case is decided. *Exhibit 104, 16 App LO 00003919:22-23*.

Therefore, prior to its current filing, the City has made four different attempts to dismiss the Landowners' inverse condemnation claims: twice in this 35 Acre Property case, once in the 133 Acre Property case, and once in the 17 Acre Property case. All four of these attempts were rejected.

As this Court is aware, the City has argued ad nauseam that any decision by any court in these four cases has preclusive effect in the other cases. Insofar as the City has argued that decisions by these courts have preclusive effect, the four denials of the City's Motion to Dismiss should have preclusive effect in this case.[6] This Court's denial of two attempts by the City to dismiss the Landowners' inverse condemnation claims in this 35 Acre Property case should be the law of the case. The decision by Judge Sturman in the 133 Acre Property case has more preclusive effect than any decision by judges outside this 35 Acre Property case, because: 1) it pointedly denies the City's motion to dismiss inverse condemnation claims; 2) the inverse condemnation claims in the 133 Acre Property case are the same as those in this 35 Acre Property case; 3) the same exact exhibits - 16 volumes of appendices - that are before this Court were considered by Judge Sturman; 4) the City is a party to both cases and had a full and fair opportunity to argue in both cases; and 5) the Sturman order is a final decision on the merits.

Therefore, pursuant to the law of the case and issue preclusion doctrines, the City's pending Motion to Dismiss should be denied – for a *fifth time*.

2. Reason #2 the City's Motion to Dismiss Should be Denied: The Nevada Supreme Court Requires a Hearing on the Merits.

The Nevada Supreme Court has adopted an unwavering "policy of this state that cases be heard on the merits, whenever possible"[7] and the government has a high ethical duty in inverse

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

[7] Schulman v. Bongberg-Whitney Elec., Inc., 98 Nev. 226, 228 (1982).

condemnation proceedings to seek justice and develop a full and fair record.[8] In this case the City is making every effort to prevent a decision on the merits and prevent a full and fair record. The City even tried to improperly dismiss the Landowners' inverse condemnation claims in the petition for judicial review FFCL, requiring this Court to enter an Order *Nunc Pro Tunc* to remove the paragraphs from the FFCL that misleadingly dismissed the inverse condemnation claims and allow the Landowners' motion for a judicial determination of a taking proceed. The City's currently Motion for Judgment on the Pleadings is the third attempt to dismiss the Landowners' inverse condemnation claims in this case, even though this Court held the Landowners' motion for a judicial determination of a taking may proceed. The only way this case can be heard on the merits with a full and fair record is to deny the City's third attempt to dismiss this case and allow hearing on the Landowners' countermotion for a judicial determination on liability for the taking as has been ordered by this Court.

3. Reason #3 the City's Motion to Dismiss Should be Denied: the City Does Not Come Close to Satisfying the General Standard for Dismissal.

Only under "rare" circumstances is dismissal proper, such as where plaintiff can prove no set of facts entitling him to relief.[9] The Nevada Supreme Court has recognized this "rare" circumstances standard and held that a motion to dismiss "is subject to a rigorous standard of review on appeal," that it will recognize all factual allegations as true, and draw all inferences in favor of the plaintiff.[10] The Court rejected the "reasonable doubt" standard and held that a complaint should be dismissed "only" where it appears "beyond a doubt" that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief.[12]

This veritable "rigorous" standard to dismiss is especially appropriate in inverse condemnation proceedings, because 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

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[8] City of Los Angeles v. Decker, 18 Cal.3d 860 (Calif. 1977).

[9] Williams v. Gerber Prod., 552 F.3d 934, 939 (9th Cir. 2008).

[10] Buzz Stew, LLC v. City of North Las Vegas, 181 P.3d 670, 672 (2008). (emphasis supplied).

[12] Id., see also fn. 6 in Buzz Stew decision.

variety of ways in which government actions or regulations can effect property interests."[13] In this connection, Courts are clear that these are "ad hoc" proceedings that require "complex factual assessments."[14] Since these inverse condemnation claims are so fact intensive, it is gross error to grant a motion to dismiss before the landowner has the opportunity to fully present all facts to the court.

Here, not only should this Court deny the City's Motion to Dismiss, but, when the facts are fully and properly analyzed, as set forth in the Landowners' countermotion, a judicial determination of liability for a taking by inverse condemnation is the appropriate order.

4. Reason #4 the City's Motion to Dismiss Should be Denied: the Facts Establish the City's Liability for the Taking.

The fourth reason the City's Motion to Dismiss should be denied is the facts and law set forth in the Landowners countermotion for judicial determination of liability establish the City's liability for a taking.

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[13] State v. Eighth Jud. Dist. Ct., 351 P.3d 736, 741 (Nev. 2015) (citing Arkansas Game & Fish Comm's v. United States, 568 U.S. --- (2012)). *See also* 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).

[14] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720 (1999).

STATEMENT OF FACTS RELEVANT TO OPPOSITION TO MOTION TO DISMISS AND COUNTERMOTION FOR JUDICIAL DETERMINATION OF LIABILITY ON THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS[15]

A. GENERAL FACTS RELATED TO THE LANDOWNERS' 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. As stated, these 10 parcels will be referred to in segments as the 65 Acre Property, the 17 Acre Property, the 35 Acre Property (at issue here), 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 Who 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.[16] 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 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 ensuring the 35 Acre Property is competently developed compatible and consistent with the surrounding properties.

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[15] 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 demand statement as a basis to provide notice of facts that support a claim).

[16] 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 in downtown Las Vegas. *Exhibit 5: 2 App LO00000418-419.*

B. FACTS RELATED TO "PROPERTY INTEREST": FIVE REASONS THE LANDOWNERS HAVE A "PROPERTY INTEREST" IN THE 35 ACRE PROPERTY.

The Landowners concede they must have a "property interest" in order to support their taking claim. Therefore, this section of the Landowners' brief will set forth five underlying reasons why the Landowners not only have a "property interest" in the 35 Acre Property, but they also have the actual "vested right to use" their 35 Acre Property in the context of an eminent domain action. As this Court will see, all courts and both parties that are connected to this case have uniformly opined that the Landowners have the vested right to use their property and the only individuals connected to this case that denies this vested right to use the 35 Acre Property are the City's privately retained attorneys - who are making an argument contrary to their own client's opinion!

1. Reason #1 Supporting the Landowners' Vested Right to Use: The Nevada Supreme Court Cases of McCarran Intl. Airport v. Sisolak and State v. Schwartz Confirm the Vested Right to Use the 35 Acre Property.

Any determination of whether the Landowners have a "property interest" or the vested right to use the 35 Acre Property must be based on eminent domain law, rather than the land use law the City cites. And, any discussion of the vested right to use property in the context of an eminent domain action must begin with the Nevada Supreme Court seminal eminent domain decision of McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006). In the Sisolak case, the Nevada Supreme Court rejected the exact same arguments the City is making in this case and held that, in the context of an inverse condemnation case, every single property owner in the State of Nevada has the vested right to use their property.

The Sisolak Court first noted "[a]n individual must have a **property interest** in order to support a taking claim." Id., at 658. (emphasis supplied). The Court then identified the "property interest" issue as "whether the plaintiff [landowner] possesses a valid interest in the property affected by the governmental action, [that is] whether the plaintiff possessed a 'stick in the bundle of property rights.'" Id.

Mr. Sisolak's property was vacant, he had no approvals from the County to develop his property, and he had no approvals to build into his airspace. Id., at 653-54. Even though he had no approvals to develop his property or to build into his airspace, he alleged that the County took his airspace (an intangible property right) when it enacted a development height restriction over his

property.

The County argued that there could not be a taking, because Mr. Sisolak had no "property interest" or vested right to use his airspace. This is the same exact argument the City is making in this case. The County specifically argued "that Sisolak never obtained a vested property right in the airspace because he failed to obtain zoning or use permit approvals to undertake a project to use the airspace, and thus the airspace was not constitutionally protected from uncompensated takings." Id., at 660, fn. 26, and 654. In other words, the County claimed that it could take property without paying for it as long as the owner had not yet received approval to develop from the local government agency - the same exact argument the City is making to this Court.

The Nevada Supreme Court rejected the County's argument (the same argument made by the City in this case). First, the Court held that "the term property includes all rights inherent in ownership, including the right to possess, use, and enjoy the property." Id., at 658. "The fact that [the owner] does not occupy [the property] in the physical sense - by the erection of buildings and the like - is not material." Id., at 658. The Court concluded that Mr. Sisolak had a "property interest" / vested property right in the airspace above his property. Id., at 661.

The Nevada Supreme Court then spent a great deal of time in the Sisolak opinion explaining the reasoning for this rule to make sure that the County's argument is quashed in Nevada and not repeated by other government agencies (as the City is doing in this case). It explained that Mr. Sisolak's property right stems, in part, from the fact that "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 Nevada Constitution contemplates expansive property rights in the context of taking claims through eminent domain," and "Nevada enjoys a rich history of protecting private property owners against government takings." Id., 669-670. The Sisolak decision makes clear that, even if an owner of property does not have approvals from the City to develop her property, she still has a "property interest" / vested right to use her property and, if the City engages in action to prevent the use of that property, it is liable for a taking and must pay just compensation.

The Court did explain that the City can apply "valid zoning and related regulations which do

not give rise to a taking claim." Id., at 660, fn 25. This allows the City discretion to deny land use applications or regulate the use of property, but the City action must be based on "valid zoning" regulations and the City action must not give rise to a taking claim, *i.e.* denial of all use of property.

The Nevada Supreme Court adopted a similar holding in the case of Schwartz v. State, 111 Nev. 998 (1995). In Schwartz, Martin and Phyllis Schwartz owned an 8.9 acre parcel of vacant and undeveloped land for which no entitlements had been granted for development. Specifically, the Schwartzes had not obtained (or even applied) to the State of Nevada for an encroachment permit to allow access to the adjoining street. Id., at 940, 943, fn.6. The State did not take any part of the Schwartz's vacant and undeveloped property, but eliminated direct access to the street and required a more indirect route to the property. Id., at 940. The district court found a substantial impairment of access, but held the impairment was reasonable and disallowed damages. Id., at 940-41. On appeal, the State tried to deny the Schwartz's had an underlying property interest or vested property right in their access, because the property was vacant and undeveloped, there were no approvals for the access, and obtaining access to the roadway would have been a "bureaucratic nightmare." Id., at 943, fn 6. As this Court can see, these are the same arguments the City is making in this case to try to convince this Court that the Landowners have no property interest / vested right to use the 35 Acre Property. The Nevada Supreme Court rejected the argument, holding the Schwartz's had a property interest in the access "despite the fact that [they] had not yet developed access to U.S. 95 when the right of access was denied." Id., at 942-43. The Court went on to explain that the lack of entitlement to use the access was irrelevant when determining whether there is a vested right to use property and liability for depriving the landowner of that right to use, but may become relevant in the just compensation phase. Id., at 943, fn 6.

In conclusion, the Nevada Supreme Court in both the Sisolak and Schwartz decisions held that all property owners in Nevada, including the Landowners in this case, have the vested right to use their property, even if that property is vacant, undeveloped, and without City approvals. The City can apply "valid" zoning regulations to the property to regulate the use of the property, but if those zoning regulations "rise to a taking," then the City is liable for the taking and must pay just compensation.

2. Reason #2 Supporting the Landowners' Vested Right to Use: Mr. Peccole's Own Concept Plan Has Always Shown this Specific 35 Acre Property as Residential.

This 35 Acre Property has always been zoned AND land use planned for a residential use. As this Court is aware, the City has repeatedly touted William Peccole's Concept Plan he drafted in 1986 for how the larger 250 Acre Residential Zoned Land and the surrounding area should develop. The City has asserted that Mr. Peccole identified the larger 250 Acre Residential Zoned Land as a golf course and the Landowners do not have a vested right to use the 250 Acre Residential Zoned Land (or the claims in this matter are not ripe), because the Landowners have "not provided the City Council with an opportunity to consider and decide an application for a major modification to the Peccole Ranch Master Development Plan." City Motion, 9:25-28.

This vested rights/Major Modification argument asserted by the City entirely fails **in this specific case as it relates to this specific 35 Acre Property**. Mr. Peccole's Concept Plan (even if it applies in this case), has ALWAYS identified the specific 35 Acre Property in this case for a **residential use**. Attached hereto as *Exhibit 107* is a map showing the location of the open space / golf course designation in Mr. Peccole's Concept Plan and the location of the 35 Acre Property. The 35 Acre Property is identified in red and the golf course is identified in yellow. As this Court can see, the 35 Acre Property (in red) is far outside the golf course area (in yellow). Therefore, even if this Court accepts the City's argument that Mr. Peccole's Concept Plan applies in this case, that plan identifies this specific 35 Acre Property for a residential use (outside the golf course), further confirming the right to use the 35 Acre Property for a residential use and that no Major Modification of Mr. Peccole's Plan would ever be needed in this specific case to use the 35 Acre Property for a residential use. This Major Modification argument is further discussed below.

3. Reason #3 Supporting the Vested Right to Use: The Judge Smith Orders (Affirmed by the Nevada Supreme Court) Confirm the Vested Right to Use the 35 Acre Property Residentially and Reject the "Open Space" Argument.

The above cited Sisolak and Schwartz rules were reaffirmed by the Nevada Supreme Court in an opinion that applies specifically to the 35 Acre Property at issue in this very case. The pointed issue of whether the Landowners have a "property interest" / vested right to use the 35 Acre Property was presented to the Honorable Judge Douglas E. Smith and the Nevada Supreme Court and both Judge Smith and the Nevada Supreme Court agreed the Landowners have a property interest in and

the vested right to develop the 35 Acre Property at issue in this case. *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.*

a. Judge Smith Findings

The issue of whether the 35 Acre Property is R-PD7 (residential zoning allowing up to 7 units per acre) hard zoned, which grants the Landowners a "right to develop" was fully litigated before the Honorable Judge Douglas E. Smith where the City was named as a party. *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: 1) the 35 Acre Property has been hard zoned R-PD7 since 1986; 2) this hard zoning grants the Landowners the "right to develop" the 35 Acre Property; 3) this hard zoning trumps any other conflicting land use plan - including any City public plan; and, 4) the City's "open space" argument is without merit:

- 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 35 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 (emphasis supplied).*

- "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* (emphasis supplied).

- 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]."[17] *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.*

- 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.*

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[17] 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 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."***[18] *Exhibit 7: 3 App., LO 00000565, finding # 13, LO 00000571, finding # 38, LO 00000574, finding #53 (emphasis supplied).*

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* (emphasis supplied). This meant that the Court's ruling applied not only to the Queensridge plans, but also the City's "public maps." 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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[18] 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*.

b. The Nevada Supreme Court Affirmance of the Judge Smith Orders Nullifies the Crockett Order In This Eminent Domain Proceeding.

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").

1. 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 for the Landowners to develop their property 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 1990 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 next contends (applying the Crockett Order) that the Landowners have no property interest/ vested right to use the 35 Acre Property and, if the Landowners want to use their 35 Acre Property 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, approved by the City, 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 on at least three separate occasions (as further explained below).

2. How The Nevada Supreme Court Nullified 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 has been on the 250 Acre Residential Zoned Land since 1986, instead of the "conceptual" land-use plan drafted by Mr. Peccole and specifically

rejects any "open space" designation argument. 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 "open space" designation argument was specifically rejected by Judge Smith; 3) the 250 Acre Residential Zoned Land was never part of the Queensridge Community or subject to any Queensridge CC&Rs; 4) the Queensridge homeowners have no rights whatsoever to the 250 Acre Residential Zoned Land; 5) no Queensridge CC&Rs or other City **"public map"** may be invoked to prevent this development; and, 6) 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"[19] - 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 CC&Rs 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 (emphasis added)*. 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

[19] 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*.

be dedicated for public use, such as a park. The Nevada Supreme Court understood this well, 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]."[20]

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), affirm the Landowners' property interest and "right to develop" the 35 Acre Property residentially, and specifically reject the "open space" designation argument.[21] The Crockett Order, on the other hand, ignores the R-PD7 zoning and, instead, focuses on Mr. Peccole's alleged "concept" plan designation of open space and holds no residential units are allowed in the open space.[22]

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,[23] legislative,[24] and judicial branches[25] have all determined Judge Smith is correct - hard zoning trumps the land use plan,[26] especially a "concept" plan by Mr. Peccole that is not even a city master land use plan.[27]

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[20] 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 (emphasis added).* Also, the "Master Plan" for the Queensridge CC&Rs shows that the 250 acre property is "NOT A PART" of the Queensridge Community. *Id.*

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

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

[23] 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.")

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

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

[26] 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

3. Strong Public Policy Supports the Nevada Supreme Court Affirmance of the Judge Smith Orders Finding the Landowners Have the Vested Right to Use Their Property.

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

Public Policy #1. First, as cited above, the 35 Acre 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 conflicting land use plan designation.[28] In fact, any challenge to this vested "right to develop" is, as stated by Judge Smith, "frivolous."[29] Moreover, the ruling is consistent with the Nevada Supreme Court Sisolak and Schwartz cases, which hold that Nevada landowners have a "property interest" / the vested right to develop their properties even if they have not put it to a beneficial use,[30] and the government may only

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area, while zoning designations specifically define allowable uses and contain the design and development guidelines for those intended uses." *Exhibit 10, 3 App LO 00000632:8-12 (emphasis added).* 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, 12 App. LO 00002804: 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 24, 5 App LO 00001071: 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. LO 00001070-71.*

[27] The City attorney and planning director have admitted on the record that the 1990 Peccole Concept Plan is not one of the City's enumerated plans that requires a major modification. *Exhibit 5, 2 App LO 00000400:1221-1233* ("the master plan adopted by the City Council specifically call out those master plan areas that are required to be changed through a major modification. This Peccole Ranch is not one of those.")

[28] *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.*

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

[30] 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).

regulate that use with "valid zoning and related regulations" that do not "give rise to a taking claim."[31] Otherwise, if the City had absolute discretion to grant or deny the use of property, then the Just Compensation Clause in the constitution 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.

Public Policy #2. 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. And, even if a major modification is required, pursuant to the Sisolak and Schwartz cases, this does not defeat the Landowners' property interest / vested right to use the 35 Acre Property.

Public Policy #3. 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 in a constitutional eminent domain case.

Public Policy #4. If this Court elects to follow the Crockett Order that entirely ignores the

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[31] 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.

Landowners' hard zoning property interest 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."[32] 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.[33] Adherence to the Crockett Order in this case would result in 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.

Therefore, there is strong public policy supporting the Judge Smith Orders and affirmance by the Nevada Supreme Court.

4. The City is Bound by the Judge Smith Orders.

The City has repeatedly argued for and cited to the elements of issue preclusion in this case.[34] This doctrine applies more fully to the Judge Smith Orders than other orders advanced by the City, because: 1) the Judge Smith Orders pointedly reject the City's argument that the Landowners have no property interest/vested right to use their property; 2) the City's argument of no property interest/vested right to use argument the City is making in this case is the same one that was made in the Judge Smith case and Judge Smith and the Nevada Supreme Court relied upon "public maps" (which would include the City's maps) in finding a vested right to use the 35 Acre Property (Exhibit 84, p. 4); 4) the City is a party in the Judge Smith case and had a full and fair opportunity to be heard;

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

[33] Id., at 2601.

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

and, 5) the Judge Smith Orders are a final decision on the merits as they have been affirmed by the Nevada Supreme Court.

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4. Reason #4 Supporting the Landowners' Vested Right to Use: The Party in this Case (the City of Las Vegas) Confirmed the Vested Right to Use and Should Be Judicially Estopped From Now Arguing the Exact Opposite Position.

a. The City Has Hard Zoned the 35 Acre Property For a Residential Use Since 1986 and Reaffirmed this Zoning Numerous Times over the Past 32 Years.

On numerous occasions over the past 32 years (1986,[35] 1996,[36] 2001,[37] 2014,[38] 2016,[39] and 2018[40]) the City of Las Vegas has confirmed the R-PD7 hard zoning on the 35 Acre Property, which "allows" residential development on the 35 Acre Property.

Even the City's own 2020 Master Plan shows the Landowners' Property as hard zoned R-PD7. *Exhibit 106.* This map, prepared by the City and included in the City's own current Master Plan identifies the Landowners' Property as a residentially hard zoned property.

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[35] *Exhibit 85.*

[36] *Id.*

[37] *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)."*

[38] *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.*

[39] *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.*

[40] *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.*

b. The City's Representatives Stated on the Record that the Landowners Have Hard R-PD7 Zoning Which Grants the Landowners the Right to Use Their Property.

The persons most knowledgeable at the City have affirmed the Landowners' property interest/vested right to develop their property and rejected the "open space"/Major Modification argument now being advanced by the City's private counsel. Brad Jerbic is perhaps the best person at the City who can offer an opinion on the matter 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 Landowners have the right to use their property, and the City's "Major Modification" argument which the City's current privately retained counsel asserts is nothing more than a "red herring."[41] 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 matter and he also stated that a Major Modification is not required.[42] Tom Perrigo, the City's highest ranking planner, stated a Major Modification is not a barrier/required to develop the 35 Acre Property.[43] *See also footnote 27 above*. If the "Major Modification" argument is a red herring, then the no property interest/vested right to use argument is also a red herring, because the only basis the City has to argue there is no vested right is the City's assertion that a Major Modification is necessary as a precondition to develop.

c. The City's Past Actions Show the "Open Space" / No Vested Property Rights Argument is a Complete Farce.

The City's own past actions in approving 1,067 units in the Peccole Concept Plan area show that the City's privately retained counsel's "open space"/no vested rights argument is a completely fabricated argument to this Court. In previous pleadings to this Court, the Landowners advised the Court that they were able to find at least 50 applications submitted to the City of Las Vegas that had the same R-PD7 hard zoning as the Landowners' 35 Acre Property and also had the alleged "open space" designation on the City's land use plan. The City of Las Vegas determined in every single one

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

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

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

of these 50 instances that the owner had a property interest/the vested right to use their property and approved the residential use of the property. And, **NOT ONCE** in any of these 50 applications did the City assert there is an "open space" designation that limited development or require a "Major Modification" from the Peccole 1990 Conceptual Plan.[44]

Now, subsequent to the previously submitted pleadings, the Landowners were also able to locate where the City approved a total of 26 projects and 1,017 units for development that are also within the boundaries of the Peccole Concept Plan and the uses for these 1,017 units were also contrary to the land use designation in the Peccole Concept Plan. *Exhibit 105* **NOT ONCE** in these 26 projects / 1,017 units did the City assert the development must be stopped due to the Peccole Concept Plan "open space" and **NOT ONCE** did the City assert that a Major Modification needed to be filed with the City to modify the Peccole Concept Plan. This clearly shows that the City's "open space" / Major Modification argument to this Court is a complete fabrication. 1,067 v. zero is not a mistake - it is compelling and overriding evidence that the City's continuous representation to this Court on the "open space" / Major Modification argument is a complete fallacy.

d. The City Should be Judicially Estopped from Taking any Contrary Position on the Property Interest/Vested Rights Issue

The Nevada Supreme Court adopted the doctrine of judicial estoppel "to prevent parties from deliberately shifting their positions to suit the requirements of another case concerning the same subject matter." Matter of Irrevocable Trust Dated October 29, 1996, 390 P.3d 646, 652 (Nev. 2017). The Court looks for five elements when considering the doctrine of judicial estoppel: 1) the same party has taken two positions; 2) the positions were taken in judicial or quasi-judicial proceedings; 3) the party was successful in asserting the first position; 4) the two positions are totally inconsistent;

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[44] The City admitted that there have been six other development/entitlement actions completed 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.

and 5) the first position was not taken as a result of ignorance, fraud, or mistake. Id. Here, as explained above, the party to this case - the City of Las Vegas - has repeatedly confirmed the Landowners' property interest/vested right to use the 35 Acre Property. And, even to this day, the employee representatives for the party to this case - the City of Las Vegas - have not denied this property interest/vested right to use the 35 Acre Property. The only person connected to this case that denies this vested right to use the 35 Acre Property is the City's privately retained counsel, who cannot provide testimony in this case. Accordingly, the City should be judicially estopped from denying the Landowners have the vested right to use the 35 Acre Property for purposes of this inverse condemnation proceeding.

5. Reason #5 Supporting the Landowners' Vested Right to Use: The County of Clark Even Recognizes the Hard R-PD7 Zoning.

This residential zoning is so widely accepted that the Clark County Assessor has assessed taxes for the property as residential for a value of approximately $88 million and the current Clark County website identifies the 35 Acre Property "zoned" R-PD7. *Exhibit 36: 8 App LO 00001923-1938*. Again, the only person even remotely connected to this case that denies the Landowners' property interest/right to develop the 35 Acre Property residentially is the City's privately retained counsel.

C. REBUTTAL OF CITY'S FACTUAL ARGUMENT TO DENY THE LANDOWNERS' PROPERTY INTEREST VESTED RIGHT TO USE THE 35 ACRE PROPERTY.

1. The City's Private Attorney's Argument that the 35 Acre Property Was Originally Designated Open Space by Mr. Peccole is False.

To try and rebut this overwhelming and compelling evidence that the Landowners have a property interest in and the right to develop the 35 Acre Property and that the property has always been hard zoned R-PD7 with the vested right of use, the City has asserted that the Landowners predecessor in interest, William Peccole, originally sought and obtained an "open space" designation on the 35 Acre Property. This is a patently false statement with absolutely no support in any documents before the Court. Even if reference is made to the Peccole Concept Plan the City touts before this Court, that Concept Plan is entitled "A Master Plan Amendment and Phase Two ***Rezoning Application***." Exhibit 60: 10 App LO 00002366. That underlying and original "Re-Zoning application" requested and received "R-PD7" hard zoning on the 35 Acre Property - not "open space."

This is explained above in the Judge Smith Orders and confirmed in writing clear back in the 1990s. *See Exhibit 85, 13 App LO 00003007-3012.* That R-PD7 hard zoning has never been nullified. And, the property has never been properly changed to "open space" as argued by the City. In fact, as explained above, the same "open space" argument the City is making to this Court, was made to Judge Smith and was rejected in the Smith Orders and those orders have been affirmed by the Nevada Supreme Court. Moreover, the City, itself, conducted a detailed and expansive investigation to determine how the "open space" designation even ended up on the 35 Acre Property and City Attorney Brad Jerbic provided the following statement setting forth the City's findings from this investigation:

> "Brad Jerbic: If I can jump in too and just say that 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 [the City of Las Vegas] 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.* (emphasis supplied).

This is a very important statement, because Mr. Jerbic has been the City Attorney for over 30 years and is the person that can best determine the validity of the hard R-PD7 zoning and the Open Space issue on behalf of the City. Accordingly, statements by the City's now retained private counsel (that are directly contrary to the City representations) are irrelevant in these proceedings.

Moreover, the Landowners' predecessor ALWAYS insisted on maintaining residential "fallback" for the 250 Acres Residential Zoned Land for future development potential. In fact, the deposition of Mr. Greg Goorjian, who was the former VP of Marketing for Queensridge and had worked with William Peccole since 1983, testified that Mr. Peccole made sure that there was always a "fallback" position of residential for the 250 Acre former golf course property; that "Mr. Peccole had tremendous foresight, and always, believe it or not, planned for the worst," "[t]hat there might be circumstances that it would no longer be able to be a golf course, whether it was financially, water. He always brought up issues like war. He always was very cautious, conservative person." (*Exhibit 99*, *LO 00003838, Goorjian Depo Transcr. p. 17-18*). Accordingly, despite the City's unsupported representations, Mr. Peccole would not have sought any designation on his then 250 acres which would have prevented future development. Mr. Goorjian further confirmed that the 250 Acre Residential Zone Land was never part of Queensridge or the Peccole Master Plan. Accordingly,

contrary to the City's contention, the Landowners' 250 Acres Residential Zoned Land was always protected and intended for future residential development.

2. The City's Citation to Zoning Law for this Vested Rights Issue is Misplaced.

Instead of following the well established eminent domain law on the vested rights issues cited above (Sisolak and Schwartz) and the well reasoned vested rights law applicable specifically to the Landowners' 35 Acre Property (Judge Smith Orders) and the statements by the City's own employee representatives, the City's privately retained counsel cites to entirely inapplicable zoning law, Stratosphere Gaming Corp. v. City of Las Vegas, 120 Nev. 523 (2004), which is not inverse condemnation case law, but rather law related to the City's discretion to deny "redevelopment applications." The City asserts that "[t]his Court already determined that the [Landowners have] no vested right to have its redevelopment applications approved," and, therefore, there can never be a taking of the Landowners' Property. City Mot. 5:22-23. The City further asserts "[i]f the landowner retains the same interest it had previously, there is no taking." City Mot. 6:18-19.

This City cited zoning law does not apply in the context of this inverse condemnation case. In the context of an inverse condemnation case, all Nevada landowners have a property interest in/ the vested right to use their property as explained in detail above. The City has the discretion to limit or interfere with the Landowners vested right to use his property by applying "valid zoning and related regulations which do not give right to a taking claim." Sisolak, at 660, fn 25. If, however, as in Sisolak and Schwartz, the City applies "valid zoning and related regulations" that "give rise to a taking claim," then it is liable for a taking and must pay just compensation. The discretion to apply the "valid zoning and related regulations" does not defeat the landowner's property interest and it is not a defense to a taking.

The application of this rule can be seen in several cases where the government had discretion to deny a land use, the government denied the land use, but the Court still found a vested property right and a taking. In the Sisolak case, the County exercised its discretion to apply a valid zoning ordinance (a height restriction to protect safe airplane travel), prohibited the development of property into the airspace, and the Nevada Supreme Court still found a vested right to use and a taking of the airspace. In the Schwartz case, the State exercised its discretion to apply a valid regulation to change

access to the Schwartz's property, prohibited access to a roadway, and the Nevada Supreme Court still found a vested right to use and a taking of the access. In the Del Monte Dunes case, the City of Monterey exercised its discretion to apply regulations (to protect an endangered butterfly), prohibited the development of property in furtherance of this regulation, and the United States Supreme Court still found a vested right for which compensation must be paid if taken. In the Lucas case, the South Carolina Coastal Commission exercised its discretion to apply a regulation (the Beachfront Management Act - to protect inland flooding), prohibited the development of property in furtherance of this development, and the United States Supreme Court held there could still be a vested right for which compensation must be paid if taken. What each of these decisions hold is that government discretion to apply regulations and deny land use applications is not a defense to a landowner's vested right to use and it is not a defense to a taking action as argued by the City in this case.

The following comparison shows further why using zoning law is improper in this inverse condemnation case.

Zoning Law:	**Eminent Domain Law**:
City has discretion to deny land use applications. Stratosphere	If City exercises discretion to render a property valueless or useless, there is a taking. Hsu, Sisolak, Del Monte Dunes, Lucas,
There is no vested right to have a land use application granted. Stratosphere	Every landowner in the state of Nevada has the vested right to possess, use, and enjoy their property and if this right is taken, just compensation must be paid. Sisolak.

Finally, a simple example illustrates the difference between zoning and inverse condemnation law. If the owner of a vacant one acre residentially zoned parcel applies to develop her property and requests 4 units to the acre (similar to the surrounding area) but the city says that the zoning only allows for 2 units and approves the 2 units, the owner could file a petition for judicial review to challenge the outcome under the zoning code and related cases, which could include citation to the Stratosphere case. If however, the city denies any residential units and precludes all development of the one acre vacant parcel, then the owner's recourse is an inverse condemnation action as the city's action would have rendered the property useless and denied all right to use, possess and enjoy the vacant property which is a taking and that case would include citation to the Sisolak, Schwartz, Del

Monte Dunes, and Lucas cases.

3. The City's "Same Interest" Argument is Without Merit.

Finally, the City's argument that "[i]f the landowner retains the same interest it had previously, there is no taking" is patently false. City Mot. 6:19. This argument is entirely irrelevant in the determination of liability for a taking. In fact, a similar argument was made by the County in Sisolak and the State in Schwartz and both times the Court rejected the argument. In the Sisolak case, the County asserted that Mr. Sisolak's airspace could not have been taken, because he could have obtained a variance to build in to the airspace, meaning he would "retain the same interest [he] had previously." The Nevada Supreme Court rejected this argument, holding that it is irrelevant to the determination of whether there has been a taking.

As it is very clear the Landowners have a property interest in the 35 Acre Property, the next issue is whether the City has taken that property interest.

D. 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' Countermotion will set forth the systematic and aggressive actions by the City to prevent any and all use of the 35 Acre Property thereby rendering the property useless and valueless and establishing liability for a taking. The City has repeatedly tried to claim that the Landowners' taking claims are based on just the City's one denial of development application for the 35 Acre Property. That is entirely incorrect. The Landowners' taking claim is based on the numerous systematic and aggressive City actions rendering the 35 Acre Property valueless and unuseable. 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."[45] The following 11 City actions demonstrate the basis for the Landowners' Inverse

[45] Merkur v. City of Detroit, 680 N.W.2d 485, 496 (Mich.Ct.App. 2004). *See also* 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 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 a property interest in/the "right to develop" this 35 Acre 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 00000950-976.* Tom Perrigo, the City Planning Director, stated at the hearing on the Landowner's applications 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,[46] 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.*

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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).

[46] 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.*

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

To comply with the City demand to have one unified development, for over two years (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.*[47] As stated above, the City mandated that development of the 35 Acre Property be included in the MDA covering all 250 acres,[48] rather than one application for just the 35 Acre Property. In fact, this was the sole basis the City gave for denying the 35 Acre Property individual applications to develop.

The amount of work that went in to the MDA was demanding and pervasive.[49] The

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

[48] 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.*

[49] 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.*

Landowners complied with each and every City demand, making more concessions than any developer that has ever appeared before this City Council.[50] 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 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.[51] In total the City required at least 16 new and revised versions of the MDA. *Exhibit 28*.[52] In the end, the

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[50] 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.*

[51] 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.*

[52] *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.*

Landowners were very diligent in meeting all of the City's demands[53] and the MDA met all of the City mandates, the Nevada Revised Statutes and the City's own Code requirements.[54] *Exhibit 24: 5 App LO 00001071-1073 lines 2652-2655.* Even the City's own Planning Staff, who participated at

[53] 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.*

[54] 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.*

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*. And, as will be explained below, the MDA even met any and all Major Modification procedures and standards that are set forth in the City Code.

Notwithstanding the Landowners' efforts and sweeping concessions, and the City's own Planning Staff recommendation to pass the MDA, and the fact that the MDA met each and every City Code Major Modification procedure and standard, and the City's promise that it would approve the MDA (the sole basis the City gave for denying the 35 Acre Property applications was to allow approval of 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.* The City did not ask the Landowners to make more concessions, like increasing the setbacks or reducing the units per acre, it just simply and plainly denied the MDA altogether. *Id.*

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 and complete 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 any and all uses of the 35 Acre Property. 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%[55] 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

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[55] 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.*

Residential Zoned Land in order to create further barriers 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 be submitted regardless 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%[56] 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.[57] 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.[58] The Court held that this right exists "despite the fact that the Landowner had not yet developed access."[59] 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

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56 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.*

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

58 Schwartz v. State, 111 Nev. 998 (1995).

59 Id., at 1003.

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.*

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.[60] 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, and 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

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

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, referenced above, requires a technical drainage study in order to grant entitlements. The City, 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,[61] 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: The City's 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.*[62] *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

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

[62] 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*.

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 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 133 Acre Property 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 and affirmative actions to create barriers to development 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 prevent all development on the Landowners' Property so the city can take it for the City's 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 a property interest/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,[63] 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**.[64]

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 Landowners's 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 [250 Acre Residential Zoned Land] guy? While you are waiting to hear **is there a fair amount of intel on the scum** behind [sic] the badlands [250 Acre Residential Zoned Land] 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

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63 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.)

64 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.

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 but call or write to our 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 advised Queensridge residents on how to circumvent the legal process and the Nevada Public Records Act[65] 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 them" 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

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65 *See NRS 239.001(4)* (use of private entities 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)

Property at issue in this case. This 17 Acre approval was in early 2017 with a drastically different City Council and each and every one 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 attempting to use their property for which they have a property interest and 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*.

11. City Action #11: The City Retains Private Counsel to Confirm that It Will Push an Invalid Open Space Designation on the 35 Acre Property.

Finally, as this Court is aware, the City has now retained and authorized private counsel to push an invalid "open space" designation/Major Modification argument in this case to prevent any and all development on the 35 Acre Property. As explained above, this is the exact opposite position of the City's own employee representatives and the exact opposite position the City has taken for the past

32 years on at least 1,067 development units in the Peccole Concept Plan area. *Exhibit 105.* As explained above, 1,067 units have been developed over the past 32 years in the Peccole Concept Plan area and **NOT ONCE** did the City even attempt to apply the "open space"/Major Modification argument it's privately retained counsel is arguing to this Court, even though those 1,067 units were developed contrary to the land use designation on the Peccole Concept Plan. It is undeniable that the City has specifically targeted this one Landowner and this one Property and is treating them differently than it has treated all other units in the area (1,067 other units in the area) and all other landowners in the area for the sole purpose of denying 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*.

E. 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[66] claims against the City (pursuant to this Court's order to sever the claims from the petition for judicial review) alleging 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.

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[66] 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).

LEGAL ARGUMENT

The Landowners are seeking a judicial determination of liability for the taking on each of these inverse condemnation claims **with the exception of the Penn Central claim**. The reason the Landowners are not seeking liability for the taking on the Penn Central claim is so the exhaustion of administrative remedies/ripeness arguments (which involve the City's "open space"/Major Modification argument) are not at issue. As will be explained, exhaustion of administrative remedies/ripeness arguments are **only** applied when a Penn Central claim is at issue; they have no place where other taking claims (like the Landowners' four other claims listed above) are at issue. This means that the City's no property interest/no vested rights ("open space"/major modification) arguments have no place in the Countermotion For Judicial Determination of Liability on Landowners' Inverse Condemnation Claims.

A. STANDARD OF REVIEW

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).[67] 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

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[67] *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).

compensation.[68] 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 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.[69] 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."[70]

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[68] "[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.

[69] *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).

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

C. THIS COURT SHOULD ENTER A JUDICIAL DETERMINATION THAT THERE HAS BEEN A TAKING ON ALL INVERSE CONDEMNATION 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 economical use of her property."[71] 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.[72] 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 waterfront 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 vacant 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 conceded the validity of the underlying Act and did not challenge the Act in the first instance. 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 where there

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

[72] 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.)

had been a deprivation of all economic use of the property, this is a "categorical taking" and the government action in the case was sufficient to find a taking.

As explained above, according to the Sisolak decision, the Schwartz decision, and 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 as part of a scheme to leave the 35 Acre Property vacant so the City can take the Property for a City park. The City denied the individual applications to develop the 35 Acre Property as a stand alone parcel **and** the denied the MDA that would have allowed the 35 Acre Property to be developed as one unit with the overall 250 Acre Residential Zoned Land, even though both sets of applications met every single City requirement. In fact, as explained above, the City drafted, for the most part, the entire MDA, then denied its own MDA to prevent the Landowners from using the 35 Acre Property. 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' this constitutional right to 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 these Yohan Lowie Bills so that it can use them as a barrier and an excuse to deny all development applications on any part of the 250 Acre Residential Zoned Land. The City has also stricken applications to develop the 133 Acre Property, refusing to even allow the Landowners to be heard on the applications and 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." And, the City has retained private counsel now to push the "open space" designation

on the Landowners' Property which is contrary to the City's own actions for the past 32 years and actions on at least 1,067 units in the area of the 35 Acre Property. 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, this Court should enter a judicial determination 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.[73] Ordinance 1221 preserved the airspace above properties near the airport for a future unbuilt runway. After many years of litigation, the Nevada Supreme Court held that Ordinance 1221 was a taking of the landowners' airspace,[74] "because the right to fly through the airspace **is preserved** by the Ordinances

[73] Sisolak, at 1114-15.

[74] 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

[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 landowners' airspace near the airport undeveloped.[75] Therefore, if the government engages in action to preserve property undeveloped, there has been a regulatory per se taking for which just compensation must be paid. Here, the impact to the 35 Acre Property as a result of the City's actions in this case is significantly more than the impact to the property surrounding the Airport as result of Ordinance 1221 referenced in the Sisolak case. The landowners whose properties were impacted by Ordinance 1221 in the Sisolak case could still use their underlying physical property for development; they just could not use their airspace past a certain height. Therefore, Mr. Sisolak could build up to 66 feet, but no higher. And, the Court held that was a taking. Here, as explained above, the City has taken much more than just the airspace above 66 feet and not only is the City preserving the 35 Acre Property undeveloped, but the City has engaged in affirmative aggressive and systematic actions, described above, to preemptively preclude any and all use of the 35 Acre Property. Therefore, the City is not only "preserving" the vacant nature of the entire 35 Acre Property, including the dirt and the airspace, 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.

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cases as they litigated the airspace taking cases for nearly 14 years.

[75] 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).

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.

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.[76] In this connection, it is well settled that there does not have to be a physical invasion to establish a non-regulatory/de facto taking.[77] Nichols on Eminent Domain,[78] the foremost authority on eminent domain law, generally

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[76] 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).

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

[78] 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

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 property rights[79] in the context of inverse condemnation cases to protect Nevada landowners.[80] 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."[81] 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

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(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).

[79] 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.

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

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

government involves a direct interference with or disturbance of property rights."[82] In Richmond Elks Hall, the government engaged in a series of actions which 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 Landowners' 35 Acre (vacant) Property, entirely useless and valueless. In fact, as explained, despite repeated and valiant attempts to develop the 35 Acre Property, the Property lies vacant today as a result of the City's aggressive and systematic actions to prevent any and all use of the Property. Accordingly, there has been a non-regulatory/de facto taking of the Landowners' property.

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.[83] Two cases are instructive. In Citino v. Redevelopment Agency of City of Hartford,[84] 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

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

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

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

arrested, property has been taken in the constitutional sense."[85] 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."[86]

It cannot be disputed that the City action in this case is a substantial deprivation of the Landowners' use and enjoyment of their 35 Acre 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 was decided in the context of a land use case and which entirely ignores the Landowners' hard zoning and vested right to develop) to deny the taking in this case, this will add a judicial taking claim, because the Crockett 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.

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

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85 Id., at 1209. Emphasis supplied.

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

> 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).[87]

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]." And, in this very proceeding the City's privately retained counsel is trying to advance an "open space"/Major Modification argument to deny the Landowners their right to use the 35 Acre Property, even though this "open space"/Major Modification standard has not been applied for the past 32 years on 1,067 other units that have developed in the Peccole Concept Plan area. *Exhibit 105.* In other words, for the past 32 years every landowner in the Peccole Concept Plan area has been permitted to develop except these Landowners. Accordingly, the City action in targeting solely the Landowners and their singular property makes the Landowners' taking claims "much more formidable."

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."[88] 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."[89] The

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87 Lucas, at 1074 (law cited in Justice Stevens dissent).

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

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

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.[90] The Washington Supreme Court has also acknowledged that the effect of condemnation activity targeting vacant land "chains" landowners to the property.[91] 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.[92]

The Landowner's 35 Acre Property is vacant and unimproved with a property interest / "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, paying taxes assessed on residential value ($88 million), until the City gets around to formally taking the property for the park. Accordingly, the marketability and development potential of the Landowners' vacant property have been eliminated by the City's actions making the Landowners taking claims "much more formidable."

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."[93] No reasonable person could possibly argue that the City's actions, described above, are anything but bad faith. And, retaining private counsel to make arguments that are contrary to the representations by the City's own 30 year veteran City Attorney (Brad Jerbic) and the City's actions for the past 32 years and the City's actions on 1,067 other units in the area, all in an effort to take the Landowners' 35 Acre Property

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[90] Althaus v. U.S., 7 Cl.Ct. 688 at 695 (1985).

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

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

[93] Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468, 487 (Tx. 2012). *See also* City of Austin v. Teague, 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.).

without payment of just compensation, further supports this 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 entered a judicial finding of 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."[94] 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 JUDICIAL DETERMINATION OF 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 request for a judicial determination of liability and enter an order that the City has taken the Landowners' 35 Acre Property mandating payment of just compensation.

ARGUMENT ON INDIVIDUAL ISSUES THE CITY RAISES REGARDING LIABILITY

In these inverse condemnation proceedings, the City has raised several arguments (and may raise additional ones) to deny liability, nearly all of which have already been presented and rejected by the United States and Nevada Supreme Courts. In fact, it appears that the City has researched all of the arguments the Nevada Supreme Court has rejected in the past 30 years and is trying to re-argue them in this case.

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

A. ARGUMENT REGARDING THE STATUTE OF LIMITATIONS AND WAIVER.

The City asserts 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. City Mot. pp. 7-9. 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 Does Not Amount to a Taking; Liability Does Not Arise Until the Government Implements the Designation on 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."[95] 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 of the plan upon his land, the courts of this state would be inundated with futile litigation.[96]

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

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[95] 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).

[96] Id., at 444.

the public agency's activities have gone beyond the planning stage to reach the "acquiring stage.'"[97] 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. Moreover, since, as explained above, the City has approved at least 1,067 other units that were contrary to the Peccole Concept Plan over the past 32 years, there is no indication that the Peccole Concept Plan or any other alleged "open space" designation even applied to the Landowners' 35 Acre Property for the past 32 years. Instead, it is the aggressive and systematic actions taken by the City since 2015 (listed above) to preclude any and all use of the 35 Acre Property in order to preserve the property for the City's park that gives rise to the taking claims in this case. Therefore, all City actions leading to the taking in this case have occurred within the 15-year statute of limitations period. White Pine Limber v. City of Reno, 106 Nev. 778 (1990) (adopting 15 year statute of limitations for inverse condemnation actions).

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

The City also asserts 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. City Mot. pp. 7-9. 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. And, the Landowners have been the owners of the 35 Acre Property during all relevant times the City has prevented the use of the Property. Moreover, in Palazzolo v. Rhode Island, the United States Supreme Court rejected the

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[97] 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).

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."[98] 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."[99] 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.[100] This is the case even if the landowner's claim is one in inverse condemnation.[101] 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."[102] It is an in rem (property) proceeding that focuses on the use and value of the taken **property** to arrive at "just compensation."[103] The Nevada State Constitution recognizes this rule, providing that "[i]n all 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"

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

[99] Palazzolo at 627.

[100] 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).

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

[102] "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).

[103] Id.

and that "the taken or damaged **property** shall be valued at **its** highest and best use."[104] Here, the res[105] (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.[106]

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104 Nev. Const., art. 1, sec. 22 (3), (5) (emphasis supplied).

105 "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).

106 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 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,

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.[107] 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.[108] 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.[109] The Court has held 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

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hey look, it's all golf course. It should be PR-OS. I don't know." *Exhibit 77: 12 App LO 00002924.*

[107] 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)).

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

[109] 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).

precondition to sue on a federally created and protected right."[110] 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."[111] 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."[112]

The Court went on to hold that the "constitutional guaranty [of just compensation] needs no legislative support, and is beyond legislative destruction."[113] 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 alleges that the Landowners' claims are not ripe in these proceedings. City Mot. pp. 11-12. The Nevada Supreme Court, however, has held that a ripeness/exhaustion of administrative remedies analysis does not apply to the four inverse condemnation claims for which the Landowners' are requesting a judicial finding of a taking - regulatory per se, non-regulatory/de facto, categorical, or temporary taking of property.[114] The reason for this rule is that the taking is known in these type of inverse 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

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110 Id., at 574. Emphasis added.

111 Id. Emphasis added.

112 Id., at 572. Emphasis added.

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

114 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).

administrative remedies) to this constitutional guarantee.[115] As explained above, one of the reasons the Landowners are only requesting a judicial finding of a taking on these four claims and **not the Penn Central claims** is to entirely avoid the City's meritless ripeness/exhaustion of administrative remedies argument. Therefore, the City's ripeness/exhaustion of administrative remedies argument has no place in the pending arguments before this Court.

2. Even if a Ripeness / Exhaustion of Administrative Remedies Analysis Applies, the Landowners' Have Met the Standard - Meaning the Landowners' Penn Central Inverse Condemnation Claims Should Not Be Dismissed.

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 countermotion), if this Court does apply the analysis, all claims are ripe[116] and the Penn Central claim should not be dismissed.

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."[117] 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."[118] "[W]hen exhausting

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

116 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)).

117 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.).

118 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).

available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review."[119]

In Del Monte Dunes[120] the United States Supreme Court held that a taking claim was ripe where the City of Monterey required 19 changes to a development application and then asked the landowner to make even more changes. Finally, the landowner filed inverse condemnation claims. Exactly as the City is arguing in this case, the City of Monterey asserted the landowners' inverse condemnation claims were not ripe fore review. The City of Monterey asserted that the City's decision was not final and the landowners' claim was not ripe, because, if the landowner had worked longer with the City of Monterey or filed a different type of application with the City of Monterey, the City of Monterey may have approved development on the landowner's property. 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."[121] 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."[122] In

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119 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 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.

120 526 U.S. 687, 119 S.Ct. 1624 (1999).

121 Del Monte Dunes, at 698.

122 Palazzolo, at 622.

other words, the ripeness doctrine only requires at least one meaningful application to develop and when it becomes clear the government is not going to permit development, the landowner may bring an inverse condemnation claim. The landowner is not required to continual submit futile applications to the government. Otherwise, the government could delay the inverse condemnation claims into perpetuity.

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 as a stand alone parcel, 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 procedures and standards for a Major Modification and the City still denied the MDA altogether. *Exhibit 24: 5 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 gain their legal and constitutionally guaranteed access to the Property. The City adopted two Bills that specifically target and 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. And, the City has retained private counsel now to push the "open space"/Major Modification argument which is contrary to the City's own actions for the past 32 years and actions on 1,067 units that have developed in the area. The City has even sought funding to purchase the 250 Acre Residential Zoned Land for 1% of its fair market value[123] for a City Park thereby showing the motive to prevent any use of the property (which is not

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

even a requirement to show a taking). As this Court can see, the Landowners did much more to develop the 35 Acre Property than even the landowner in the Del Monte Dunes case. 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 has asserted in these proceedings that the Master Development Agreement (MDA), to develop the 250 Acre Residential Zoned Land was a "grandiose development proposal" and these are not the type of development applications that, when denied, can ripen a taking claim or give rise to a taking. This is an incredibly disingenuous argument, which, hopefully, the City has abandoned.. First, the City mandated that the Landowners develop the entire 250 Acre Residential Zoned Land under one development - the MDA.[124] Second, the MDA was, for the most part, drafted entirely by the City itself.[125] Third, when the Landowners filed an application to develop the 35 Acre Property as one parcel, apart from the 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*

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[124] 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.*

[125] 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.*

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 specifically asserts 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, and the Sisolak and Schwartz cases. As explained, no "major modification" application is necessary in the context of an eminent domain case - the property is already zoned residential, its intended use and the Landowners have the right to use the property for that 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 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. These requirements and where they are met in the MDA are set forth in the following summary:

WHAT IS A MAJOR MODIFICATION?

19.10.040(G)(2) - A major modification is processed according to the procedures and standards applicable to a **re-zoning application**.

19.10.040(D) - includes the **re-zoning application requirements**:

Re-Zoning Requirements		**Where Met in the MDA**
a.	Description of the property	Exhibit to MDA, 1794
b.	Master development plan	Entire MDA
c.	Development Standards	Exhibit to MDA, 1794
d.	Proposed conditions, covenants and restrictions	Exhibit to MDA, 1794
e.	Location of roadways	Exhibit to MDA, 1794
f.	Identification of areas to be deeded to the City	Exhibit to MDA, 1794, 1821
g.	Plan for extension of necessary utilities	MDA, 1820

h.	Guidelines for physical development	MDA, Design Guidelines, 1901, 1903
I.	Location of "buffering"	MDA, 1812

DOCUMENTS INCLUDED IN THE MASTER DEVELOPMENT AGREEMENT

Master Development Agreement

55 pages

6 extensive Exhibits showing development

Exhibit D - Design Guidelines, Development Standards and Uses

11 pages

5 extensive Exhibits showing development

See Exhibit 28, which includes the above noted page numbers. Moreover, 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.* And, "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.* Also, 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. Finally, the City gave the neighbors an unprecedented and oppressive opportunity to participate in the MDA.[126] And, as explained, the City outright denied the MDA anyway.

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[126] 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, 2 App LO 00000466.*

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 application, 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 procedures and standards, the City's own Planning Staff recommended "approval" of the MDA,[127] 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"[128] 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 application with the City to be approved ignores reality. Simply put, the argument asserts that if the Landowners had written the words "major modification" at the top of its MDA or other applications,[129] 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 to develop the 35 Acre Property individually; 4) the City would not have denied the MDA (that included significantly more than any Major

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

[128] 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).

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

Modification application) which sought to develop the 35 Acre Property with the entirety of the 250 Acre Residential Zoned Land; 5) the City would not have made it impossible to get a drainage study; 6) the City would not have denied the Landowners' fence application; 7) the City would not have denied the Landowners' access applications for which they have the constitutional right to obtain; 8) the City would not have stricken from the City Agenda the applications to develop the 133 Acre Property; 9) the City would not have identified $15 million of City funds to take over the property for a "park;" 10) the City would not be vehemently trying to claw back the 17 Acre Property approvals; 11) the City would not have hired private counsel to push an invalid "open space"/Major Modification argument, which the City's own employee representatives testified is a "red herring;" and, 12) 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 TO THE CROCKETT ORDER.

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."[130]

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 that case involved a petition for judicial review and the law applicable in that proceeding was zoning law, not inverse condemnation law. The issue, therefore, was whether the City's zoning actions were based on substantial evidence, applying zoning law, not inverse condemnation law. The issue in this case is different; it is whether the City's actions rise to the level of a taking and, as explained above, inverse condemnation law is very different from the zoning law applied in the Crockett Order. The ruling in the Crockett Order also was not on the merits relevant to a taking in this case and the ruling

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

has not become final as the Nevada Supreme Court has not addressed the 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, as explained above, the preclusive effect of a prior order is more applicable to the Judge Smith Orders, this Court's prior two orders denying the City's attempts to dismiss the inverse condemnation claims in this very case, the Sturman Order denying the City's motion to dismiss the 133 Acre Property inverse condemnation claims, and Judge Bixler's order denying the City's request to dismiss the 17 Acre Property inverse condemnation claims. These orders all address the specific vested right to develop/inverse condemnation claims at issue in the pending motion. And, the Judge Smith Orders 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.

COUNTERMOTION TO SUPPLEMENT/AMEND THE PLEADINGS

Nevada is a notice pleading state, meaning the Landowners are only required to set forth a short and plain statement of their inverse condemnation claims and a demand for judgment (payment of just compensation. NRCP Rule 8. Moreover, in Liston v. Las Vegas Metropolitan Police Dep't, 111 Nev. 1575 (1995), the Nevada Supreme Court held an amended complaint, deposition testimony, interrogatory responses and pretrial demand statement were all sufficient to provide notice of facts that support a claim. Here, in the many pleadings that have been filed in this matter, including the above Opposition and Countermotion ,the Landowners have put the City on sufficient notice of the Landowners' property interest, the Landowners' vested right to use the 35 Acre Property, the City's actions resulting in the taking, and the Landowners' demand for payment of just compensation. However, insofar as the Government argues that all allegations and facts must be included in a formal complaint, attached hereto is the Landowners Proposed amended/supplemental complaint and the Landowners request leave to file the amended/supplement complaint under the Nevada Rules of Civil Procedure and Nevada Supreme Court Precedent, including NRCP Rule 15.[131] As this matter is in

[131] The Landowners' Proposed Amended Complaint also includes additional parties, FORE STARS, Ltd. and SEVENTY ACRES, LLC, a Nevada Limited Liability Company as they appear in the chain of title during certain time periods referenced by the City in its pleadings and

the very preliminary stages of litigation leave to amend/supplement should be freely given. NRCP Rule 15(a).

CONCLUSION

Based on the foregoing, the Landowners respectfully request that this Court deny the City's motion to dismiss and enter a judicial determination that the City has taken by inverse condemnation the 35 Acre Property based on the three taking claims alleged by the Landowners - categorical taking, regulatory per se taking, and non-regulatory/de facto taking. The Landowners also request leave to file the Proposed amended/supplemental complaint attached hereto.

Respectfully submitted this 4th day of March, 2019.

LAW OFFICES OF KERMITT L. WATERS

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Attorneys for Plaintiff Landowners

to assure all parties are properly before the Court these parties are included in the new amended complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 4th day of March, 2019, a true and correct copy of the foregoing: **Plaintiff Landowners' Opposition to City of Las Vegas' Motion For Judgment on the Pleadings On Developer's Inverse Condemnation Claims and Counter-Motion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims and To Supplement/Amend the Pleadings, If Required** 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:

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Proposed Second Amendment and First Supplement to Complaint for Severed Alternative Verified Claims in Inverse Condemnation

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DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, Ltd., SEVENTY ACRES, LLC, a Nevada Limited Liability Company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Plaintiff, *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	Case No.: A-17-758528-J Dept. No.: XVI **(PROPOSED)** **SECOND AMENDMENT and FIRST SUPPLEMENT TO COMPLAINT FOR SEVERED ALTERNATIVE VERIFIED CLAIMS IN INVERSE CONDEMNATION** **(Exempt from Arbitration – Action Seeking Review of Administrative Decision and Action Concerning Title To Real Property)**

LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendant.

COMES NOW Plaintiff, 180 Land Company, LLC, FORE STARS, Ltd., and SEVENTY ACRES, LLC, a Nevada Limited Liability Company, ("Landowner") by and through its attorneys of record, The Law Offices of Kermitt L. Waters and Hutchison & Steffen, for its Second Amendment and First Supplement To Complaint For Severed Alternative Claims In Inverse Condemnation complains and alleges as follows:

PARTIES

1. Landowners 180 Land Company, LLC, FORE STARS, Ltd., and SEVENTY ACRES, LLC, a Nevada Limited Liability Company, are organized and existing under the laws of the state of Nevada.

2. Respondent City of Las Vegas ("City") is a political subdivision of the State of Nevada and is a municipal corporation subject to the provisions of the Nevada Revised Statutes, including NRS 342.105, which makes obligatory on the City all of the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC §4601-4655, and the regulations adopted pursuant thereto. The City is also subject to all of the provisions of the Just Compensation Clause of the United States Constitution and Article 1, sections 8 and Article 1, section 22 of the Nevada Constitution, also known as PISTOL (Peoples Initiative to Stop the Taking of Our Land).

3. That the true names and capacities, whether individual, corporate, associate, or otherwise of Plaintiffs named herein as DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X

(hereinafter collectively referred to as " DOEs") inclusive are unknown to the Landowner at this time and who may have standing to sue in this matter and who, therefore, sue the Defendants by fictitious names and will ask leave of the Court to amend this Complaint to show the true names and capacities of Plaintiffs if and when the same are ascertained; that said Plaintiffs sue as principles; that at all times relevant herein, Plaintiff DOEs were persons, corporations, or other entities with standing to sue under the allegations set forth herein.

4. That the true names and capacities, whether individual, corporate, associate, or otherwise of Defendants named herein as 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 (hereinafter collectively referred to as "ROEs"), inclusive are unknown to the Landowner at this time, who therefore sue said Defendants by fictitious names and will ask leave of the Court to amend this Complaint to show the true names and capacities of Defendants when the same are ascertained; that said Defendants are sued as principles; that at all times relevant herein, ROEs conduct and/or actions, either alone or in concert with the aforementioned defendants, resulted in the claims set forth herein.

JURISDICTION AND VENUE

5. The Court has jurisdiction over the alternative claims for inverse condemnation pursuant to the United States Constitution, Nevada State Constitution, the Nevada Revised Statutes and pursuant to the Court Order entered in this case on February 1, 2018.

6. Venue is proper in this judicial district pursuant to NRS 13.040.

GENERAL ALLEGATIONS

PROPERTY INTEREST / VESTED RIGHTS

7. Landowner owns approximately 250 acres of real property generally located south of Alta Drive, east of Hualapai Way and north of Charleston Boulevard within the City of Las Vegas, Nevada; all of which acreage is more particularly described as Assessor's Parcel Numbers 138-31-702-003, 138-31-601-008, 138-31-702-004; 138-31-201-005; 138-31-801-002; 138-31-801-003; 138-32-301-007; 138-32-301-005; 138-32-210-008; and 138-32-202-001 ("250 Acre Residential Zoned Land").

8. This Complaint more particularly addresses Assessor Parcel Number 138-31-201-005 (the "35 Acre Property" and/or "35 Acres").

9. At all relevant times herein, the Landowner had a property interest in the 35 Acre Property.

10. At all relevant times herein, the Landowner had the vested right to use and develop the 35 Acre Property.

11. At all relevant times herein the hard zoning on the 35 Acre Property has been for a residential use, including R-PD7 (Residential Planned Development District – 7.49 Units per Acre).

12. At all relevant times herein the Landowner had the vested right to use and develop the 35 Acre Property up to a density of 7.49 residential units per acre as long as the development is comparable and compatible with the existing adjacent and nearby residential development.

13. The Landowner's property interest in the 35 Acre Property and vested property rights in the 35 Acre Property are recognized under the United States and Nevada Constitutions, Nevada case law, and the Nevada Revised Statutes.

14. The Landowner's property interest and vested right to use and develop the 35 Acre Property is confirmed by the following:

15. On March 26, 1986, a letter was submitted to the City Planning Commission requesting zoning on the entire 250 Acre Residential Zoned Land (which includes the 35 Acre Property) and the zoning that was sought was R-PD as it allows the developer flexibility and shows that developing the 35 Acre Property for a residential use has always been the intent of the City and all prior owners.

16. The Landowner's property interest and vested right to use and develop the 35 Acre Property residentially has further been confirmed by the City of Las Vegas in writing and orally in, without limitation, 1996, 2001, 2014, 2016, and 2018.

17. The City of Las Vegas adopted Zoning Bill No. Z-2001, Ordinance 5353, which specifically and further demonstrates that the R-PD7 Zoning was codified and incorporated into the City of Las Vegas' Amended Atlas in 2001. As part of this action, the City "repealed" any prior City actions that could possibly conflict with this R-PD7 hard zoning adopting: "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."***

18. At a November 16, 2016, City Council hearing, Tom Perrigo, the City Planning Director, confirmed the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) is hard zoned R-PD7, which allows up to 7.49 residential units per acre.

19. Long time City Attorney Brad Jerbic has also confirmed the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) is hard zoned R-PD7, which allows up to 7.49 residential units per acre.

20. The City of Las Vegas Planning Staff has also confirmed the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) is hard zoned R-PD7, which allows up to 7.49 residential units per acre.

21. Even the City of Las Vegas' own 2020 master plan confirms the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) is hard zoned R-PD7, which allows up to 7.49 residential units per acre.

22. The City issued two formal Zoning Verification Letters dated December 20, 2014, confirming the R-PD7 zoning on the entire 250 Acre Residential Zoned Land (which includes the 35 Acre Property).

23. This vested right to use and develop the 35 Acres, was confirmed by the City prior to the Landowner's acquisition of the 35 Acres and the Landowner materially relied upon the City's confirmation regarding the Subject Property's vested zoning rights.

24. Based upon information and belief, the City has approved development on approximately 26 projects and over 1,000 units in the area of the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) on properties that are similarly situated to the 35 Acre Property further establishing the Landowner's property interest and vested right to use and develop the 35 Acre Property.

25. Based upon information and belief, the City has never denied an application to develop in the area of the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) on properties that are similarly situated to the 35 Acre Property further establishing the Landowner's property interest and vested right to use and develop the 35 Acre Property.

26. The City is judicially estopped from now denying the Landowner's property interest and vested right to use and develop the 35 Acre Property residentially.

27. This property interest / vested right to use and develop the 250 Acre Residential Zoned Land, which includes the 35 Acre Property has also been confirmed by two orders issued by the Honorable District Court Judge Douglas E. Smith (the Smith Orders), which have been affirmed by the Nevada Supreme Court.

28. There is a legal finding in the Smith Orders that the Landowner's have the "right to develop" the entire 250 Acre Residential Zoned Land (which includes the 35 Acre Property).

29. There is a legal finding in the Smith Orders that the initial steps to develop, parceling the 250 Acre Residential Zoned Land (which includes the 35 Acre Property), had proceeded properly: "The Developer Defendants [Landowner] 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 [Landowner] parcel map is a legal merger and re-subdividing of land within their own boundaries."

30. The Smith Orders and the Nevada Supreme Court affirmance of the Landowner's property interest, vested right to use and develop, and right to develop the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) are confirmed not only by the above facts, but also by the City's own public maps according to the Nevada Supreme Court.

31. Accordingly, it is settled Nevada law that the Landowner has a property interest in and the vested "right to develop" this specific 35 Acre Property with a residential use.

32. The City is bound by this settled Nevada law as the City was a party in the case wherein the Smith Orders were issued, the City had a full and fair opportunity to address the issues in that matter, and the Smith Orders have become final as they have been affirmed by the Nevada Supreme Court.

33. The Landowner's property interest and vested right to use and develop the entire 250 Acre Residential Zoned Land (which includes the 35 Acre Property) is so widely accepted

that even the Clark County tax Assessor has assessed the property as residential for a value of approximately $88 Million and the current Clark County website identifies the 35 Acre Property "zoned" R-PD7.

34. There have been no other officially and properly adopted plans or maps or other recorded document(s) that nullify, replace, and/or trump the Landowner's property interest and vested right to use and develop the 35 Acre Property.

35. Although certain City of Las Vegas planning documents show a general plan designation of PR-OS (Parks/Recreation/Open Space) on the 35 Acre Property, that designation was placed on the Property by the City without the City having followed its own proper notice requirements or procedures. Therefore, any alleged PR-OS on any City planning document is being shown on the 35 Acre Property in error. The City's Attorney confirmed the City cannot determine how the PR-OS designation was placed on the Subject Property.

36. Further the Smith Orders legally confirm that notwithstanding any alleged open space land use designation, the zoning on the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) is a residential use - R-PD7.

37. The Smith Orders further legally reject any argument that suggests the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) is zoned as open space or otherwise bound by an open space designation.

38. The Smith Orders further legally confirm that the hard, residential zoning of R-PD7 trumps any other alleged open space designation on any other planning documents.

39. Although the 35 Acre Property was used for an interim golf course use, the Landowner has always had the right to close the golf course and not water it.

40. The Smith Orders confirmed that there is no appropriate "open space" designation on the 35 Acre Property and this was affirmed by the Nevada Supreme Court.

41. Nevada Supreme Court precedent provides that the Landowner has a property interest and the vested right to use and develop the 250 Acre Residential Zoned Land (which includes the 35 Acre Property).

CITY ACTIONS TO TAKE THE LANDOWNER'S PROPERTY

42. The City has engaged in numerous systematic and aggressive actions to prevent any and all use of the 35 Acre Property thereby rendering the 35 Acre Property useless and valueless.

43. The City actions and how the actions as a whole impact the 35 Acre Property are set forth herein so that the form, intensity, and the deliberateness of the City actions toward the 35 Acre Property can be examined as all actions by the City in the aggregate, must be analyzed.

44. Generally, and without limitation, there are 11 City actions the City has engaged in to prevent any and all use of the 35 Acre Property thereby rendering the 35 Acre Property useless and valueless.

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

45. On or about December 29, 2016, and at the suggestion of the City, the Landowner filed with the City an application for a General Plan Amendment to change the General Plan Designation on the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) from PR-OS (Parks/Recreation/Open Space) to L (Low Density Residential) ("GPA-68385"). While an application for a General Plan Amendment was filed by the Landowner relating to the 250 Acre Residential Zoned Land (which includes the 35 Acre Property), being application number, GPA-68385; additional applications were filed by the Landowner with the City that related more particularly to the 35 Acre Property. Those zoning applications pertaining to the 35 Acres were application numbers WVR-68480; SDR-68481 and TMP-68482.

46. The proposed General Plan Designation of "L" allows densities less than the corresponding General Plan Designation on the Property prior to the time any alleged PR-OS designation was improperly placed on the Property by the City.

47. To the north of the 35 Acre Property are existing residences developed on lots generally ranging in size from one quarter (1/4) of an acre to one third (1/3) of an acre.

48. In the center of the 35 Acre Property, are existing residences developed on lots generally ranging in size from one quarter (1/4) of an acre to one third (1/3) of an acre.

49. To the south of the 35 Acre Property, are existing residences developed on lots generally ranging in size from three quarters (3/4) of an acre to one and one quarter (1¼) acre.

50. On or about January 25, 2017, the Landowner filed with the City an application pertaining to the 35 Acre Property for a waiver to allow 32-foot private streets with a sidewalk on one side within a privately gated community where 47-foot private streets with sidewalks on both sides are required. The application was given number WVR-68480 ("WVR-68480").

51. On or about January 4, 2017, the City required the Landowner to file an application pertaining to the 35 Acre Property for a Site Development Plan Review for a proposed 61-Lot single family residential development. The application was given number SDR-68481 ("SDR-68481").

52. On or about January 4, 2017, the Landowner filed with the City an application pertaining to the 35 Acre Property for a Tentative Map for a proposed 61-Lot single family residential development. The application was given number TMP-68482 ("TMP-68482").

53. The Planning Staff for the City's Planning Department ("Planning Staff") reviewed GPA-68385, WVR-68480, SDR-68481 and TMP-68482 and issued recommendations of approval for WVR-68480, SDR-68481 and TMP-68482. The Planning Staff originally had "No Recommendation" with regard to GPA-68385; however, in the "Agenda Memo-Planning" relating

to the City Council meeting date of June 21, 2017, Planning Staff noted its recommendation of GPA-68385 as "Approval."

54. 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.

55. Tom Perrigo, the City Planning Director, stated at the hearing on the Landowner's applications that the proposed development met all City requirements and should be approved.

56. On February 14, 2017, the City of Las Vegas Planning Commission ("Planning Commission") conducted a public hearing on GPA-68385, WVR-68480, SDR-68481, and TMP-68482.

57. After considering Landowner's comments, and those of the public, the Planning Commission approved WVR-68480, SDR-68481, and TMP-68482 subject to Planning Staff's conditions.

58. The Planning Commission voted four to two in favor of GPA-68385, however, the vote failed to reach a super-majority (which would have been 5 votes in favor) and the vote was, therefore, tantamount to a denial.

59. On June 21, 2017, the Las Vegas City Council ("City Council") heard WVR-68480, SDR-68481, TMP-68482 and GPA-68385.

60. In conjunction with this City Council public hearing, the Planning Staff, in continuing to recommend approval of WVR-68480, SDR-68481, and TMP-68482, noted ***"the adjacent developments are designated ML (Medium Low Density Residential) with a density cap of 8.49 dwelling units per acre. The proposed development would have a density of 1.79 dwelling units per acre…Compared with the densities and General Plan designations of the adjacent***

residential development, the proposed L (Low Density Residential) designation is less dense and therefore appropriate for this area, capped at 5.49 units per acre." (emphasis added).

61. The Planning Staff found the density of the proposed General Plan compatible with the existing adjacent land use designation, found the zoning designations compatible and found that the filed applications conform to other applicable adopted plans and policies that include approved neighborhood plans.

62. At the June 21, 2017, City Council hearing, the Landowner addressed the concerns of the individuals speaking in opposition, and provided substantial evidence, through the introduction of documents and through testimony, of expert witnesses and others, rebutting each and every opposition claim.

63. Included as part of the evidence presented by the Landowner at the June 21, 2017, City Council hearing, the Landowner introduced evidence, among other things, (i) that representatives of the City had specifically noted in both City public hearings and in public neighborhood meetings, that the standard for appropriate development based on the existing R-PD7 zoning on the 35 Acre Property would be whether the proposed lot sizes were compatible with and comparable to the lot sizes of the existing, adjoining residences; (ii) that the proposed lot sizes for the 35 Acre Property were compatible with and comparable to the lot sizes of the existing residences adjoining the lots proposed in the 35 Acres; (iii) that the density of 1.79 units per acre provided for in the 35 Acre Property was *less than the density* of those already existing residences adjoining the 35 Acre Property; and (iv) that both Planning Staff and the Planning Commission recommended approval of WVR-68480, SDR-68481 and TMP-68482, all of which applications pertain to the proposed development of the 35 Acre Property.

64. Any public statements made in opposition to the various applications were either conjecture or opinions unsupported by facts; all of which public statements were either rebutted

by findings as set forth in the Planning Staff report or through statements made by various City representatives at the time of the City Council public hearing or through evidence submitted by the Landowner at the time of the public hearing.

65. In spite of the Planning Staff recommendation of approval and the recommendation of approval from the Planning Commission, and despite the substantial evidence offered by the Landowner in support of the WVR-68480, SDR-68481, TMP-68482 and GPA-68385; and in spite of the fact that no substantial evidence was offered in opposition, the City Council denied the WVR-68480, SDR-68481, TMP-68482 and GPA-68385.

66. The City Council's stated reason for the denial was its desire to see, not just the 35 Acre Property, but the entire 250 Acre Residential Zoned Land, developed under one Master Development Agreement ("MDA") which would include all of the following properties:

APN 138-31-201-005, a 34.07 acre property, which is the 35 Acre Property, legally subdivided and separate and apart from the properties identified below;

APN 138-31-702-003, a 76.93 acre property that has its own assessor parcel number and is legally subdivided separate and apart from the 35 Acre Property;

APN 138-31-601-008, a 22.19 acre property that has its own assessor parcel number and is legally subdivided separate and apart from the 35 Acre Property;

APN 138-31-702-004, a 33.8 acre property that has its own assessor parcel number and is legally subdivided separate and apart from the 35 Acre Property;

APN 138-31-801-002, a 11.28 acre property that has its own assessor parcel number and is legally subdivided separate and apart from the 35 Acre Property;

APN 138-32-301-007, a 47.59 acre property that has its own assessor parcel number and is legally subdivided separate and apart from the 35 Acre Property and is owned by a different legal entity, Seventy Acres, LLC;

APN 138-32-301-005, a 17.49 acre property that has its own assessor parcel number and is legally subdivided separate and apart from the 35 Acre Property and is owned by a different legal entity, Seventy Acres, LLC;

APN 138-31-801-003, a 5.44 acre property that has its own assessor parcel number and is legally subdivided separate and apart from the 35 Acre Property and is owned by a different legal entity, Seventy Acres, LLC;

APN 138-32-202-001, a 2.13 acre property that has its own assessor parcel number and is legally subdivided separate and apart from the 35 Acre Property and is owned by a different legal entity, Fore Stars, LTD;

67. At the City Council hearing considering and ultimately denying WVR-68480, SDR-68481, TMP-68482 and GPA-68385, the City Council advised the Landowner that the only way the City Council would allow development on the 35 Acres was under one MDA for the entirety of the Property (totaling 250 Acre Residential Zoned Land).

68. At the time the City Council was considering WVR-68480, SDR-68481, TMP-68482 and GPA-68385, that would allow the 35 Acre Property to be developed, the City Council stated that the approval of the MDA is very, very close and "we are going to get there [approval of the MDA]." The City Council was referring to the next public hearing wherein the MDA would be voted on by the City Council.

69. The City Attorney stated that "if anybody has a list of things that should be in this agreement [MDA], but 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. . . . This is where I have to use my skills and say enough is enough and that's why I said tonight 'speak now or forever hold your peace.' If somebody comes to me with an issue that they should have come to me with months ago I'm gonna ignore them 'cause that's just not fair

either. We can't continue to whittle away at this agreement by throwing new things at it all the time. There's been two years for people to make their comments. I think we are that close."

70. 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?"

71. The City Council stated at the hearing that the sole basis for denial was the City's alleged desire to see the entire 250 Acre Residential Zoned Land developed under the MDA.

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

72. To comply with the City demand to have one unified development, for over two years (between July, 2015, and August 2, 2017), the Landowner 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.

73. The amount of work that went in to the MDA was demanding and pervasive.

74. The Landowner complied with each and every City demand, making more concessions than any developer that has ever appeared before this City Council, according to Councilwoman Tarkanian.

75. A non-exhaustive list of the Landowner's concessions, as part of the MDA, include without limitation: 1) donation of approximately 100 acres as landscape, park equestrian facility, and recreation areas; 2) building brand new driveways and security gates and gate houses for the existing security entry ways for the Queensridge development; 3) building two new parks, one with a vineyard; and, 4) reducing the number of units, increasing the minimum acreage lot size, and reduced the number and height of towers.

76. 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.

77. In total, the City required approximately 16 new and revised versions of the MDA, over the two plus year period.

78. In the end, the Landowner was very diligent in meeting all of the City's demands and the MDA met all of the City mandates, the Nevada Revised Statutes and the City's own Code requirements.

79. Even the City's own Planning Staff, who 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."

80. Based upon information and belief, the MDA met or exceeded any and all Major Modification procedures and standards that are set forth in the City Code.

81. Notwithstanding that less than two months after the City Council said it was very, very close to approving the MDA, the Landowner's efforts and sweeping concessions, and the City's own Planning Staff recommendation to pass the MDA, and the fact that the MDA met each and every City Code Major Modification procedure and standard, and the City's promise that it would approve the MDA (the sole basis the City gave for denying the 35 Acre Property applications was to allow approval of the MDA), on August 2, 2017, the MDA was presented to the City Council and the City denied the entire MDA altogether.

82. The City did not ask the Landowner to make more concessions, like increasing the setbacks or reducing the units per acre, it just simply and plainly denied the MDA in its entirety.

83. The City's actions in denying Landowner's tentative map (TMP-68482), WVR-68480, SDR-68481, GPA-68385 and MDA foreclosed all development of the 35 Acre Property in

violation of Landowner's property interest and vested right to use and develop the 35 Acre Property.

84. On or about June 28, 2017, Notices of Final Action were issued for WVR-68480, SDR-68481, TMP-68482 and GPA-68385 stating these applications had been denied.

85. As the 35 Acre Property is vacant, this meant that the property would remain vacant.

86. These facts show that the City assertion that it wanted to see the entire 250 Acre Residential Zoned Land developed as one unit was an utter and complete farce. Regardless of whether the Landowner submits individual applications (35 Acres applications) or one omnibus plan for the entire 250 Acre Residential Zoned Land (the MDA), the City unilaterally denied any and all uses of the 35 Acre Property.

87. Based upon information and belief, the denial of the 35 Acre Property individual applications to develop and the MDA denial are in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

City Action #3 - Adoption of the Yohan Lowie Bills

88. After denial of the MDA, the City then raced to adopt two new ordinances that solely target the 250 Acre Residential Zoned Land in order to create further barriers to development.

89. 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 Landowner] Bill**."

90. Based upon information and belief, 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 be submitted regardless of the existing hard zoning and whether the neighbors have any legal interest in the property or not.

91. The second is Bill No. 2018-24, which, based upon information and belief, is also clearly intended to target only the Landowner's 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 Landowner for seeking development of his property.

92. On October 15, 2018, a recommending committee considered Bill 2018-24 and it was shown that this Bill targets solely the Landowner's Property.

93. 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.

94. Bill 2018-24 requires costly and technical application procedures, including: approval of expensive and technical master drainage, traffic, and sewer studies before any applications can be 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.

95. 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.

96. 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.

97. Based upon information and belief, 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.

98. On November 7, 2018, despite the Bill's sole intent to target the Landowner's Property and prevent its development, the City adopted the Bill.

99. This further shows the lengths to which the City has gone to prevent the development of the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) – seeking unique laws to jail the Landowner for pursuing development of his own property for which he has the "right to develop."

100. Based upon information and belief, the adoption of these two City Bills is in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

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

101. In August 2017, the Landowner filed a request with the City for three access points to streets the 250 Acre Residential Zoned Land abuts – one on Rampart Blvd. and two on Hualapai Way.

102. Based upon information and belief, this was a routine over the counter request and is specifically excluded from City Council review.

103. Also, based upon information and belief, 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, even if the owner had not yet developed the access.

104. Contrary to this Nevada law, the City denied the Landowner's access application citing as the sole basis for the denial, "the various public hearings and subsequent debates concerning the development on the subject site."

105. In violation of its own City Code, the City required that the matter be presented to the City Council through a "Major Review."

106. Based upon information and belief, this access denial is in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

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

107. In August, 2017, the Landowner 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.

108. Based upon information and belief, 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.

109. 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."

110. 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, based

upon information and belief, states that the Director determines that the proposed development could significantly impact the land uses on the site or on surrounding properties.

111. Based upon information and belief, 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, and publicly noticed Planning Commission and City Council hearings. The City has required this extraordinary standard from the Landowner to install a simple chain link fence to enclose and protect two water features/ponds on his property.

112. Based upon information and belief, this fence denial is in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

City Action #6 - Denial of a Drainage Study

113. In an attempt to clear the property, replace drainage facilities, etc., the Landowner submitted an application for a Technical Drainage Study, which should have been routine, because the City and the Landowner have an On-Site Drainage Improvements Maintenance Agreement that allows the Landowner to remove and replace the flood control facilities on his property. The City would not accept the Landowners' application for a Technical Drainage Study.

114. Based upon information and belief, the City's Yohan Lowie Bill, referenced above, requires a technical drainage study in order to grant entitlements.

115. Based upon information and belief, the City, in furtherance of its scheme to keep the Landowner's property in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value - 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.

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

116. As part of the numerous development applications filed by the Landowner 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.

117. The City Planning Staff 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 recommended approval.

118. 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.

119. The City put the Yohan Lowie Bill on the morning agenda and the 133 Acre Property applications on the afternoon agenda.

120. The City then approved the Yohan Lowie Bill in the morning session.

121. 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 Property filed by the Landowner.

122. The other Council members and City staff were taken a back and surprised by this attempt to deny the Landowner even the opportunity to be heard on the 133 Acre Property 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." Councilwoman Fiore: "none of us had any briefing on what just occurred." 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."

123. The City then refused to allow the Landowner to be heard on his applications for the 133 Acre Property and voted to strike the applications.

124. Based upon information and belief, 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 (which includes the 35 Acre Property).

125. Based upon information and belief, this City action is in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

City Action #8 - The City Announced 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

126. Based upon information and belief, the purpose for the repeated City denials and affirmative actions to create barriers to development is the City wants the Landowner's Property for a City park.

127. 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 Landowner's private property - "$15 Million-Purchase Badlands and operate."

128. Councilman Seroka issued a statement during his campaign entitled "The Seroka Badlands Solution" which provides the intent to convert the Landowner's private property into a "fitness park."

129. In an interview with KNPR Seroka stated that he would "turn [the Landowners' private property] over to the City."

130. Councilman Coffin agreed as referenced 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."

131. 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, based upon information and belief, is to prevent all development on the Landowner's Property so the city can take it for the City's park.

132. 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.

133. Based upon information and belief, Councilman Seroka testified at the Planning Commission (during his campaign) that it would be "**over his dead body**" before the Landowner could use his private property for which he has a vested right to develop.

134. Based upon information and belief, in reference to development on the Landowner's Property, Councilman Coffin stated firmly "I am voting against the whole thing," calls the Landowner's representative a "motherfucker," and expresses his clear resolve to continue voting against any development on the 35 Acre Property.

135. Based upon information and belief, this City action is in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

City Action #9 - The City has Shown an Unprecedented Level of Aggression to Deny All Use of the 250 Acre Residential Zoned Land

136. The City has gone to unprecedented lengths to interfere with the use and enjoyment of the Landowner's Property.

137. Based upon information and belief, 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).

138. Based upon information and belief, 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.

139. Based upon information and belief, Councilman Coffin advised Queensridge residents on how to circumvent the legal process and the Nevada Public Records Act by instructing how not to trigger any of the search terms being used in the subpoenas.

140. Based upon information and belief, this City action is in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

City Action #10 - the City has Reversed the Past Approval on the 17 Acre Property

141. The City has tried to claw back a past approval to develop on part of the 250 Acre Residential Zoned Land - the 17 Acre Property approvals.

142. Whereas in approving the 17 Acre Property applications the City agreed the Landowner had the vested right to develop without a Major Modification, now the City is arguing in other documents that: 1) the Landowner has no property rights; and, 2) the approval on the 17 Acre Property was erroneous, because no Major Modification was filed.

143. Based upon information and belief, this City action is in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

City Action #11 - The City Has Retained Private Counsel to Push an Invalid Open Space Designation on the 35 Acre Property

144. Based upon information and belief, the City has now retained and authorized private counsel to push an invalid "open space" designation / Major Modification argument in this case to prevent any and all development on the 35 Acre Property.

145. Based upon information and belief, this is the exact opposite position the City and the City's staff has taken for the past 32 years on at least 1,067 development units in the Peccole Concept Plan area.

146. Based upon information and belief, approximately 1,000 units have been developed over the past 32 years in the Peccole Concept Plan area the City has never applied the "open space" / Major Modification argument now advanced by its retained counsel.

147. Based upon information and belief, the City has targeted this one Landowner and this one Property and is treating them differently than it has treated all other owners and developers in the area for the sole purpose of denying the Landowner his constitutional property rights so the Landowner's property will remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

148. Based upon information and belief, the City's actions singularly targets the Landowner and the Landowner's Property; the Property is vacant; and, the City's actions are in bad faith.

EXHAUSTION OF ADMINISTRATIVE REMEDIES / RIPENESS

149. The Landowner's Alternative Verified Claims in Inverse Condemnation have been timely filed and, pursuant to the Court's Order entered on February 1, 2018, are ripe.

150. The Landowner submitted at least one meaningful application to the City to develop the 35 Acre Property and the City denied each and every attempt to develop.

151. The Landowner provided the City the opportunity to approve an allowable use of the 35 Acre Property and the City denied each and every use.

152. The City denied the Landowner's applications to develop the 35 Acre Property as a stand alone parcel, even though the applications met every City Code requirement and the City's own planning staff recommended approval.

153. The Landowner also worked on the 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 Landowner back to the drawing board at least 16 times to redo the MDA, and the Landowner agreed to more concessions than any landowner ever to appear before this City Council. The MDA even included the procedures and standards for a Major Modification and the City still denied the MDA altogether.

154. If a Major Modification is required to exhaust administrative remedies / ripen the Landowner's taking claims, the MDA the Landowner worked on with the City for over two years included and far exceeded all of the procedures and standards for a Major Modification application.

155. The Landowner cannot even get a permit to fence ponds on the 250 Acre Residential Zoned Land or a permit to utilize his legal and constitutionally guaranteed access to the Property.

156. The City adopted two Bills that specifically target and effectively eliminate all use of the entire 250 Acre Residential Zoned Land (which includes the 35 Acre Property).

157. Based upon information and belief, City Councilman Seroka stated that "over his dead body" will development be allowed and City Councilman Coffin put in writing that he will vote against any development on the 35 Acre Property.

158. The City has retained private counsel now to push the "open space" / Major Modification argument which is contrary to the City's own actions for the past 32 years and actions on approximately 1,000 units that have developed in the area.

159. Based upon information and belief, this City action is in furtherance of a City scheme to specifically target the Landowner's Property to have it remain in a vacant condition to be turned over to the City for a park for pennies on the dollar – a value well below its fair market value.

160. Therefore, the Landowner's inverse condemnation claims are clearly ripe for adjudication.

161. It would be futile to submit any further applications to develop the 35 Acre Property to the City.

FIRST ALTERNATIVE CLAIM FOR RELIEF IN INVERSE CONDEMNATION
(Categorical Taking)

162. The Landowner repeats, re-alleges and incorporates by reference all paragraphs included in this pleading as if set forth in full herein.

163. The City reached a final decision that it will not allow development of Landowner's 35 Acres.

164. Any further requests or applications to the City to develop the 35 Acres would be futile.

165. The City's actions in this case have resulted in a direct appropriation of Landowner's 35 Acre property by entirely prohibiting the Landowner from using the 35 Acres for any purpose and reserving the 35 Acres vacant and undeveloped.

166. As a result of the City's actions, the Landowner has been unable to develop the 35 Acres and any and all value in the 35 Acres has been entirely eliminated.

167. The City's actions have completely deprived the Landowner of all economically beneficial use of the 35 Acres.

168. Open space or golf course use is not an economic use of the 35 Acre Property.

169. The City's actions have resulted in a direct and substantial impact on the Landowner and on the 35 Acres.

170. The City's actions require the Landowner to suffer a permanent physical invasion of his property.

171. The City's actions result in a categorical taking of the Landowner's 35 Acre Property.

172. The City has not paid just compensation to the Landowner for this taking of his 35 Acre Property.

173. The City's failure to pay just compensation to the Landowner for the taking of his 35 Acre Property is a violation of the United States Constitution, the Nevada State Constitution, and the Nevada Revised Statutes, which require the payment of just compensation when private property is taken for a public use.

174. Therefore, the Landowner is compelled to bring this cause of action for the taking of the 35 Acre Property to recover just compensation for property the City is taking without payment of just compensation.

175. The requested compensation is in excess of fifteen thousand dollars ($15,000.00).

SECOND ALTERNATIVE CLAIM FOR RELIEF IN INVERSE CONDEMNATION
(Penn Central Regulatory Taking)

176. The Landowner repeats, re-alleges and incorporates by reference all paragraphs included in this pleading as if set forth in full herein.

177. The City reached a final decision that it will not allow development of the Landowner's 35 Acres.

178. Any further requests or applications to the City to develop the 35 Acres would be futile.

179. The City already denied an application to develop the 35 Acres, even though: 1) the Landowner's proposed 35 Acre development was in conformance with its zoning density and was comparable and compatible with existing adjacent and nearby residential development; 2) the Planning Commission recommended approval; and 3) the City's own Staff recommended approval.

180. The City affirmatively stated that it will not allow the Landowner to develop the 35 Acres unless it is developed as part of the MDA, referenced above. The Landowner worked on the MDA for nearly two years, with numerous City-imposed and/or City requested abeyances and with the City's direct and active involvement in the drafting and preparing the MDA and the City's statements that it would approve the MDA and despite nearly two years of working on the MDA, on or about August 2, 2017, the City denied the MDA.

181. The City's actions have caused a direct and substantial economic impact on the Landowner, including but not limited to preventing development of the 35 Acres.

182. The City was expressly advised of the economic impact the City's actions were having on Landowner.

183. At all relevant times herein, the Landowner had specific and distinct investment backed expectations to develop the 35 Acres.

184. These investment backed expectations are further supported by the fact that the City, itself, advised the Landowner of its vested rights to develop the 35 Acre Property prior to acquiring the 35 Acres.

185. The City was expressly advised of Landowner's investment backed expectations prior to denying the Landowner the use of the 35 Acres.

186. The City's actions are preserving the 35 Acres as open space for a public use and the public is actively using the 35 Acres.

187. The City's actions have resulted in the loss of the Landowner's investment backed expectations in the 35 Acres.

188. The character of the City action to deny the Landowner's use of the 35 Acres is arbitrary, capricious, and fails to advance any legitimate government interest and is more akin to a physical acquisition than adjusting the benefits and burdens of economic life to promote the common good.

189. The City never stated that the proposed development on the 35 Acres violated any code, regulation, statute, policy, etc. or that the Landowner did not have a vested property right to use/develop the 35 Acres.

190. The City provided only one reason for denying Landowner's request to develop the 35 Acres - that the City would only approve the MDA that included the entirety of the 250 Acre Residential Zoned Land owned by various entities and that the MDA would allow development of the 35 Acres.

191. The City then, on or about August 2, 2017, denied the MDA, thereby preventing the development of the 35 Acres.

192. The City's actions meet all of the elements for a Penn Central regulatory taking.

193. The City has not paid just compensation to the Landowner for this taking of his 35 Acre property.

194. The City's failure to pay just compensation to the Landowner for the taking of his 35 Acre Property is a violation of the United States Constitution, the Nevada State Constitution, and the Nevada Revised Statutes, which require the payment of just compensation when private property is taken for a public use.

195. Therefore, the Landowner is compelled to bring this cause of action for the taking of the 35 Acre Property to recover just compensation for property the City is taking without payment of just compensation.

196. The requested compensation is in excess of fifteen thousand dollars ($15,000.00).

THIRD ALTERNATIVE CLAIM FOR RELIEF IN INVERSE CONDEMNATION
(Regulatory Per Se Taking)

197. The Landowner repeats, re-alleges and incorporates by reference all paragraphs included in this pleading as if set forth in full herein.

198. The City's actions stated above fail to follow the procedures for taking property set forth in Chapters 37 and 342 of the Nevada Revised Statutes, Nevada's statutory provisions on eminent domain, and the United States and Nevada State Constitutions.

199. The City's actions exclude the Landowner from using the 35 Acres and, instead, permanently reserve the 35 Acres for a public use and the public is using the 35 Acres and that use is expected to continue into the future.

200. Based upon information and belief, the City is preserving the 35 Acre Property for a future public use by the City.

201. The City's actions have shown an unconditional and permanent taking of the 35 Acres.

202. The City has not paid just compensation to the Landowner for this taking of his 35 Acre property.

203. The City's failure to pay just compensation to Landowner for the taking of his 35 Acre property is a violation of the United States Constitution, the Nevada State Constitution, and the Nevada Revised Statutes, which require the payment of just compensation when private property is taken for a public use.

204. Therefore, Landowner is compelled to bring this cause of action for the taking of the 35 Acre property to recover just compensation for property the City is taking without payment of just compensation.

205. The requested compensation is in excess of fifteen thousand dollars ($15,000.00).

FOURTH ALTERNATIVE CLAIM FOR RELIEF IN INVERSE CONDEMNATION
(Nonregulatory Taking)

206. The Landowner repeats, re-alleges and incorporates by reference all paragraphs included in this pleading as if set forth in full herein.

207. The City actions directly and substantially interfere with the Landowner's vested property rights rendering the 35 Acres unusable and/or valueless.

208. The City's actions substantially deprive the Landowner of the use and enjoyment of the 35 Acre Property.

209. The City has taken steps that directly and substantially interfere with the Landowner's property rights to the extent of rendering the 35 Acre Property valueless or unusable.

210. The City actions have rendered the 35 Acre Property unusable on the open market.

211. The City has intentionally delayed approval of development on the 35 Acres and, ultimately, denied any and all development in a bad faith effort to preclude any use of the 35 Acres.

212. The City's actions are oppressive and unreasonable.

213. The City's actions result in a nonregulatory taking of the Landowner's 35 Acres.

214. The City has not paid just compensation to the Landowner for this taking of his 35 Acre Property.

215. The City's failure to pay just compensation to the Landowner for the taking of his 35 Acre Property is a violation of the United States Constitution, the Nevada State Constitution, and the Nevada Revised Statutes, which require the payment of just compensation when private property is taken for a public use.

216. Therefore, the Landowner is compelled to bring this cause of action for the taking of the 35 Acre Property to recover just compensation for property the City is taking without payment of just compensation.

217. The requested compensation is in excess of fifteen thousand dollars ($15,000.00)

FIFTH ALTERNATIVE CLAIM FOR RELIEF IN INVERSE CONDEMNATION
(Temporary Taking)

218. The Landowner repeats, re-alleges and incorporates by reference all paragraphs included in this pleading as if set forth in full herein.

219. If there is subsequent City Action or a finding by the Nevada Supreme Court, or otherwise, that the Landowner may develop the 35 Acre Property, then there has been a temporary taking of the Landowner's 35 Acre Property for which just compensation must be paid.

220. The City has not offered to pay just compensation for this temporary taking.

221. The City failure to pay just compensation to the Landowner for the taking of his 35 Acres is a violation of the United States Constitution, the Nevada State Constitution, and the Nevada Revised Statutes, which require the payment of just compensation when private property is taken for a public use.

222. Therefore, the Landowner is compelled to bring this cause of action for the taking of the 35 Acre Property to recover just compensation for property the City has taken without payment of just compensation.

223. The requested compensation is in excess of fifteen thousand dollars ($15,000.00).

SIXTH ALTERNATIVE CLAIM FOR RELIEF IN INVERSE CONDEMNATION

(Judicial Taking)

224. The Landowner repeats, re-alleges and incorporates by reference all paragraphs included in this pleading as if set forth in full herein.

225. If this Court elects to follow the Crockett Order (that was decided in the context of a land use case and which entirely ignores the Landowner's hard zoning and vested right to develop) to deny the taking in this case, this will add a judicial taking claim, because the Crockett Order would be applied to recharacterize the Landowner's 35 Acre Property from a hard zoned residential property with the vested "rights to develop" to a public park / open space.

226. The requested compensation for this claim is in excess of fifteen thousand dollars ($15,000.00).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. An award of just compensation according to the proof for the taking (permanent or temporary) and/or damaging of the Landowner's Property by inverse condemnation,

2. Prejudgment interest commencing from the date the City first froze the use of the 35 Acre Property which is prior to the filing of this Complaint in Inverse Condemnation;

3. A preferential trial setting pursuant to NRS 37.055 on the alternative inverse condemnation claims;

4. Payment for all costs incurred in attempting to develop the 35 Acres;

5. For an award of attorneys' fees and costs incurred in and for this action; and,

//

6. For such further relief as the Court deems just and equitable under the circumstances.

DATED THIS _____ day of March, 2019.

LAW OFFICES OF KERMITT L. WATERS
BY: /s/ Kermitt L. Waters
KERMITT L. WATERS, ESQ. (NBN 2571)
JAMES J. LEAVITT, ESQ. (NBN 6032)
MICHAEL SCHNEIDER, ESQ. (NBN 8887)
AUTUMN WATERS, ESQ. (NBN 8917)

HUTCHISON & STEFFEN
BY: /s/ Mark A. Hutchison
Mark A. Hutchison (4639)
Joseph S. Kistler (3458)
Robert T. Stewart (13770)

Attorneys for 180 Land Company, LLC

VERIFICATION

STATE OF NEVADA)
) :ss
COUNTY OF CLARK)

Yohan Lowie, on behalf of the Landowner, being first duly sworn, upon oath, deposes and says: that he has read the foregoing **SECOND AMENDMENT and FIRST SUPPLEMENT TO COMPLAINT FOR SEVERED ALTERNATIVE VERIFIED CLAIMS IN INVERSE CONDEMNATION** and based upon information and belief knows the contents thereof to be true and correct to the best of his knowledge.

_____
YOHAN LOWIE

SUBSCRIBED and SWORN to before me
This _____ day of _____, 2019.

NOTARY PUBLIC