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. 8

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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, CITY OF LAS VEGAS, a political subdivision of the State of Nevada, et al, Defendants.	Case No.: A-17-758528-J Dept. No. XVI OPPOSITION TO THE CITY OF LAS VEGAS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION TO THE NEVADA SUPREME COURT ON ORDER SHORTENING TIME **AND** COUNTERMOTION FOR *NUNC PRO TUNC* ORDER OST Hearing Date: May 15, 2019 OST Hearing Time: 9:00 AM

(Oral Arguments Requested)

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 the City of Las Vegas' Motion to Stay Proceedings Pending Resolution of Writ Petition to the Nevada Supreme Court On Order Shortening Time and Countermotion for Nunc Pro Tunc Order.

This Opposition and Countermotion is based upon the Memorandum of Points and Authorities included herein, 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 7th day of May, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The City will not prevail on its writ petition as the Nevada Supreme Court will only accept a writ from a denial of a motion to dismiss if there are: 1) no factual disputes; or, 2) an important issue of law needing clarification[1] - neither of which are present here.

The City's Motion to Stay is simply a recycling of the exact same arguments it has previously and unsuccessfully presented to this Court (and Judge Sturman and Judge Bixler). Accordingly, this Opposition will not delve deep into these recycled arguments,[2] as this Court has heard the same

[1] State. of Nev. v. 8th Jud. Dist. Ct., 118 Nev. 140, 42 P.3d 233, 238 (2002).

[2] However, the City routinely attempts an end run by claiming the Landowners have not addressed some meritless argument the City has made and therefore, according to the City, a

arguments numerous times and the same have been thoroughly addressed by the Landowners in the Landowners' ***75 page*** Opposition to the 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 *filed March 4, 2019* ("Landowners' March Opposition") - incorporated herein by reference and the subsequent Reply in support thereof filed on *March 21, 2019* - also incorporated herein by reference. Unfortunately, the City continues to pursue relief from this Court based on incorrect facts, incorrect law and an incorrect interpretation of the Landowners' claims.

In regards to the ripeness arguments, even assuming*, in arguendo*, that the City is correct (it is not) and the Landowners are only challenging the denial of their applications (they are not as there are a total of at least ten additional City actions the Landowners claim lead to a taking) and the Landowners need to file a major modification (they did not and even if they did the Landowners already met all the major modification requirements) this still does not divest this Court of jurisdiction to hear the Landowners' Inverse Condemnation Claims, as controlling United States and Nevada Supreme Court precedence provide that if filing an application (major modification) would be futile, then the inverse condemnation claims may still proceed. "[W]hen exhausting available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review."[3] The Landowners have affirmatively established that any further application to the City

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ruling should be made in the City's favor pursuant to EDCR 2.20(e). To avoid this baseless argument by the City, the Landowners hereby contest and oppose all facts and law raised by the City in its Motion to Stay whether specifically addressed herein or not and those arguments previously presented to this Court in opposition to each of these facts and law are also incorporated herein by reference.

[3] 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

would be futile. Moreover, this "major modification"/ripeness analysis is only pertinent to the Landowners' Penn Central inverse condemnation claim, the remaining four inverse condemnation claims the Landowners' have against the City do not have a requirement that administrative remedies be exhausted. *See Landowners' March Opposition pages 65-71.*

While the City's ripeness argument is completely contrary to controlling case law, its statute of limitations argument, is contrary to controlling case law **and also** contrary to every argument made on this issue in inverse condemnation cases by Nevada governmental agencies. The City's effort to escape liability by arguing that the statute of limitations for a taking begins to run when the government put something on a planning map is so stunningly contrary to Nevada case law and every government argument made on this issue that it takes a moment to process. Putting something on a planning map does NOT amount to a taking, if it did, government could not function or plan as every planning action would amount to a taking. Sproul Homes of Nev. V. State ex rel. Dept of Highways, 96 Nev. 441, 443 (1980); see also Landowners' March Opposition at 60-62.

And, despite this Court's warning at the March 22, 2019, hearing,[4] and previous *nunc pro tunc* order,[5] the City continues to try to use this Court's "narrowly focus[ed]" ruling that the City had

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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.

[4] "...if your going to say that, say it right. You say, Judge, you know what, you have a much different standard of review in a petition for judicial review. And ***you made a determination that there was substantial evidence in the record to support the findings of the Las Vegas City Council. Period.*** And that's all I made. Now, I have it right here. ***I can nunc pro tunc change*** everything." *(Exhibit 1* at 45:16-23)(emphasis added).

[5] As this Court may recall, a prior Order *Nunc Pro Tunc* was necessary as the City improperly placed language in the Order it presented to this Court entirely dismissing the Landowners' Inverse Condemnation Claims without even a hearing on the claims. The previous Order *Nunc Pro Tunc* was required to remove this improper language submitted by the City and this Court unambiguously 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 enterer on November 21, 2018, ("FFCL")." Order Nunc Pro Tunc Regarding Findings of Fact and Conclusion of Law Entered November 21, 2018 filed February 6, 2019 *see 2:14-17* ("February

"substantial evidence in the record to support the findings of the Las Vegas City Council" as a "sword." (*Exhibit 1* at 45-46). The findings of fact and conclusions of law currently being utilized by the City as a sword are superfluous to this Court's ultimate ruling on the Petition for Judicial Review. Given the City's continuous effort to misuse the same, despite fair warnings, this Court should enter another order *nunc pro tunc* removing all the superfluous language the City wrongfully[6] inserted and is now misusing. Attached hereto as *Exhibit 2* is the November 2018 Finding of Fact and Conclusions of law being continually misused by the City with the superfluous language the City wrongly inserted highlighted for removal.[7] As this Court will see, the highlighted superfluous language has no bearing at all on this Court's ruling on the Petition for Judicial Review that "there was substantial evidence in the record to support the findings of the Las Vegas City Council. Period." (*Exhibit 1* at 45:18-20). A simple reading of the non highlighted language that would remain shows that this non highlighted language is all that needs to be included to address the denial of the Petition for Judicial Review. Accordingly, as the City continues to wrongfully attempt to use this superfluous highlighted language as a sword in the entirely separate inverse condemnation claims, it should all be removed *nunc pro tunc* and only the language necessary for this Court's ruling that the City had substantial evidence for its decision should remain.

II. LAW AND ARGUMENT

A. The Nevada Supreme Court Only Accepts Writ Petitions Under Limited Circumstances, Which Are Not Present Here.

A stay is not warranted, because the City cannot show the Supreme Court will even accept its Writ Petition. The Nevada Supreme Court only accepts writ petitions stemming from a denial of a motion to dismiss when: "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law

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Order Nunc Pro Tunc").

[6] It is clear that the City inserted all this superfluous language in its FFCL to try and defeat the Landowners' inverse condemnation claims before the same were even heard by this Court, which is clearly contrary to Nevada's strong policy to hear cases on the merits.

[7] The language previously removed by the February Order Nunc Pro Tunc has also been removed as indicated by the red font.

needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." St. of Nev. v. 8th Jud. Dist. Ct. (Anzalone), 118 Nev. 140, 42 P.3d 233, 238 (2002).

1. Factual Disputes Exist in this Case

This Court listened to "three and a half, four hours of factual disputes and arguments"on March 22, 2019. (*Exhibit 1* at 128:21-22). The City even agrees there are factual disputes stating that "the City disclaims the validity of almost every one of the [facts]" presented by the Landowners and "[s]o the facts are in dispute". (*Exhibit 1* at 110:3-7). Accordingly, the Supreme Court is extremely unlikely to accept the City's writ petition as there are factual disputes that exist in this case.

As an aside, the City has time and time again attempted to keep the facts from this Court. The pending writ petition is simply more of the same, now the City seeks to keep the facts from the Supreme Court. For the City to argue that "facts cannot be considered,"[8] when dealing with fundamental constitutional rights, is troubling. If the facts establish that the City has taken the Landowners' Property without payment of just compensation, a constitutional mandate, the same must be brought to light and adjudicated, not dismissed on improper procedural grounds. The City's desperation to prevent discovery from commencing in this matter suggests that there is even more evidence in the City's possession that supports the Landowners' inverse condemnation claims, otherwise, the City would proceed through discovery and allow this case to be heard on the merits. The City's continual effort to prevent the same, shows the City's lack of confidence in its position.

2. There are no Important Issues of Law Which Need Clarification

There are no important issues of law which need clarification, as there is more than sufficient precedent from both the Nevada and United States Supreme Court which address the legal issues presented in the Landowners' inverse condemnation claims. Furthermore, the taking at issue in this matter only impacts the Landowners' 250 Acre Residentially Zoned Land. By way of just one example, the new ordinance adopted by the City (LVMC 19.16.105), which is one of the City taking

[8] "The Court is precluded from considering any facts on a motion for judgment on the pleadings;""They're not entitled to present the facts to you here today;""So the facts are in dispute. But we don't get to the facts because this case at this stage must be dismissed as a matter of law on the pleadings." (*Exhibit 1* at 7:18-19; 59:7-8; 110:7-10).

actions alleged by the Landowners, only impacts the Landowners' 250 Acre Residentially Zoned Land. In fact, the City Ordinance's singular focus on the Landowners' Property was the reason the bills introducing the ordinance received the nickname, the "Yohan Lowie Bill."

The Government's "sky is falling" rhetoric claiming "[t]he current posture of this case establishes a dangerous precedent that would allow disappointed landowners to sue for inverse condemnation whenever a land use application has been denied...."[9] could not be further from the truth. As this Court is well aware, Government entities routinely argue to the Courts in eminent domain actions that the *sky will fall* and no court has accepted this argument.

> "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. Causby, 328 U.S., at 275, 66 S.Ct. 1062 (Black, J., dissenting); Loretto, 458 U.S., at 455, 102 S.Ct. 3164 (Blackmun, J., dissenting). We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall after Causby, and today's modest decision augurs no deluge of takings liability." Arkansas Game and Fish Com'n v. U.S., 568 U.S. 23, 36, 133 S. Ct. 511, 521 (2012).

As explained in detail in the Landowners' March Opposition, The City's actions specifically target and impact only the Landowners' Property. In fact, this is what makes the City's taking action "much more formidable."[10] Therefore, this is not a far reaching issue that needs to be immediately addressed by the Supreme Court. To be clear, the only risk of any cascading effect arises out of the City's woefully inaccurate statute of limitations argument, as it (if accepted) places every governmental entity in Nevada at risk of significant liability which is why every government entity and the Nevada Supreme Court have rejected the City's statute of limitations argument in the past. Sproul Homes of Nev. v. State ex rel. Dept of Highways, 96 Nev. 441, 443 (1980).

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[9] City Mot. At 11:8-10.

[10] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1074 (1992) (Justice Stevens dissent).

B. The City's Writ Petition is Not Likely to Succeed on the Merits

1. Facts Establishing the Landowners' Property Rights

The City will not prevail on the property rights issue as the Landowners have a property interest and vested property rights in the Subject Property for the following reasons:

a. The Landowners Own the Subject Property

The Landowners own 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[11] ("250 Acre Residential Zoned Land"). This action deals specifically and only with Assessor Parcel Number 138-31-201-005 (the "35 Acre Property" and/or "35 Acres" and/or "Landowners' Property" or "Property") which, again, the Landowners own. By virtue of this ownership, the Landowners' property interest 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.

b. The Property is Hard Zoned for Residential Use

The Landowners' Property has always been hard zoned for a residential use, including R-PD7 (Residential Planned Development District – 7.49 Units per Acre). The City does not contest that the hard zoning on the Landowners' Property has always been R-PD7.

c. The Landowners are Entitled to Use Their Property So Long as the Use is Comparable and Compatible with the Existing Adjacent Residential Development.

The Landowners have 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.

d. Additional Confirmation of the Landowners' Property Interest and Vested Right to Use and Develop the Subject Property

The Landowners' property interest and vested right to use and develop the 35 Acre Property is further confirmed by the following:

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[11]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

a) 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-PD7 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.

b) The City has confirmed the Landowners' property interest and vested right to use and develop the 35 Acre Property residentially in writing and orally in, without limitation, 1996, 2001, 2014, 2016, and 2018.

c) The City 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 Zoning Atlas in 2001. As part of this action, the City "repealed" any prior City actions that could 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."

d) 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.

e) 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.

f) The City 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.

g) The City's 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.

h) 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).

i) The City confirmed the Landowners' vested right to use and develop the 35 Acres prior to the Landowners' acquisition of the 35 Acres and the Landowners materially relied upon the City's confirmation regarding the Subject Property's vested zoning rights.

j) 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 Landowners' property interest and vested right to use and develop the 35 Acre Property.

k) 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 Landowners' property interest and vested right to use and develop the 35 Acre Property.

l) There has been a judicial finding that the Landowners have the "right to develop" the 35 Acre Property.

m) The Landowners' 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.

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

o) 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.

p) The 35 Acre Property has always been zoned and land use planned for a residential use. The City has argued that the Peccole Concept Plan applies to the Landowners' 35 Acre Property and that plan has always identified the specific 35 Acre Property in this case for a residential use. The land use designation where the 35 Acre Property is located is identified for a residential use under the Peccole Concept Plan and no major modification of Mr. Peccole's Plan would be needed in this specific case to use the 35 Acre Property for a residential use.

2. Law on the Landowners' Property Rights

As more fully detailed in the Landowners' March Opposition, "[a]n individual must have a property interest in order to support a takings claim....The term 'property' includes all rights inherent in ownership, including the right to possess, use, and enjoy the property." McCarran v. Sisolak, 122 Nev. 645, 137 P.3d 1110, 1119 (2006). "It is well established that an individual's real property interest in land supports a takings claim." ASAP Storage, Inc. v. City of Sparks, 123 Nev. 639, 645, 173 P.3d 734, 738 (2007); *citing to* McCarran v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (Nev. 2006) and Clark County v. Alper, 100 Nev. 382 (1984). Meaning a landowner merely need allege an ownership interest in the land at issue to support a takings claim.

Furthermore, despite the City's continual argument to the contrary, 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 land use law. The Nevada Supreme Court in both the Sisolak and Schwartz v. State, 111 Nev. 998, fn 6 (1995) 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," Sisolak at fn 25, then the City is liable for the taking and must pay just compensation. Accordingly, this Court has jurisdiction over this matter.

3. The City's Major Modification Argument is a Red Herring.

a. There is Nothing to Modify

The City claims the Landowners, as a precondition to bringing their taking claims, need to file a major modification application with the City to "modify" the land use designation on the Peccole Concept Plan from a golf course use to a residential use. The City makes this bold assertion without providing the underlying facts and analysis. A proper factual analysis, set forth in the Landowners' March Opposition, shows that the 35 Acre Property **has always been designated residential on the Peccole Concept Plan**. The Landowners' applications with the City were to develop residentially. Therefore, the Landowners' applications were entirely consistent with the Peccole Concept Plan. This means no major modification application was necessary - there was nothing being modified in the Peccole Concept Plan. This is an argument the City has drug over from the 17 Acre Crockett case which has no application to this 35 Acre Property.

b. The City has Never Required A Major Modification

Additionally, for the past 33 years the City has not required a major modification to the Peccole Concept Plan. "Madam Mayor, for point of clarification, there has been subsequent rezoning and general plan after that, which established **One Queensridge Place, Tivoli, as well as parts of Boca Park**, which did not include a major modification." Peter Lowenstein, City Party Representative. *Exhibit 3*, portion of Verbatim Transcript of City Council Meeting of January 3, 2018 – 79:2325-2328. The Landowners' March Opposition showed that the City approved 26 projects and 1,017 units in the Peccole Concept Plan that were inconsistent with the Peccole Concept Plan and not once did the City require a major modification application.

c. Law on Presumption that No Major Modification is Required

Long-continued practice, known to and acquiesced in by a governing body would raise a presumption of how a law should be interpreted and applied. United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915).

d. Any Further Application to the City Would Be Futile, Accordingly, the Law Deems the Landowners' Inverse Condemnation Claim Ripe for Review.

i. Any Further Application to the City Would Be Futile

The Landowners have affirmatively established that any further application with the City, including a major modification, would be futile as shown by all the other City actions that individually and/or cumulatively amount to a taking. These City actions are set forth as follows in the Landowners' March Opposition:

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

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

City Action #3: Adoption of the Yohan Lowie Bills (now LVMC 19.16.105).

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

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

City Action #6: Denial of a Drainage Study.

City Action #7: The City's Refusal to Even Consider the 133 Acre Property Applications.

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.

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

City Action #10: the City Reverses the Past Approval on the 17 Acre

City Action #11: The City Retains Private Counsel to Confirm that It Will Push an Invalid Open Space Designation on the 35 Acre Property. (*See* Landowners' March Opposition pages 32-45).

ii. Law on Ripeness

"[W]hen exhausting available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review." State v. Eighth Judicial Dist. Court of Nev., 351 P.3d 736, 742 (Nev. 2015) "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.

The Landowners takings claims are based on the aggregate of the City's actions, summarized above, which have conclusively established that the City will allow no development whatsoever on the Landowners' Property, as the City is reserving the Property for a City Park. Such City action goes beyond a Penn Central Regulatory taking and, therefore, removes the need to exhaust administrative remedies (the City argues this would be filing a major modification). However, even under a Penn Central regulatory taking analysis, the City has shown that any further application to the City, such as a major modification, would be futile. Therefore, under controlling case law, the Landowners' claims are ripe and this Court must retain jurisdiction of the same.

e. Even if a Major Modification is Required, the Landowners Met the Major Modification Procedures and Standards

The Landowners' March Opposition showed in detail that, even if a major modification was required, the Landowners met all of the procedures and standards of a major modification application in their attempts to develop the 35 Acre Property and the City still denied any use of the Property. This was shown as follows: 1) the Master Development Agreement included and far exceeded the standards for a major modification; and, 2) the Landowners submitted a General Plan Amendment that included and far exceeded the standards for a major modification. The City denied all of these applications. This caused City Attorney Brad Jerbic to state (contrary to the City representations to this Court) as follows: "Let me state something for the record **just to make sure we're absolutely accurate on this**. **There was a request for a major modification that accompanied the development agreement [MDA]**, **that was voted down by Council**. So that the modification, major mod was also voted down." See Landowners' March Opposition, Exhibit 61, City Council Meeting of January 3, 2018 Verbatim Transcript – Item 78, Page 80 of 83, lines 2353-2361.

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4. The City's Statute of Limitations Argument is Contrary to Nevada Law and the Best Interest of all Governmental Entities.

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."[12] 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.[13]

Nevada law is very clear that the government cannot become liable for a taking until the government "takes steps" to implement or enforce the planning document against a particular parcel of property or otherwise takes action to acquire or preclude use of the property: "[t]he pivotal issue . . . is whether the public agency's activities have gone beyond the planning stage to reach the "acquiring stage.'"[14]

Therefore, merely writing "PR-OS" over the 35 Acre Property on the City's general "plan" does not begin the commencement of the statute of limitations period for the Landowners' inverse condemnation claims. Moreover, since the City has approved at least 26 projects and 1,017 other

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[12] 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).

[13] Id., at 444.

[14] 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).

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 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). The statute of limitations has not run on the Landowners' inverse condemnation claims and, therefore, this Court has jurisdiction over this matter.

5. All Litigants Must Participate in Discovery

The City claims it should not have to engage in discovery and, therefore, a stay should be granted. All litigants must participate in discovery and this Court has already bifurcated discovery to reduce litigation costs. It must be noted that, at the recent early case conference hearing before this Court, the City opposed this bifurcation and instead wished to increase the litigation costs by having discovery on damages occur at the same time as discovery on liability. The Landowners and the Court have continually sought to make sure this case proceeds efficiently; it has been the City that at every turn has sought to unnecessarily increase litigation costs.

III. COUNTERMOTION FOR SECOND ORDER *NUNC PRO TUNC*

This Court is not bound by the FFCL, as the City has already argued and the Supreme Court agreed[15] that the FFCL are not a final judgment. Therefore, pursuant to NRCP 54(b), this Court may reconsider that ruling at any time. In fact, this Court can reconsider the FFCL at any time before a final judgment, as this Court has the inherent jurisdiction to reconsider its own orders.

The FFCL is not *res judicata* on the inverse condemnation claims as res judicata requires a final judgment, which the FFCL are not, according to the Nevada Supreme Court. Nor does the

[15] Order Dismissing Appeal filed April 22, 2019 180 Land LLC. v. City of Las Vegas Nevada Supreme Court Case Number 77771.

law of the case apply to bind this Court to apply the FFCL to the Landowners' inverse condemnation claims, as law of the case applies only to the decision of an appellate court.

However, as mentioned in the Introduction, despite this Court's warning at the March 22, 2019, hearing,[16] and in the February *Nunc Pro Tunc* order, the City continues to try to use this Court's "narrowly focus[ed]" ruling that the City had "substantial evidence in the record to support the findings of the Las Vegas City Council" as a "sword." (*Exhibit 1*, *45-46*). The findings of fact and conclusions of law currently being utilized by the City as a sword are superfluous to this Court's ruling. Given the City's continuous effort to misuse the same, despite fair warnings, this Court should enter another order *nunc pro tunc* removing all the superfluous language the City inserted and is now misusing from the FFCL. Attached hereto as *Exhibit 2* is the FFCL with the superfluous language the City wrongfully inserted highlighted for removal. As this Court will see, the highlighted superfluous language has no bearing on this Court's ruling that "there was substantial evidence in the record to support the findings of the Las Vegas City Council. Period." (*Exhibit 1* at 45:18-20). Accordingly, as the City continues to use this superfluous language as a sword, it should all be removed *nunc pro tunc*.

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[16] "...if your going to say that, say it right. You say, Judge, you know what, you have a much different standard of review in a petition for judicial review. And ***you made a determination that there was substantial evidence in the record to support the findings of the Las Vegas City Council. Period.*** And that's all I made. Now, I have it right here. ***I can nunc pro tunc change*** everything." *(Exhibit 1* at 45:16-23)(emphasis added).

IV. CONCLUSION

For the foregoing reasons, the City's motion to stay should be denied as the City is unlikely to succeed on its Writ. However, to prevent the City from continuing to misuse the superfluous language it wrongfully placed in the FFCL, the Landowners respectfully request that this Court enter an second order *nunc pro tunc* removing all the superfluous language from the FFCL, specifically FFCL at 4:23- 8:11; 11:23-12:6; 14:12-21, 14:25-16:27; 17:15-23:3.

RESPECTFULLY SUBMITTED this 7th day of May, 2019.

LAW OFFICES OF KERMITT L. WATERS

By: */s/ Autumn Waters*
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Attorney for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 7th day of May, 2019, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the foregoing document(s): **OPPOSITION TO THE CITY OF LAS VEGAS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION TO THE NEVADA SUPREME COURT ON ORDER SHORTENING TIME AND COUNTERMOTION FOR *NUNC PRO TUNC ORDER*** 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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Evelyn Washington, an employee of the
Law Offices of Kermitt L. Waters

Exhibit 1

CASE NO. A-17-758528-J

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

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

REPORTER'S TRANSCRIPT
OF
MOTIONS

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED FRIDAY, MARCH 22, 2019

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

APPEARANCES:

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* * * * *

LAS VEGAS, NEVADA; FRIDAY, MARCH 22, 2019

1:36 P.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: Good afternoon to everyone.

IN UNISON: Good afternoon.

THE COURT: Let's go ahead and place our appearances on the record.

MR. OGILVIE: Your Honor --

MR. WATERS: Kermitt Waters -- go ahead. Go ahead.

MR. OGILVIE: Sorry. Good afternoon, your Honor. George Ogilvie on behalf of the City of Las Vegas.

MS. LEONARD: Good afternoon, your Honor, Debbie Leonard on behalf of the City of Las Vegas.

MR. HOLMES: Good afternoon, your Honor, Dustun Holmes on behalf of the intervenors.

MR. BICE: Good afternoon, your Honor. Todd Bice on behalf of the intervenors.

MR. WATERS: Kermitt Waters on behalf of 180 Land, your Honor.

MR. LEAVITT: James A. Leavitt on behalf of 180 Land, your Honor.

MS. WATERS: And Autumn Waters on behalf of 180 Land.

MR. HUTCHISON: Mark Hutchinson, your Honor, on behalf of 180 Land as well.

THE COURT: All right. Once again, good afternoon. And before we get started, are there any preliminary matters we need to discuss?

MR. LEAVITT: Your Honor, we're ready to move forward with our argument.

THE COURT: Okay. All right.

You ready, Mr. Ogilvie?

MR. OGILVIE: Yes, your Honor.

THE COURT: All right. So you have the floor, sir. I think your motion is up first.

MR. OGILVIE: Thank you.

Your Honor, as the Court knows, this is City of Las Vegas' motion for judgment on its pleading pursuant to Rule 12(c) of Nevada Rules of Civil Procedure on a motion for judgment on the pleadings. The Court reviews the pleadings, the exhibits to the pleadings and may take judicial notice of other relevant materials. But the Court must make a determination as a matter of law without considering any factual contentions.

And I will state now, and I will -- I will

state it later as I anticipate significant, if not substantial, amount of factual contentions to be presented by the plaintiff in this matter. City of Las Vegas objects to such factual presentation, and --

THE COURT: And when you say "objection to factual presentation," what specifically are you focusing on, sir, so I understand?

MR. OGILVIE: Well, as I review the countermotions, your Honor, there's many factual contentions being made by the plaintiff that are outside the record of this -- outside of the pleading, the four corners of the pleading, that's being challenged by this Rule 12(c) motion.

Also, outside any exhibits because they're -- any exhibits attached to the pleading. And specifically, your Honor, I want to make this clear because I hear this from attorneys all the time. They confuse what a pleading is, and Rule 7 is very clear about what a pleading is. Rule 7 limits pleadings to a complaint, an answer, an answer to a counterclaim, third-party complaint, answer to a third-party complaint, or a reply to an answer.

Those are the only types of pleadings that can be considered by this Court on this motion for judgment on the pleadings. And the reason I state that is

because I hear all the time attorneys of some significant sophistication who have been practicing for a long time conflating pleadings with filings, briefs.

So, again, the sole determination by this Court at this juncture is a determination as to whether the complaint sets forth allegations sufficient to make out the elements of a right to relief. That is it.

And in making that determination the Court can only consider those pleadings that are identified in Rule 7, any exhibits and any properly judicially noticed materials.

Now --

THE COURT: I understand that.

MR. OGILVIE: Thank you.

THE COURT: Okay.

MR. OGILVIE: So it's not a matter, as the developer likes to argue, that the City doesn't want the Court to consider the facts. The Court is precluded from considering any facts on a motion for judgment on the pleadings, such as we have today.

And the reason that I expect a lot of factual contentions that are improper at this juncture is twofold. One, the countermotions that were filed as well as the need for a three-and-a-half-hour hearing that the --

THE COURT: And talk about the countermotions. I want to hear -- understand. And you can only -- you don't have to spend more than a minute or two, because I've thought about that too, from a procedural aspect of the current posture of the case. What are you saying there to me?

MR. OGILVIE: Okay. I'm glad you raised that.

So let's take a step back and look at the posture of this case. So far there was an amended pleading filed by -- an amended complaint filed by the plaintiff, which included a petition for judicial review and a complaint for damages for inverse condemnation. The City filed a motion to dismiss prior to my involvement in this matter.

The Court took that into -- under consideration, had conducted a hearing in January 2018 and made a determination that it was going to bifurcate those two components of this case. And the Court entered an order that specifically stayed this.

THE COURT: Did I bifurcate or sever?

MR. OGILVIE: Well, you used the word sever, but you referred to a -- the bifurcation rule under --

THE COURT: Okay.

MR. OGILVIE: -- Rules of Civil Procedure rather than severance, so --

THE COURT: Was that done in the order? Or -- I mean, because I really don't know. And I don't mind telling you this. I mean, I've looked at this case. And I understand from time to time lawyers are in the trenches, you know, and conducting trench warfare, and that happens. It just so happens I'm at 30- or 40,000 feet and so my view is, really and truly, much different as far as the procedural posture of the case is concerned. I understand what you're saying. And I thought about that well before you walked in here today.

Because this is what we have going on right now. We have the motion or the petition for judicial review, and I do understand what my charge is under those circumstances. And it's to make a determination as to whether or not there's substantial evidence in the record to support the decision and findings of the Las Vegas City Council in that case regarding that specific issue.

And then we have another -- we had a complaint that was filed in this matter. They were in the same case, and the complaint was seeking -- primarily based on inverse condemnation. I understand that. There's completely didn't standards of proof involved. It's really and truly a different matter.

I realize that Mr. Bice filed a motion to intervene on behalf of some adjacent property owners, and that specifically went to the issues that were involved in the petition for judicial review. And the reason why I think that's important -- and I'm going to have everybody talk about it. But as far as the severed case, the severed action regardless of the language I used, because bifurcation is different than severance. We know that.

If -- now we're dealing specifically with the issue as it relates to the inverse condemnation action. I don't think Mr. Bice's clients would have standing to even come into that dispute as it relates to the inverse condemnation. That's a totally different issue, totally different animal, different levels of proof and the like. And I thought all about that.

And just as important, too, I thought about this. Because the first thing I said to myself when I look at any case, and I say, What is -- what is the status of the pleadings in this matter procedurally? We dealt with the petition for judicial review. I realize there's a matter for reconsideration. I'm going to issue an order today, so that will be taken care of.

But that's one aspect of it. But here we have

a complaint. We have a motion to dismiss. We don't even have an answer on file; right?

MR. OGILVIE: Correct.

THE COURT: So, you know, I'm looking at this. And I'm saying -- and here's the one thing that I'm always concerned about. I realize at times I have to make very tough calls. I do. That's what we do as trial judges; right? But I don't want there to be error based upon the easy stuff.

MR. OGILVIE: I can appreciate that fully, your Honor.

THE COURT: You see where I'm going?

MR. OGILVIE: I don't think anyone in the courtroom wants that.

THE COURT: Right.

MR. OGILVIE: And if I can address particularly in that regard the intervenors' --

THE COURT: Right.

MR. OGILVIE: -- participation. And I fully understand and I support the Court's concern --

THE COURT: Right.

MR. OGILVIE: -- that allowing the intervenors to --

THE COURT: And I respect Mr. Bice and his partner. I've seen him more -- I didn't see him much

in construction defect because I don't think they practice specifically in that area, maybe a couple times. I remember seeing your partner one time on a somewhat complex indemnity matter at some level. Maybe seven, eight, nine, ten years ago.

But we have to come back and say, at the end of the day, where are we. And that's why I kind of focused on at the very beginning of the discussion trench warfare; right? The fog of war. And we have very capable litigators here today. I get that. But sometimes the fog of war makes us forget where we're at; right? You kind of lose sight of that.

So I want to make sure no matter what happens today that we don't lose sight of, you know, the book, the Rules of Civil Procedure. We don't push things down the road that maybe shouldn't be decided today, but should be decided at some point. Do you understand where I'm going on that?

MR. OGILVIE: And your Honor is right in line with where I was going. As I was directing the Court's attention to Rule 12(c) and what we are here for today. And my objection to the factual contentions that I anticipate hearing from the plaintiffs today.

So -- and I appreciate the Court taking the step back, because I would like to take a step back.

And, again, reinforce where we are today. Because as you say --

THE COURT: And I want to tell you, I'm well aware, because -- I am. I'm going to let you continue on, but I know where we're at. And I know where we should be. And one of the things I think in 13, close to 14, years, I've never had any issues regarding where we should be.

MR. OGILVIE: Okay.

THE COURT: That's probably the best way I can say that.

MR. OGILVIE: So, I mean, technically pursuant to the Court's order on the motion to dismiss that was filed by the City 18 months ago, this portion of the case is still stayed. Because the Court stayed the inverse condemnation action until such time as there is a final ruling on the petition for judicial relief. Now, the Court's entry of the November 21, 2018, findings of fact conclusions of law resulted in a final ruling on the petition for judicial review.

THE COURT: Right.

MR. OGILVIE: So that would, in fact, release -- remove the stay.

However, then the plaintiffs filed a motion for reconsideration, which is, as the Court noted,

still pending, and I appreciate the Court indicating that it's going to issue an order today.

Nonetheless, pursuant to the Court's earlier order, the action on the inverse condemnation claims is still technically stayed. We heard -- I have heard complaints by the plaintiffs that the City is attempting to drag its feet on this matter, so as an -- out of an abundance of concern that that complaint would resonate with the Court, we filed this motion for judgment on the pleadings prior to the entry of a final order on the motion for reconsideration, which would remove the stay.

So, I guess, technically, my filing of the motion for judgment on the pleadings was a violation of the stay. Nonetheless, again, what the City doesn't want to be placed in a position where it is accused of attempting to drag this out. We're not.

But where we are, again, is there is a -- an amended complaint that we have now filed a motion for judgment on the pleadings. There hasn't been an answer, as the Court noted. There hasn't been, as a result, any early case conference. There hasn't, as a result, been any discovery conducted.

And now that gets to, again, where the Court was saying current posture of the case is, and where --

and going back to the Court's original question to me, what do I think about these countermotions. Well, the countermotion for judicial determination on liability is a -- essentially the plaintiff's motion for summary judgment and is premature.

So that is my response to --

THE COURT: Because, in essence, it is a motion for summary judgment --

MR. OGILVIE: It is.

THE COURT: -- 56 motion; right?

MR. OGILVIE: It is almost a regurgitation of the motion for summary judgment that was filed by the plaintiffs in December, which is the subject of some dispute between Mr. Leavitt and me as to a briefing schedule, and I don't know if that needs to be resolved or not.

Nonetheless, it is a motion for summary judgment. And for that reason, I state that that motion is premature. And it should not be considered by the Court at this juncture. And -- but moreover, your Honor, I think once the Court properly evaluates the motion for judgment on the pleadings, it renders the other -- the countermotions moot. Because for three separate and independent and very sound legal reasons, the motion for judgment on the pleadings must

be granted. The first of which is the fact that the developer has no vested right to redevelop the Bad Lands Golf property.

The second is the fact that the developer has waived any right to pursue the inverse condemnation claims because they are time barred as a result of the developer's predecessor's in interest position and actions relative to that property dating back to 1989 and 1990.

This 15-year statute of limitations ran on the claim on the developer's inverse condemnation claims in 2005, fourteen years ago. It's not even a close call.

The third reason that this Court must grant the motion for judgment on the pleadings and dismiss the inverse condemnation claims as a matter of law is that -- is the determination by this Court that Judge Crockett's decision has preclusive effect in this matter.

THE COURT: Well, here's my question. And I've thought a lot about this. I don't mind telling everybody this. Understand, and if I -- I just want to make sure what's going on in other courts. All these other court issues that have been determined, whether it's Smith -- wasn't it Sturman?

MR. OGILVIE: Judge Sturman.

THE COURT: And wasn't it Judge Bare also had a piece of some sort?
MR. LEAVITT: Judge Bixler.
THE COURT: Judge Bixler, okay. And I remember that from reading the points and authorities.
But weren't all these issues regarding petitions for judicial review as a result of a decision by the City council?
MR. LEAVITT: No, your Honor. Those -- the decision by Judge Sturman and the decision by Judge Bixler were in the inverse condemnation part of each one of those cases.
THE COURT: Okay. Involving different parcels?
MR. LEAVITT: Involving different parcels. And in both of those cases, the Court denied the City's motion to dismiss.
THE COURT: But the reason why -- but here's the thing.
MR. OGILVIE: I'd like to argue my --
THE COURT: Wait. Here's --
MR. OGILVIE: -- position.
THE COURT: But you have to understand this. I'm not going to be guided by what other judges do. I just want everybody to understand that. I'm not going

to do that.

Secondly, the reason why I remember -- you discussed it was Judge Crockett and his decision. But here's what's important. This is what I want to have discussed. Understand this, a petition for judicial review is much different than a complaint for inverse condemnation. There's completely different levels of proof. I think we can all agree.

In a petition for judicial review, I think it's important to point this out on the record, my charge is limited; right? It really and truly is. To make the determination as to whether or not there's substantial evidence in the record to support the decision of the administrative body. Nothing -- or the City council or the County commission or whom ever it might be; right?

Okay. Now, and I thought about this. I don't mind telling everybody. Now, we're talking about a much different animal. We're talking about an inverse condemnation case. And it's a -- it's a case alleging a taking by the City of Las Vegas based upon a myriad of different actions by the City council.

Now, the standard of proof there is much different. We can all agree; right? It's much higher. It's by a preponderance of the evidence, right, versus

a lower standard of proof as to the substantial evidence in the record to support the decision of the administrative body, City council or whatever; right? We can all agree. That's a different animal.

And so when I hear these arguments, I question whether there's any preclusive effect because that's a different animal. And I don't mind. And we can talk about that.

And the reason why I think that's important, I don't mind sharing with anyone my thoughts as we go through this. Because one of the beauties -- I know you were here two days ago; right?

MR. LEAVITT: Correct.

THE COURT: And I read everything and thought about it. But when you have -- have a day or two to reflect, you think about more issues and more ideas; right? Because when I first went through it, I've been so busy it was like a cram match. I thought I was in law school again, reading, getting ready for an exam or something like that. I really did, especially after reading 75 pages of briefing in the countermotion; right? Well, I guess the opposition and countermotion.

And I understand why it was, because there were two separate issues. It's an opposition and a countermotion, so I get that.

And trust me, I'm never burdened. I'll read the pages. I don't care, you know. It is what it is, because these are important issues.

So with that in mind, Mr. Ogilvie, tell me why -- what Crockett did or even my own decision as it relates to determining that there was substantial evidence in the record to support the decision of the City council vis-à-vis the petition for judicial review matters when it comes to the separate claim for inverse condemnation.

MR. OGILVIE: Thank you.

While I agree with you, we can all agree that the claims for judicial review and inverse condemnation are very different claims. They involve different standards of proof, and the relief sought is very different.

However, I think we can also all agree that notwithstanding the difference between the standards of proof and the relief sought, the findings that are common to both are findings that are binding by -- to this Court and to the parties. They are now the findings that govern the rest of the case. And the Court made very specific findings in that determination, in the findings of fact and conclusions of law, that are binding on the findings for --

whatever findings the Court makes on the motion before the Court today.

And specifically --

THE COURT: And tell me why. You know, because I thought about this. And I don't think this has ever happened before that I'm aware of in jurisprudence, but I tried to think of a scenario that would be analogous to the scenario in front of us. And -- because this never happens.

Sometimes you'll see civil tort cases that are waiting for the criminal trial determination. And as we know, this is a much different standard in a criminal case. But hypothetically -- because I've never seen this happen. But just hypothetically, if you have a -- if you had a civil tort case and there was a determination made by a jury in a civil court case, how would that be admissible in a criminal trial, subsequent criminal trial, where it has much different evidentiary standards?

MR. OGILVIE: Let's flip it, because you're bringing into account a sacred portion of our jurisprudence, and that's a criminal defendant's right to a fair trial and right to jury and right to --

THE COURT: We have all that in civil.

MR. OGILVIE: Well, yes.

THE COURT: Seventh Amendment versus Sixth and all that.

MR. OGILVIE: But unless, the criticisms --

THE COURT: You know what I'm talking about though? Just hear me out. It's a different level of proof. That's what I'm talking about.

So how would a civil jury's determination be admissible in a criminal case that has a much higher standard of proof?

MR. OGILVIE: Well --

THE COURT: And that's the only analogy, I don't mind telling everybody, I could think of. I thought about that this morning when I was driving to work when I was thinking about this case.

MR. OGILVIE: Okay. So let me -- let me address the Court's question like this.

In that -- in the Court's hypothetical, we're addressing two different proceedings. In this matter we're dealing with one proceeding with a single trier of fact. If you had -- let's take it in the context of the Court's determination or the Court's hypothetical of a criminal proceeding. Let's talk about a bifurcated trial on capital murder where there is a component that is the guilt phase, and then there is a component of the penalty phase. The jury doesn't go

back and revisit and redetermine facts that were determined by the jury in the guilt phase when it is considering the penalty. The --

THE COURT: Okay. I get that. But my question is the -- a petition for judicial review is not a bifurcated portion of a claim for inverse condemnation resulting in a damage claim for the taking of real property. Those are different animals; right?

MR. OGILVIE: They are different animals.

THE COURT: Completely.

MR. OGILVIE: But if we look at specific findings that the Court made in the -- on the petition for judicial review, paragraph 35, the Court entered a finding that a zoning designation does not give the developer a vested right to have its development applications approved. In order for rights to -- in a proposed development project to vest, zoning or use approvals must be the subject of further governmental discretionary action affecting project commencement, and the developer must prove considerable reliance on the approvals granted.

There is no turning back on that finding, your Honor. The facts, the factual underpinnings of the petition for judicial review are the same factual underpinnings, some of them, some of them are the same

factual underpinnings for the inverse condemnation claims.

Now, the developer argues that the Court, in determining the -- in ruling on the inverse condemnation claims has to take into consideration the totality of the circumstances. What we've responded to them --

THE COURT: Well, why doesn't the Court? Because it's my -- and the reason why I bring that up, and there was a lot there. And we're kind of going beyond, I guess, the thrust and focus of the 12(c) motion, but I just remember there were allegations regarding conduct of certain members of the City council enacting specific ordinances, targeting the developer defendant in this case. That's much different. And this -- these types of things happen post petition; right?

And so hypothetically if we have an inverse condemnation scenario, and the other side will tell me if I'm off on this, it just seems to me -- and we're not dealing with -- I'm not dealing with the petition for judicial review. I think I had a significantly different charge as a trial judge under those circumstances.

Here we are in full-blown civil litigation;

right? And what's relevant at the end of the day might be premature at this time to decide. Because we don't even have an answer on file. We can all agree with that.

But it seems to me that potentially once you get in the discovery, there's -- there could be a lot going on, a lot of moving parts. But at the end of the day in the "civil case," a lot of that might be relevant. I mean, I don't know. But I thought about it.

MR. OGILVIE: Okay.

THE COURT: Because it's a different case.

MR. OGILVIE: Let me answer the Court's question like this: What is the taking that is being alleged in this complaint? The taking is the denial of the land-use applications by the City of Las Vegas on June 21, 2017. Whatever --

THE COURT: I think it's much broader than that. I think they're -- what they're saying is this: Notwithstanding the application and the conduct of the City council as it related to the application that was subject to judicial review in this department, that there's a myriad of -- myriad of issues and conduct that the Supreme Court -- I'm sorry, the City council engaged in that resulted at the end of the day a

taking. And that's what I think the case is ultimately going to be about. I do.

And that's to me what it appears the direction is. Because I'll say this, and I thought about it, you have a scenario where there was a denial of one petition for judicial review.

I don't think that has a preclusive effect as it relates to a claim for inverse condemnation based upon the conduct of any municipal authority or county authority or whatever. Because that's what you're asking me to rule as a matter of law.

MR. OGILVIE: No. I'm asking you to look at the -- at the amended complaint before you, and determine as a matter of law whether that complaint sufficiently pleads allegations that could lead to relief.

THE COURT: Okay. I understand that, under 12(c).

MR. OGILVIE: And that's -- that's very different.

And what the pleading that is being challenged alleges is that the City's denial of these particular land-use applications was a taking. Irrespective of the claims or the claims brought by the developer in Judge Sturman's action, which they want to bring into

this action, the claims that were proceeding before Judge Israel, which we don't have a judge currently on that case, all of those -- it's -- it's truly amazing the Byzantine nature of these pieces of litigation.

THE COURT: It is. It is. It really is. I agree.

MR. OGILVIE: Nonetheless, those actions that are being alleged by the developer against the City are being brought in separate actions. They're not being brought here, and they shouldn't be considered relative to what the City council did on June 21, 2017. Because that action taken by the City -- now, I'm not saying -- and I'm not even going to take a position today. I'd like to do the research before I commit myself one way or the other.

THE COURT: I understand.

MR. OGILVIE: I'm not saying at this point that the motivations of the City as evidenced by other actions is inadmissible, but what I'm saying is the actual -- the purported taking is the action that was taken on that particular day, and therefore the other actions for substantive purposes are irrelevant and cannot be taken into consideration by this Court for purposes of this motion.

THE COURT: I understand. I do.

MR. OGILVIE: So, again, we're still at the pleading stage. We haven't filed an answer. We have a motion pending before this Court that for, as I stated, three very distinct and sound legal reasons should be dismissed.

And the first, again, is that the developer had no vested right to have the applications approved to redevelop the Badlands golf course. And I want to emphasize the word "redevelop." Because the property at issue has already been developed one time. And that is what the developer in this action, the plaintiff, purchased, was a golf course.

The developer's predecessor in interest developed the Queensridge property with -- and benefited by the fact that it was going to, and ultimately did, develop the Badlands golf course. That increased the property values of all the homes in the Queensridge development that were, ultimately, sold.

So taking a step back to before one rock, one square foot of dirt was graded, the developer, Peccole, was developing a master plan and was going to sell specific parcels to individual home -- home builders to develop the property. The fact that the golf course was part of that development increased the value by which Peccole could sell the part -- the property

surrounding that golf course.

The value -- the increased value by that golf course was inherent in the property sales made by the -- this -- the plaintiff's predecessor in interest, and it was -- that designation was sought by that developer to increase those sales, to increase the property value for those sales. It was also to avoid having to build a park pursuant to the City's set-aside requirements for green space.

The golf course satisfied the drainage requirements. It satisfied the park set-aside requirement. It also increased the value for which the property -- the original developer could sell the adjoining parcels.

So the law in Nevada is that the developer, this plaintiff, steps into the shoes of its predecessor relative to that.

Again, it was a golf course. The plaintiff purchased a golf course. The plaintiff has the opportunity to run a golf course. The City has taken no affirmative action to deny that -- this plaintiff of any right that it purchased relative to that golf course.

THE COURT: Now, here's a question I have as far as that's concerned, and I just looked at my notes

for my review. And here we're not talking about a golf course. We're talking about 35 acres; is that correct?

MR. OGILVIE: Yes.

THE COURT: Okay. And the reason why I bring that up --

MR. OGILVIE: The 35 acres is part of the gold course.

THE COURT: But isn't it alleged -- I mean, and the reason why I'm bringing it up, wasn't the 35 acres at issue unlike the rest of the golf course rezoned to RPD7 in 2001 by the Las Vegas City Council?

MR. OGILVIE: The fact that it was zoned RPD7 has never been in dispute.

THE COURT: Okay.

MR. OGILVIE: As --

THE COURT: And the reason why I bring that up, though, that's a little bit different than the other parts of the golf course; right? Because I don't think they were rezoned RPD7 in 2001 by the Las Vegas City Council.

MR. OGILVIE: Mr. Bice can correct me if I'm wrong, but I believe the entire golf course --

THE COURT: Was it?

MR. OGILVIE: -- is RPD7.

THE COURT: All right. I understand. So

there's a difference there. That's different than PR-0 --

MR. OGILVIE: Well, that -- there's a difference between the zoning and the designation. The designation has an overlay of PROS. The zoning, and we went through this at length on June 29 when we argued the petition for judicial review. The -- just because the zoning -- and then this is discussed at length in our briefs -- that the zoning -- and, in fact, it's part of the Court's findings of fact and conclusions of law that it entered on November 21, 2018.

Just because there is a zoning of RPD7 doesn't mean that there is a -- an entitlement to develop -- redevelop the golf course into housing. There is still, as cited in our briefs, the City still has the discretion to approve or disprove the land-use application that was -- the land-use applications that were before it on June 21, 2017. That was the Court's finding. And because of that discretion, the law is when the Court -- when it -- when a municipality has the discretion, then no vested right to the development applications exist. And I want to cite specifically to the case law that I'm referring to.

In America West Development --

THE COURT: And I want to make sure I'm not

throwing you off. I think that was one of the issues raised as it related to the statute of limitations, that there was a change in 2001 and there was -- I know there was an argument made, you stepped in the shoes. Well, there was a -- based upon the change, I guess, it's alleged that if there is a statute of limitations, and I realize the plaintiff is not acquiesced on that issue in any respect, but they said even with that in mind, it became RPD7 in 2001. And as a result, worst-case scenario, the statute of limitations still wouldn't apply.

MR. OGILVIE: Well, I submit to the Court this is one of the bright shiny balls that the plaintiff wants to distract the Court with.

The designation, the PROS designation, that the City is maintaining is the triggering event and the triggering date for the statute of limitations. Goes back to 1990. It has nothing to do with the zoning of RPD7.

And, again, we fought this battle on June 29 whether or not zoning gave the City -- or gave the developer a vested right to develop the golf course as housing, and the Court made a specific determination in paragraphs 35 through 38 of the findings of fact and conclusions of law that, in fact, it didn't.

And I will cite the Court specifically to paragraph 36 of the findings of fact and conclusions of law:

"Compatible zoning does not ipso facto divest a municipal government of the right to deny certain uses based upon considerations of public interest."

Citing the Tighe versus Van Goerken case, and the Nevada Contractors case which affirmed the county commission's denial of the special-use permanent, even though the property was zoned for that use.

Again, in paragraph 34 of the findings of fact and conclusions of law, this Court found that the four applications submitted to the council, to the City council for a general plan amendment tentative map cite development review and waiver were all subject to the City council's discretionary decision-making no matter the zoning designation.

My point is, your Honor, we've already gone through this zoning designation and the Court has already made a determination against the developer on that very issue; that, in fact, just because the zoning is RPD7 does not, does not remove the City council's discretionary decision-making. And because there is a discretionary decision-making authority on behalf of

the City, that means, under Nevada law, that there is no vested right to redevelop that property.

THE COURT: So are you saying that the City's discretionary authority is a shield to an inverse condemnation action?

MR. OGILVIE: Absolutely. You know why?

THE COURT: Okay.

MR. OGILVIE: Because if there is a -- if there is a discretionary authority, that means there is no constitutionally protected right. There is no vested right. There is no entitlement. And I use those terms interchangeably because that's what the case law --

THE COURT: I'm going to tell you this. I don't look at entitlement as the same thing as a guarantee under the United States Constitution and the State of Nevada Constitution. That's a different animal, right, when it --

MR. OGILVIE: So the case laws talks about entitlement and interchangeably, synonymously with a vested right, and that's why I mention it. So let's just focus on a constitutionally protected right or a vested right.

And the case law is consistent. Whether it's in Nevada or in the Ninth Circuit or in the United

States Supreme Court, without a vested right, there is no -- there can be no taking. That is settled law. Notwithstanding what the developer wants to tell you. The developer would like to change the law. But what that means, your Honor, is let's -- it has to be that way; right?

Because if it weren't the law that there had to be a vested right before there could be a taking, that would mean that any decision by any municipality, whether it be the City council, the County commission, State of Nevada, State of California, whoever, if there wasn't a standard, a threshold that had to be met before there was a taking, any denial of any application, any land-use application would result in litigation.

But the United States Supreme Court has determined, and the State -- the State of Nevada, the Supreme Court, has agreed that in order for there to be a taking, in order for a taking claim to even exist, there must be a vested right to develop the property in the manner in which the applicant is choosing.

The Court, this Court, your Honor has already made a determination that there was no such vested right because the City council still maintained its discretionary decision-making on the four land-use

applications that it denied.

So ipso facto, if there is a discretionary decision-making authority on behalf of the City council, there is no vested right. And if there is no vested right, there cannot be a taking. That is clear. That is plainly the law throughout the United States.

So, again, the Court made specific findings that, in fact, the City maintained -- retained its discretionary decision-making authority for evaluating these land-use applications. Because of those findings, there is no vested right and there can be no taking as a matter of law. And for that reason alone, the inverse condemnation claims asserted by the City -- or by the developer in this action must be dismissed.

The -- and I know the Court says it's not going to take -- you're -- it's not going to take into consideration the findings by other Courts. But I just want to mention that not only did your Honor make that determination, in a separate matter before -- in federal court before Judge Mahan, Judge Mahan made the -- engaged in the very same analysis that this Court engaged in and came to the very same conclusion.

THE COURT: But see -- and I have, you know, I understand that. But I feel what's being overlooked is this: That when I'm confronted with the petition for

judicial review, the Courts take on a much different role than they take in ordinary civil litigation; right? A petition for judicial review is focusing solely on the actions of the administrative and/or political body such as the County commission, City of Las Vegas. It can be in a work comp case. It can be in a myriad of different cases.

I'm sitting here reviewing it with this really, I guess, narrow lens. That's probably the best way I can say it. And I'm just making -- it's real simple. Is there substantial evidence in the record to support their decision? And if not, it's arbitrary and capricious; right? Is there any plain error of law? I'm done. I walk. I'm out.

Whereas, in full-blown civil litigation, I'm -- here I am, and I'm looking at Rule 12(c). And I'm accepting the complaint and the allegations in the complaint as being true. And making a determination that, Okay. Are there any set of facts upon which relief can be granted? And that's it.

It's not that big of a, you know -- but it's a much different analysis.

MR. OGILVIE: Okay. It is a much different analysis. But I want to apply what the Court said, the Court's concern to the specific findings that bind this

Court to a determination that the motion for judgment on the pleadings must be granted.

And I want to go back to paragraphs 35, 36, 37, and 38 of the Court's findings of fact and conclusions of law that were entered on November 21, 2018.

Paragraph 35, the Court's findings of fact state:

"A zoning designation does not give the developer a vested right to have its development applications approved."

Is the Court going to take the position that --

THE COURT: I never have positions. I mean, I don't.

MR. OGILVIE: Let me state it a different way.

THE COURT: I can't have a position. I never have a position.

I'll tell you what I'm thinking; right? And I want to make sure it's based upon the law and supported by facts. But I've never had a position.

MR. OGILVIE: Okay.

THE COURT: Zero position.

MR. OGILVIE: Let me state it differently.

I submit to the Court that just because there

is a different standard of proof between a PJR and an inverse condemnation claim, that the Court cannot then go back and state the contrary of that finding, that, in fact, a zoning designation does give the developer a vested right. The Court can't do that.

The Court, no matter whether it's an inverse condemnation claim or a petition for judicial review, the Court has made a finding that, in fact -- that is consistent with all of Nevada law.

THE COURT: Okay. I think I have a really good example for you. I really do.

You can take a worker's comp case; right? And lo and behold both the civil case and the tort case and the worker's comp case ends up in Department 16. I have a petition for judicial review. And the appeals officer in work comp said there's no causation. And then I review it, and I said there's substantial evidence in the record to support the finding of the appeals officer.

Then we have the tort case that's in my department. Are you telling me that the -- that because I indicated and stated on the record that there's substantial evidence in the record to support the findings of the work comp hearing officer, that that would have preclusive effect and that case could

never go to trial in front of a jury in Clark County?

MR. OGILVIE: Let me explain. Let me distinguish.

THE COURT: Isn't that it?

MR. OGILVIE: No. It's not. It's not even close.

THE COURT: Okay. I want to hear this.

MR. OGILVIE: If the Court -- if that's where the Court left it, that it stated that there -- they found that there were substantial -- there was substantial evidence to support the arbitration hearing's decision, that would be one thing.

THE COURT: The work comp.

MR. OGILVIE: The worker's -- yes. That would be one thing.

But if the Court went beyond that, just went beyond saying that it finds that there was substantial evidence and made specific findings that, in fact, this poor old woman was not injured on the job but, in fact, was injured in the car accident that she was involved in that day after work, that finding could not --

THE COURT: I would never make that finding.

MR. OGILVIE: Pardon me?

THE COURT: Because all I would do as the trial judge is just look and see. There might be

findings there that supports the determination by the appeals officer that there was no causation or there was no injury or whatever. But that doesn't have preclusive effect in a trial before a jury in the same department if that happened to happen fortuitously.

That's my question. And I mean, I think that's probably a better example than my first example.

MR. OGILVIE: Okay. Let me -- let me address that a little bit different. And -- and I don't know if the Court was hearing me.

If you -- if the Court went beyond a finding that there was substantial evidence before the hearing officer to support his decision, that would be one thing. I would agree with the Court, that that does not have preclusive effect. But if the Court in summary judgment granted partial summary judgment, making a finding that, in fact, the injuries didn't result from the -- some alleged on-the-job activity, but it resulted for something else, that, in fact, would have preclusive effect.

THE COURT: Yes, but that's a different standard; right? That's not a petition for judicial review. You're talking -- they're talking about a full-blown injury causation analysis. I'd have to do a Williams and Morsicato and all those wonderful things;

right? That's a different issue.

I'm just talking about a petition for judicial review. And see, I don't mind telling everybody this because I realize that this is not a -- this is a different case. I mean, I can't remember at any point in my career as a judge that I've had both a petition for judicial review, and the underlying lawsuit in my same department.

But as we've gone through this, and that's -- instinctively that's why I haven't made the final determination on the petition for rehearing. Because one of the things I do understand, and I feel very strongly about this -- and we got a great record. And I think that no matter what happens, the Supreme Court will know exactly what I was thinking about and considering. And that's a paramount significance for everybody.

And then -- and they will know what I was confronted with and what I was thinking about. They tell me I make pretty good records. I don't mind saying that. They do.

But it's important. It really is. And so as a trial judge, ultimately, this is what you want to be: You want to be fair. And you don't want to make a -- you got to be cautious in your decision-making. And I

realize what is on my plate right now.

So whatever decision -- I mean, I feel strongly about and stand by my earlier decision as it related solely to the petition for judicial review. However, I don't mind saying this: I don't think that in light of the different evidentiary requirements, that that has an impact just because I happen to have the same parties in front of me on a totally different litigation theory, i.e., a taking for inverse condemnation where there's a claim for damages.

That's what's going on. I just happened to get it. But -- and what I mean by that is it's in this department. But those are different issues. They are different issues. I don't mind saying that for anybody.

MR. OGILVIE: Taking that statement by the Court to -- and applying it to the Court's findings that I'm referring to in paragraphs 35 through 38 of the Court's findings of fact and conclusions of law, that would allow this Court to make a completely contrary determination that compatible zoning does not ipso facto divest in a municipal government of the right to deny certain uses based upon considerations of public interest. That would allow -- what the Court is saying would allow this Court in the inverse

condemnation claims to make a finding that compatible zoning does ipso facto divest a municipality of the right to deny certain applications.

THE COURT: Well --

MR. OGILVIE: And that is the difference between --

THE COURT: I'm going to tell you -- I'm going to tell you: I look at it so much differently.

Because number one, my thrust and focus is this on the issue regarding the petition for judicial review: Are the sole actions of the Las Vegas City Council as it relates to that one petition? That's it.

Now, and it's a much lower standard of proof. If this complaint was filed in another department in front of another trial judge, I can tell you this: They would not be concerned about the petition for judicial review.

Case in point. If this -- if Judge Sturman or Judge Bixler or Judge Smith -- or there's one more.

MR. OGILVIE: It's the unknown judge right now.

THE COURT: Yeah, if they had made -- they had granted -- they had denied the petition for judicial review and I was stuck with the inverse condemnation case in my department, it would proceed on the merits.

I couldn't care less what the other judges did as far as their findings are concerned.

And I think that's the difference. It just so happens to be here. And I understand that.

MR. OGILVIE: Judge, I got to tell you, I'm completely lost that you are saying that you think you can reverse the findings, the fact-finding --

THE COURT: I'm not reversing --

MR. OGILVIE: No.

THE COURT: No.

MR. OGILVIE: That's what you're saying --

THE COURT REPORTER: I need one at a time.

THE COURT: Wait.

Mr. Ogilvie, you know what you should say, if you're going to say that, say it right.

You say, Judge, you know what, you have a much different standard of review in a petition for judicial review. And you made a determination that there was substantial evidence in the record to support the findings of the Las Vegas City Council. Period.

And that's all I made.

Now, I have it right here. I can nunc pro tunc change everything. I don't mind saying that.

And what you're trying to do is you're saying, Look, Judge, we're going to use that -- that findings

by the -- that you made in this case vis-à-vis a very narrow focus as a sword. I don't think that -- I don't think I can do that. I don't mind telling everybody that. It's a different issue.

So I just happen to be here. Do I stand by denying the petition? I'm not going to change that. I can tell you that. But that's a different animal. Now, everyone might disagree with me. That's okay. But it's a different animal. It just is. I have a different charge.

Now we got a full-blown civil litigation case in front of me where there's no answer.

MR. OGILVIE: Your Honor, I apologize for becoming frustrated --

THE COURT: Yeah, that's okay.

MR. OGILVIE: -- and --

THE COURT: That won't -- that doesn't bother me at all.

MR. OGILVIE: I -- what I'm apparently not articulating well is the Court -- and, yes, the Court can issue an order nunc pro tunc and change some of its specific findings. Absolutely.

The Court, if it feels that somehow some of its findings were right -- were wrong, the Court has that authority. But unless the Court -- what I'm

stating is unless the Court reverses specific findings, and it's not just a finding that there was substantial evidence before the City council to deny the applications. There are specific findings. There's probably 60 paragraphs of specific findings -- factual findings that if, unless the Court issues an order nunc pro tunc like it did on paragraph 60 -- I think 63 through 66, those factual findings, no matter that the claims are different, those factual findings are binding on everybody in this courtroom.

That's what I'm stating. And the Court specifically found that --

THE COURT: But here's my question. I've never seen that. So you're telling me that the findings of the trial court regarding the worker's compensation appeal potentially denying coverage as it relates to -- or denying the claim as it relates to injury causation, great example, would be binding in a -- in this department or any department as it relates to a jury making a determination as to whether that individual suffered personal injury?

MR. OGILVIE: If this Court made a specific finding in that proceeding, yes.

THE COURT: Okay.

MR. OGILVIE: And I go back to, and I know the

Court distinguished it the first time I said it. But I go back to summary judgment. If this Court issued summary judgment -- partial summary judgment on some findings, the jury is bound by that. In fact, it becomes --

THE COURT: But isn't that different?

MR. OGILVIE: No. It's not different at all. The --

THE COURT: I've never seen a work comp appeal decision entered into trial. And I did tort law for a long time; probably filed a thousand lawsuits. A lot of clients had work comp claims. Some were denied. Didn't have preclusive effect on putting that case in front of a jury.

MR. OGILVIE: Not putting it in front of the jury, but some of the findings that the jury could consider are bound by partial summary judgment.

THE COURT: Okay. I understand. You made a good record.

MR. OGILVIE: And, again, the -- and I understand the Court's position.

THE COURT: I don't have a position.

MR. OGILVIE: I'm -- I apologize. I understand what the Court said in response the first time that I mentioned Judge Mahan.

THE COURT: Yes.

MR. OGILVIE: But I want to reiterate that in front of Judge Mahan, he stated that the plaintiffs were making a claim for procedural due process. And the defendants before him argued that the Court should dismiss the plaintiff's procedural due process claim because the plaintiff's alleged right to develop the Badlands property is not a constitutionally protected interest.

That is the exact same issue that is before the Court in this component of my argument right now, whether or not the plaintiff here has an constitutionally protected property interest, whether or not it had a vested right to redevelop the Badlands golf course.

The defendants in that action argued that the plaintiff did not have a constitutionally protected property interest to redevelop the Badlands property. And the Court stated the Court agrees. And then the Court proceeded to go through the same analysis like this Court went through in the petition for judicial relief and stated that a government benefit, such as a license or permit, may give rise to a protect -- protectable property interest where the recipient has a legitimate claim of entitlement to it. And that's

where I come -- came up with the word entitled.

A legitimate claim of entitlement, citing the Ninth Circuit case of Gerhart versus Lake County, Montana. Judge Mahan continued on to say:

"A legitimate claim of entitlement can exist where state law significantly limits the decision-maker's discretion or where the decision-maker's policies and practices create a de facto property interest."

The Court then cited various provisions of the Las Vegas Unified Development Code and NRS 278.349 in support of the claim that the state law significantly limited -- this was the developer stating that the state law significantly limited the City council's discretion.

And Judge Mahan found that while these law -- those laws impose procedural constraints on the City council in considering various land development applications, they did not amount to significant substantive restriction on the City council's decision-making.

And based on that determination, found that, in fact, the plaintiffs here on this very same issue did not have a legitimate claim of entitlement, which means that they did not have a constitutionally

protected property interest to redevelop the Badlands property.

Going back to this Court's findings of fact and conclusions of law. The Court stated in the minute order that it issued on October 11th, 2018, that stated -- and I quote:

"Further, the issue raised by the intervenor, which once again challenges whether any intent to develop part of the Badlands property without first applying for and addressing a major modification to the master plan, is identical to the issues litigated before Judge Crockett.

"Lastly, that issue was fully adjudicated. The Court hereby determines that the doctrine of issue preclusion applies to the instant matter. The doctrine of issue preclusion controls and it would be improper after a determination of substantial identity between 180 Land LLC, 70 Acres, LLC to permit the petitioner to circumvent the decision of Judge Crockett on issues that were fully adjudicated."

And I want to go back to what the issue was. Whether or not the developer could develop the

Badlands' properties without first applying for and addressing a major modification to the master plan. That was this Court's finding. That, in fact, Judge Crockett's ruling had preclusive effect and, in fact, the developer here must submit and obtain a major -- an application -- must submit a major -- an application for major modification, and obtain an approval of that application for a major modification to the master plan before the City can consider the land-use applications that it denied that found -- that formed the basis for these inverse condemnation claims.

So, yes, while the standard proof is different, while the relief sought is different, the underpinnings are very much the same. Whether or not the decision by Judge Crockett that the developer must obtain a major modification to the master plan before it can have its four applications approved.

There's no difference. Whether it's PJR or inverse condemnation, that is a factual finding that everyone in this courtroom is bound by.

And for that reason, because -- and let me state this. Because it goes to the issue of prejudice or harm. There is nothing that prevented the plaintiff here today to submit an application for a major modification today. There's nothing that prevented the

developer here from submitting a major modification -- an application for a major modification yesterday, or the 300-plus yesterdays prior to today. There's nothing.

The only reason that the developer has not submitted an application for a major modification is because that undermines the developer's litigation strategy. And I submit to the Court that that is not justification for finding that somehow there is prejudice or harm to the developer.

And, therefore, the Court should affirm its prior finding that Judge Crockett's determination has preclusive effect. And unless and until the developer in this case submits a -- an application for a major modification, and unless and until that application is granted, the inverse condemnation claims here are not ripe and must be dismissed for separate and independent reason.

Therefore, your Honor, because there cannot be a taking in the absence of a vested right, because the developer is barred by the actions of its predecessor, and because the preclusive effect of Judge Crockett's order, the Court must grant the motion for judgment on the pleadings and dismiss the inverse condemnation claims.

If the Court has any further questions, I'd be happy to answer them at this time.

THE COURT: Not at this time, sir. Thank you.

MR. OGILVIE: Thank you.

Oh, Ms. Leonard handed me a note that I made a misstatement.

THE COURT: All right.

MR. OGILVIE: The City actually did file an answer to the First Amended Complaint a year ago.

THE COURT: Okay.

MR. OGILVIE: And that's the reason that we're here on a 12(c) motion rather than a 12(b)(5) motion.

THE COURT: That makes perfect sense. Thank you, sir.

MR. LEAVITT: Your Honor, would you like me to proceed?

THE COURT: Sir.

Well, what's -- Peggy, how are you doing?

THE COURT REPORTER: Let's take a break.

MR. LEAVITT: Five minutes?

THE COURT: We'll take a few minutes. Peggy -- I always make sure my court reporter is well taken care of because we appreciate her. We really do.

MR. LEAVITT: Thank you, your Honor.

THE COURT: And when she's ready, we'll get

started. We'll take a few minutes.

MR. LEAVITT: Okay.

(At 2:46 PM, break taken.)

THE COURT: We can go back on the record.

All right. Sir.

MR. LEAVITT: Your Honor, may I proceed?

THE COURT: Yes, you may.

MR. LEAVITT: Your Honor, we've argued ad nauseam in this proceeding that the land-use law that the City used in the petition for judicial review proceeding should not be applied in this eminent domain case. And we heard exactly why that's the case.

What the City did is they stood up to you and they cited to your order, and they cited to some law, they cited to the Stratosphere case where the City has; discretion -- and here's where their discretion is, and they gloss over it. The City has discretion to deny a land-use application.

What the City does not have discretion to do is to take property and not pay for it. So if, in denying a land-use application, the City takes property, it has to pay for it. And discretion is not an immunity to that. And I'll give you some examples. The government argued exactly --

THE COURT: I understand.

MR. LEAVITT: You got that? Okay.
I'll give you one example, your Honor.
THE COURT: You can make your record, sir.
MR. LEAVITT: Okay. For 14 years we argued the air space taking cases.
(Clarification by the court reporter.
THE COURT: Like Sisolak?
MR. LEAVITT: Sisolak. And the other -- there's two published decisions. The Sisolak case and the Hsu case. And in both of those cases, the government made the exact same argument that the City's making here to you today, is that the landowner's property was vacant, they didn't have entitlements, and the government was entitled to deny the use -- or to deny the applications on their property and, therefore, when the government imposed a height restriction on that property, there was no taking. Or stated another way, the government had discretion to impose the height restriction on the property and therefore there couldn't be a taking. And the Nevada Supreme Court in Sisolak case Footnote 25, unequivocally stated that the government may have discretion to apply valid zoning laws that don't amount to a taking.
So if they apply those valid zoning laws, and in applying those valid zoning laws and applying their

discretion it amounts to a taking, then they have to pay just compensation. But that's a perfect example of why we can't use PJR or land-use law in this eminent domain case. And, your Honor, I was going to talk about that later in my presentation.

But it was so -- I mean, the present -- Mr. Ogilvie's entire presentation was that the City of Las Vegas has discretion and, therefore, they can take property without paying for it. That was his whole argument.

Well, anyway, your Honor, so let me go back to -- let me go back to the other argument that was made by the City is that they have the right to bring this judgment or this motion for judgment on the pleadings, and we don't have a right to bring our motion for summary judgment, and you can only look at the four squares of the pleadings in this case, and you have to make a decision based upon that.

First of all, we filed a complaint. And as you'll recall, Judge, in that original complaint, there was a petition for judicial review and there was an inverse condemnation claim.

THE COURT: Right.

MR. LEAVITT: In that very first one. And the City came to you, and it was the City who said, Judge,

they have to be entirely separate. And remember what the City's original request was. The City said, Mr. Leavitt, you need to go refile this in an entirely new department.

So they said these are two entirely separate cases. We don't have the same standard that applies to both of them.

THE COURT: They're not the same standard.

MR. LEAVITT: They're not. And they -- that was the City's argument, though, your Honor. Back in -- about a year ago when they filed their first motion to dismiss this case.

And so what I said is, I said, Judge, listen we don't want to have to start over. Can we just sever them?

And you came up with a great idea. And you will remember I said, Judge, that's a great idea. Rule 42. Let's just sever these two claims. They will be entirely separate cases, but we'll have them in the same courtroom. And that's exactly what we did. So we weren't required to go file a totally separate lawsuit.

So that -- so, your Honor, so we have two separate cases with two separate standards, and we filed our new complaint in eminent domain and the City filed an answer. And there's been more than 20 days

that have passed since that answer, which means we can bring our motion for summary judgment or our motion for a determination of liability on the taking.

So that's where we're at. And the City doesn't get to say, Hey, Judge, Mr. Leavitt and the landowners here, they're not entitled to bring a motion for summary judgment. They're not entitled to present the facts to you here today, that you just have to decide this issue based upon the four corners of the complaint and the answer.

That's not what the City's entitled to do. We're entitled to bring our claim before you. We're entitled to argue our claim before you, and we're entitled to have this case heard on the merits. And the Nevada Supreme Court has said that's the best way to do it, is to actually decide cases on the merits.

And so, your Honor, that's what I want to do right now, is I want to talk about our motion, our motion for judicial determination of a taking. I want to go through that motion, and as I go through that motion and I go through the taking facts, you're going to see why the City's motion to dismiss should be denied, and I'm going to address each of these issues at the end. I'm going to address the City's issue of a ripeness, the City's issue of statute of limitations,

and the City's issue that it has discretion to deny every application in the City of Las Vegas, and nobody essentially has property rights anymore in the City of Las Vegas. I'm going to address every single one of these issues.

Can we start that?

And, your Honor, is it okay if I move up here?

THE COURT: Sir, you can control the well.

MR. LEAVITT: Okay.

MR. OGILVIE: Pardon me.

THE COURT: You need to see that?

MR. OGILVIE: I do want to see it.

THE COURT: Are we -- are we set up where you can put that on there?

MR. LEAVITT: Um-hum.

THE COURT: You got it there, Mr. Ogilvie? I just want to make sure you can see it.

My regular marshal isn't here. He's really good at this stuff. Are you okay?

MR. OGILVIE: It's here now.

In addition to that, your Honor, again, I want to raise the City's objection to external peripheral factual contentions that are being --

THE COURT: I got it.

MR. OGILVIE: Thank you.

THE COURT: I do. You can have a standing objection on that, sir.

MR. OGILVIE: Thank you.

MR. LEAVITT: So, your Honor, as I stated, we're going -- we're going -- I want to address four issues with you. The first one is: Has the landowner's property been taken? All right. I'm going to lay out the facts, and I'm going to lay out the standards. Do we have a property interest? Are the landowner's inverse condemnation claims right? Or should they be time barred?

All right. Issue Number 1, that's the first one we're going to go through, is has the property been taken. Your Honor, this was the original question you had earlier in the week, because what's the procedure to determine a taking in these types of cases. And I'm not going to go through this. I mean, it looks like you've already gone through it. You've read the McCarran International Airport versus Sisolak case, and the State v --

THE COURT REPORTER: I need you to slow down --

MR. LEAVITT: Okay.

THE COURT REPORTER: -- just a little.

MR. LEAVITT: I'm sorry.

THE COURT: Well, I think -- and it's my recollection, I remember reading the Sisolak case, and there was a countermotion. I think that was done on a summary judgment basis.

MR. LEAVITT: Yes, it was.

THE COURT: Yeah.

MR. LEAVITT: But here's how the Court defined that summary judgment, is that the judge is required to look at the facts and then make a legal determination based upon those facts of whether those facts rise to the level of a taking.

And -- and here's the test right here, Judge, and it's not an easy test. I mean, there's a nearly infinite variety of ways in which a taking can happen. There's no magic formula. I mean, it's essentially an ad hoc inquiry where we look at the complex facts. That is why initially these cases don't lend themselves to a motion to dismiss. Because you have to look at the facts and make a determination of whether there's been a taking or not.

So here's how -- here's how I think is the best way to do this. And, Judge, we've done this in front of Judge Bare. We have one of these cases where we're in the district court here. And we argued this very exact issue for about 12 hours in front of one

judge here in the Eighth Judicial District Court.

And what we did there is we reviewed and consider the City's action. It was at about the same posture of this case, and then we compared those city actions to other cases where a Court found that there was a taking.

So if, in those other cases, we have similar facts and the Court found that there was a taking under those similar facts, then this Court should also find a taking.

THE COURT: Now, here's my question.

MR. LEAVITT: Sure.

THE COURT: And it's -- and this is my real concern.

MR. LEAVITT: Um-hum.

THE COURT: Because one of the things I don't want to do is jump the gun.

MR. LEAVITT: Right.

THE COURT: I just don't.

MR. LEAVITT: I agree.

THE COURT: Here we have a scenario where there's been -- it's my understanding, an amended complaint.

MR. LEAVITT: Correct.

THE COURT: And an answer filed; right?

MR. LEAVITT: Yes.

THE COURT: Is that the current posture of the case?

MR. LEAVITT: That's correct.

THE COURT: We have -- and they're raising that as an issue, meaning it's too premature and those types of things. But my question is this: Procedurally, before we dive into the next swimming pool potentially regarding inverse condemnation and the like, shouldn't the case be along a little bit further procedurally?

MR. LEAVITT: Your Honor, and that's --

THE COURT: Because I kind of asked that question, I think, right, for a moment or two at the last hearing.

MR. LEAVITT: I agree. It's a valid concern, Judge. Are we going to enter a summary judgment-type ruling at this point in time when we haven't engaged in discovery? It's a valid question.

And here's -- and this is why I pointed this out. You have two potential decisions. You can say, Yes, I think the facts at this time meet the elements of a taking. At this early stage of the proceedings.

Okay. In other words, if we've presented to you the facts which show that there's been a taking,

these facts are known and these facts are undisputed and they establish a taking, then you should enter a determination of liability for a taking, and the sole issue is just compensation.

If the answer is no, then you're right. If you say to me, Mr. Leavitt, you haven't convinced me today, you haven't shown me enough facts, then what would happen is this case would proceed through discovery. At the end of discovery, we would bring the same motion and then we would ask you to make a finding at that point in time of liability.

But the important point to note here is that the Nevada Supreme Court has made it very clear that this issue of whether a taking happened is based upon -- based upon two things. Number one, you look at the facts. And number two, you compare those facts to the law.

And we believe that at this point in time, we have the known facts. These facts aren't in dispute at this point in time -- or at this juncture of the litigation. These are facts that are based upon the City's actions. They have the City's -- they're the City's minutes. It's the City's transcript. These are documents from the City itself demonstrating what it did.

And at this point in time in the litigation, your Honor, the City had not disputed that these facts happened. And the reason they haven't disputed it is because they can't. Because it's based upon, again, the record before the City.

And as you stated before, your Honor, we have 11 City actions that I'm going to go through here. And I'm not going to spend a half hour on each one of them, but the first three I'm going to spend a little bit of time on. So if you see me spend a little bit of time on the first three, it doesn't mean I'm going to spend the same amount of time on the last eight and we are going to be here until midnight. So I am just going to talk about these first three in detail.

And, Judge, you hit it right on the head. You have to consider all of the City's actions in the aggregate. It's similar to the cumulative error rule on appeal. And, in fact, one of the cases that we cite, it's that -- one of the cases we cite says, Listen, they actually use the word. You have to look at the cumulative facts in order to determine whether a taking happens. So let's look at City Action No. 1.

Okay. And as I go through these, Judge, you're also going to see where the City's claimed that we don't have a property interest. The City's claimed

that our -- our inverse condemnation claims are not ripe. And in the City's statute of limitations claim you'll see where they're irrelevant and have been rejected.

So here's City's Action No. 1. They deny our 35-acre application. As you recall, we brought an application to develop this 35-acre right here on our map here as a stand-alone piece of property. We said to the City, We own this 35-acre property. It's a separate parcel. It has separate legal owners. We want to develop that property as a stand-alone piece.

We went to the City staff and we said, What do we need to do -- or what do we need to submit to you to do that?

And the City planning staff --

THE COURT: And I don't mind --

MR. LEAVITT: Okay.

THE COURT: This is -- I'm sitting here and I'm thinking and I'm listening.

MR. LEAVITT: Um-hum.

THE COURT: But I can't recall ever granting or denying a motion for summary judgment before there was a 16.1 early case conference; right? And so I'm sitting here, and I'm -- I don't mind telling you this: I'm a little concerned.

Not necessarily about -- because, I mean, I think Mr. Ogilvie has been a gentleman in this regard. He hasn't said whether they contest the facts or not, but I kind of think they might; right?

And the reason -- and he's nodding his head.

And I'm sitting here saying to myself, One of the -- I mean, after -- I mean, I can live with my decision, but I don't want to make a quote "obvious error."

MR. LEAVITT: I got it.

THE COURT: You see what I mean?

MR. LEAVITT: I got it.

THE COURT: I just don't want -- I don't want to make what potentially could be considered an issue. And so I'm just wondering: Is it more prudent for me as a trial judge to handle the case this way. I understand your client might be frustrated because this matter has been in litigation for a while.

MR. LEAVITT: Right.

THE COURT: I get that; right?

MR. LEAVITT: Um-hum.

THE COURT: But just as important, too, I would be more -- if I was a client I'd be more frustrated that the case went up on appeal and had to come back, and we had to redo certain things regarding

the case procedurally. Because that can save -- I mean, that could waste a lot of time versus, ultimately, if there is an appeal, it's on firm ground.

MR. LEAVITT: Right.

THE COURT: You see where I'm going with that? I mean, it's -- because I just sit back and I just think about where we're at in the proceedings; right?

MR. LEAVITT: Um-hum.

THE COURT: I mean, it's -- and I know you got a wonderful PowerPoint done.

MR. LEAVITT: Right.

THE COURT: There's a lot of factual issues. I see where the factual issues are potentially very -- I understand your position regarding the opposition to the motion to dismiss, and we can talk about that. But from a practical perspective, utilizing prudence and approaching the case in a way where we just want to make sure we get it right.

MR. LEAVITT: Um-hum.

THE COURT: Aren't I better off pushing that down the road a little bit after the 16.1 and so on? Because at that point potentially somewhere down the road, any and all appellate issues regarding the procedural posture of the case are off the table.

MR. LEAVITT: Your Honor, I understand the

issue. And I understand the concern.

THE COURT: I do have a lot of concern on that.

MR. LEAVITT: I got it.

THE COURT: I do. I don't mind saying that.

MR. LEAVITT: And I anticipated that issue, your Honor. As I went through all these facts and as I went -- as I prepared here, as I put this PowerPoint together, your Honor. Here's the concern that we have: Our client purchased this property in 2015.

THE COURT: I understand that.

MR. LEAVITT: Early. We're at 2019.

THE COURT: Yes.

MR. LEAVITT: And as Mr. Ogilvie stated, there hasn't been a shovel of dirt turned out there.

THE COURT: Right.

MR. LEAVITT: So they're going -- if we don't get this issue resolved pretty quickly, they're going to be delayed another year. They're going to be delayed another couple years. Your Honor, we want this issue presented to you. We want it decided.

Now, if, after looking at these facts, you say, Hey, Mr. Leavitt you haven't convinced me, I totally understand that.

THE COURT: But see, here's the thing. I

don't want to say you have or have not convinced me --

MR. LEAVITT: Right.

THE COURT: -- when I'm concerned. I mean, I want to sit back and really reflect, and if I'm going to pull the trigger, I want to pull the trigger with confidence.

MR. LEAVITT: I agree.

THE COURT: Or not; right?

But I want to make sure the case is in a position where all the i's are dotted and t's are crossed, that procedurally there's no issue. There's been a 16.1. There's been an exchange of documents.

MR. LEAVITT: Uh-huh.

THE COURT: Under 16.1 there's a mechanism to object to the document's authenticity. And there's a whole myriad of things that are available to all the parties; right? And so -- and understand this. This case is in business court; right?

MR. LEAVITT: No, your Honor.

THE COURT: Okay. Well, I won't be involved in the 16.1 then.

MR. OGILVIE: Unless the parties stipulate.

THE COURT: Unless the parties stipulate; right?

MR. OGILVIE: We would stipulate.

THE COURT: Yeah. But you see where I'm going? One of the beauties of business court is this: We can push it a little quicker, you know. I mean, we could have the 16.1, hypothetically, depending on where the case goes, within a reasonable period of time. Because, Mr. Leavitt, I'm really concerned about that. I really and truly am. And it has nothing to do with the merits or lack thereof of your client's position.

MR. LEAVITT: Um-hum.

THE COURT: Zero. But intuitively I don't mind saying this, that if I considered and potentially granted the relief you ask for today, I would be really concerned --

MR. LEAVITT: Okay.

THE COURT: -- about the potential outcome from an appellate perspective. I don't mind saying that.

And -- because whether I am right or wrong, I give it my best efforts, but I don't want to really deal with what potentially could be concerned obvious error.

MR. LEAVITT: I understand. Sounds to me -- your Honor, sounds to me like your Honor is going to deny the City's motion for judgment on the pleadings.

THE COURT: Well, we haven't talked about that

yet.

MR. LEAVITT: Well, I know. But my concern is -- on that issue is a lot of these facts --

THE COURT: And they said -- they said they'd stipulate to business court. We can set a 16.1 out in two or three weeks, get that done. I mean, we do those in court; right? We can sit and talk about it a little bit. We can issue a scheduling order, and get things -- we can set a trial date.

And to be candid with you, I don't know what type of discovery would be necessary in this case. Maybe some would. I don't know if it would come down to issues regarding requests for admissions. But, see, here's -- this is what I think often is overlooked. I don't mind telling you this. When it comes to Rule 56 motions, I have to -- whatever decision I make has to be based upon admissible evidence; right?

I don't think I have that yet. Not unless -- and I don't think the City is going to stipulate to that this is all admissible evidence. I don't think so.

MR. LEAVITT: Your Honor --

THE COURT: You see what I'm saying? Because I -- you could be 100 percent right and Mr. Ogilvie could be wrong; Mr. Ogilvie could be right and you

could be wrong. I mean, I don't mind making tough calls. I really don't. But I don't want to make tough calls when I know there's a great probability that it's going to come back to me.

MR. LEAVITT: So, your Honor --

THE COURT: And we could waste a year.

MR. LEAVITT: I got it. And here's our concern on this, is we feel like the City has delayed and delayed and delayed this matter. And we think that they have a purpose behind it. The obvious purpose behind this is to try to run our client out of money, so that's our big concern here.

THE COURT: I understand.

MR. LEAVITT: And we have documentation here that we've submitted on the record. It's 17 volumes. And the City had an opportunity to object to that in its opposition. The way we've done these before is very similar to this.

THE COURT: But hasn't it always been after the answer, 16.1 and those --

MR. LEAVITT: No. No, your Honor. It's not always like that. And the reason that -- for that, is, again, your Honor, is because --

THE COURT: So the Court granted summary judgment?

MR. LEAVITT: Absolutely. And here's why, is because by the time we bring the complaint --

THE COURT: Is there an exception that I'm missing or something?

MR. LEAVITT: No. At the time we bring the complaint, your Honor, we know the City's actions. That's why. There's nothing else to figure out.

All of these inverse condemnation cases are based upon the government's known acts. We know that because it's based upon the documents they've submitted. It's based upon the action they've taken -- they've taken against the landowner. Unless the City is going to argue it did not deny the 35-acre application. Unless the City is going to deny that it did not -- or the City is going to claim that it did not deny the master development agreement, or that the City did not adopt these bills that are part of this whole -- this whole action or this aggregate of action that the City has taken against the landowner. That's why we --

THE COURT: See, what I don't want to do, I don't want to say yes or no after listening to all this --

MR. LEAVITT: Okay.

THE COURT: -- because I'm concerned about the

procedural posture of the case, and then come back and then do it again. I mean, I don't think that's wise.

MR. LEAVITT: I understand, your Honor. So what -- so what would you propose? I mean, and I'm not trying to put this on you. Are you saying that we go through a 16.1, we look at the documents, we exchange those documents with the City of Las Vegas, and after that we renew our motion for summary judgment at that time?

THE COURT: Well -- and I can't -- here's the thing. I can't tell you when is the appropriate time to do it. Typically lawyers know that. I mean, really; right?

MR. LEAVITT: I feel like today was, your Honor.

THE COURT: But, I mean, I -- but when I look back, and sometimes -- I did some med mal defense work and I did plaintiff's work. And I would know when the appropriate time, for example, in a medical malpractice case to file a motion for summary judgment as it relates to liability or damage limitations or something, right, in a premises liability, auto, products case, you kind of know. Sometimes you don't -- you can't file one because there's issues of material fact, and I get that.

But that's kind of up to you when you do it.

MR. LEAVITT: Right.

THE COURT: But all I can say is this: Based upon Mr. Ogilvie's representations that if, hypothetically, I deny the motion to dismiss, we could get you in relatively quick if you stipulated to business court and get things done procedurally. And -- and because it's -- I have never dealt with an issue like this at this stage without a 16.1 where I'm granting affirmative relief for a plaintiff; right?

MR. LEAVITT: Your Honor, can I have just one moment?

THE COURT: Oh, you can --

MR. LEAVITT: Because I got a long presentation.

THE COURT: I understand.

MR. LEAVITT: There's 11 facts.

THE COURT: I'm going to give you -- I'm going to give you more than a moment. Whatever time you need. You want to talk.

MR. LEAVITT: So here's what I was going to do, your Honor. I was going to go through the 11 facts showing the taking, and then I was going to rebut each of the government's actions here. If you feel more comfortable with us going through the 16.1 and then

renewing that motion for summary judgment at that time, then I'm not going to go through these 11 facts, but I am going to rebut each one of the government's arguments for the motion on the pleadings.

THE COURT: Absolutely.

MR. LEAVITT: Okay.

THE COURT: But you see where I'm going on this?

MR. LEAVITT: I got it.

THE COURT: Because I am concerned. And I don't want a decision to come down. I mean, whatever decision I make is based upon the law. I have no problem with the Supreme Court doing that. But I don't want a decision that could stand for the proposition, What is Judge Williams doing down there?

MR. LEAVITT: Understood, your Honor.

THE COURT: Right? I don't -- that's the one I don't want.

MR. LEAVITT: Okay. Well, your Honor, we're -- this is what -- could we have a moment, your Honor?

THE COURT: I'm going to let you talk.

MR. LEAVITT: Okay.

THE COURT: You know, I'm -- I'll step down. Let me know when you're ready.

MR. LEAVITT: All right.

(At 3:30 p.m., break taken.)

THE COURT: All right. We can continue on.

MR. LEAVITT: Thank you, your Honor.

Your Honor, we think it would be great idea to have this case heard in a business court-type setting where you govern or you preside over the 16.1. What we'd like to do -- what I'd like to do, your Honor, is I'd like to discuss two of the City's first actions. Okay. And they're relevant to the opposition to the City's motion for judgment on the pleadings.

THE COURT: Okay.

MR. LEAVITT: Okay. And then I won't go through the other eight. Okay?

THE COURT: That's fine. Whatever you think I is germane --

MR. LEAVITT: Okay.

THE COURT: -- in opposition to the 12(c) motion --

MR. LEAVITT: Okay. That's what I'm going to do.

THE COURT: -- is fine. You do what you have to do.

MR. LEAVITT: Okay.

THE COURT: But, I mean, for the record,

Mr. Ogilvie objected to us even considering the motion, I guess, for summary judgment. And to be candid with you, I think he's right. And we have to make sure the case is in the proper procedural posture. And let's go through the process. And then whenever the time is ripe and you feel very comfortable, you do what you have to do.

MR. LEAVITT: Okay. And, your Honor, we'd like to have that 16.1 next week. We think that it's a proper time frame. We have all of the City's documentation. All the City has to do is confirm that these are City documents. Most of them are transcripts. They are agenda items. They just confirm the City's actions, for example, of denying the master plan development or denying the individual application to develop the 35-acre property. So we'd like to do that next week if possible, your Honor.

THE COURT: Well, all I can say is this. First, let's hear argument --

MR. LEAVITT: Okay.

THE COURT: -- on the 12(c) motion. And then once we do that, and if necessary, we can talk about that.

MR. LEAVITT: Okay.

THE COURT: And that's kind of -- because I

don't want to be -- I don't want to move too quickly and put the cart before the horse at this point.

MR. LEAVITT: Let me shorten this up significantly, your Honor. What I'm going to do is I am going to address these two first City actions, and then I'm going to address each of the individual issues that the City has raised to dismiss the landowners complaint in this case.

And the reason I want to talk about, again, these two first City actions is because they're inextricably intertwined with the defense that we have to the City's motion.

So City Action No. 1, your Honor, was the denial of the 35-acre application.

Just very quickly, our landowner went to the City of Las Vegas and said they wanted to develop this individual property, the 35-acre property. And the City planning staff told our client everything that he needed to do, told the landowner everything he needed to do to meet the City code requirements. And at the end of the day, our -- the landowner prepared its own application, submitted that application to the City of Las Vegas, and the City planning staff stated that it's consistent with all the zoning requirements, it's consistent with the code, and it's consistent with the

Nevada Revised Statutes. The City of Las Vegas denied that application.

Now, for purposes of our eminent domain case, the City said the sole basis at the hearing for denying that application was it wanted to see -- and this is important right here on this map -- is the City wanted to see the whole 250 acres developed as one unit. The City said, We do not want piecemeal development on this property.

Our client vehemently objected to that and said, I have separate parcels with separate legal owners. I'm entitled to develop these parcels separately.

And the City of Las Vegas said, No, we're not going to let you do that. You have to submit a master development agreement for the entire property, and said we're very, very close to getting that done.

Your Honor, I would submit to you that that one act right there of denying this application which met all of the code requirements establishes a taking under the Del Monte Dunes case. And I wasn't going to spend a lot of time on that, but I'm going to move forward because this is relevant, again, to the opposition to the City's motion here.

City Action No. 2 was the denial of the master

development agreement. So remember, your Honor, on the 35-acre individual application, the City of Las Vegas stated to our client, The sole basis for which we're denying your application is you need to do a master development agreement. So our client went and did that.

Our client worked with the City for approximately two years on that master development agreement. The City required our client to make more concessions than any landowner ever to appear in front of the City council. They sent our client -- or they sent the landowner back to the drawing board approximately 16 times, your Honor, to redo that master development agreement.

And in the end, and I think this is an important point, Judge, this master development agreement right here that the City required our client to go through was written by the City of Las Vegas.

So the City of Las Vegas said, You're not going to be able to develop this individual parcel. You have to develop it as one cohesive unit, and here's the agreement that we drafted for you to do that.

And the City -- the City planning staff said, This meets every single requirement that we can possibly think of. We brought this to the City

council, the City's own development agreement, on how the property should be developed. And the City struck it.

So you think about that for a minute, your Honor. The City struck its own development agreement that the City drafted for the development of our 250-acre property.

The City didn't indicate a compromise. And here's the part that's in opposition to what Mr. Ogilvie just stated to you today: That master development agreement included a major modification.

So the City of Las Vegas has told you unequivocally that this claim is not ripe because we did not submit a major modification to the City of Las Vegas to develop our property. And that's one of the reasons that the City is alleging that our claim should be dismissed right now.

I want to show you this quote right here, your Honor, because this is important to what the City stated. This is a quote by Brad Jerbic at the City of Las Vegas. He said:

"Let me make something for the record, just to make sure we're absolutely accurate on this."

This is Brad Jerbic now.

THE COURT: Yeah.

MR. LEAVITT: This isn't me and this isn't private counsel over her. He said:

"I want to make sure everybody is absolutely accurate. There was a request for a major modification that accompanied the master development agreement."

That was voted down by the council. So that modification, that major mod, was also voted down.

THE COURT: Because I think that's in the points and authorities; right?

MR. LEAVITT: That's in the points and authorities, your Honor.

THE COURT: Yes. I remember reading that.

MR. LEAVITT: Okay. So here's the point. And this is why this is such a critical -- a critical part of my argument right here. If Mr. Ogilvie stood up here and said that our client -- that the landowner here did not file a major modification and therefore his claims are not ripe and therefore his claim should be dismissed.

And we know now, your Honor, that the landowner did, indeed, file a major modification to develop the 35-acre property and the City struck it.

Struck -- and, your Honor, we've also laid out

in our pleadings there where that master development agreement included every single procedure and standard that was in a major modification.

In addition to submitting a major modification as part of the master development agreement, we also submitted what's called a general plan amendment. And we just submitted the procedures and standards for general plan amendment just last night to you, your Honor, as Exhibit No. 109. And that general plan amendment far exceeds any of the requirements for a major modification.

And, your Honor, if you have any questions about that general plan amendment, I can -- I can address each one of those if you'd like.

So the comparative case here, your Honor, is, again, the City of Monterey versus Del Monte Dunes case. The City of Monterey versus Del Monte -- in that case what happened is the landowner went to the City of Monterey, and on five different occasions the City of Monterey sent him back to the drawing board to redo his development application. And finally he sued the City of Monterey and said, Listen, you've denied me five of my applications. You won't let me develop my property. I am bringing a lawsuit in inverse condemnation.

That's the same type of action that the City

of Las Vegas has engaged in in this case, to deny our client the use of their property.

And, your Honor, do you have any questions about the denial of the master development agreement?

THE COURT: Because once again, that was in the pleadings; right?

MR. LEAVITT: That's in the pleadings, your Honor.

THE COURT: Yes.

MR. LEAVITT: But these are the important parts for the judgment on the pleadings right here that the government is trying to get you to grant is, number one, we did a major modification as part of our application; and, number two, we also did a general plan amendment which far exceeds the requirements of a major modification.

So this argument that the City is making to you today that we didn't do a major modification is not true. We filed that major modification with our master development agreement.

All right, your Honor. So now I want to -- if I can just take a minute, I got to fast forward through a lot of this, and I'm going to get to the City's issues now.

All right. Let's see here. Okay.

All right. Issue No. 2. So this, your Honor, now goes directly to the City's argument of whether we have a vested property right or not. The City argued most of the time in part of its pleadings here that our -- that our landowner here when he purchased the property purchased it as a golf course, and he had no vested right to use that property for anything other than a golf course. And so here's their -- and their argument is since they have discretion to deny our land-use applications that we're stuck with a golf course use, and, therefore, we have no right to use the property for anything else.

And, your Honor, reason number one right here is why we have a vested property right. Here's the underlying number reason -- number one reason. Is the McCarran International Airport versus Sisolak case. In that case the landowner had vacant land without entitlements. The county argued the same exact argument that the City is making to you here today, is that the landowner didn't have the vested right to use his air space because the property had no entitlements and the County has discretion to deny that land-use application.

The Nevada Supreme Court flatly rejected that argument and held that every single landowner in the

state of Nevada has a property right. Sufficient -- as long as they own the property, they have a property right sufficient to bring a taking claim. That same exact argument was made in the State versus Swartz case as I told you before, your Honor. And the Nevada Supreme Court again rejected it in that case.

Your Honor, here's reason number two that we have a vested right to bring our claim here is the Judge Smith orders. Your Honor, we've talked about back and forth about the Judge Smith orders, but we think they're absolutely critical to this case.

THE COURT: And explain to me why --

MR. LEAVITT: Okay.

THE COURT: -- they would be critical to this case.

MR. LEAVITT: Absolutely, your Honor.

Number one, the City --

THE COURT: Because wasn't that -- I forget, you know, it's been a few days, but didn't that specifically deal with CC&Rs --

MR. LEAVITT: Well, it --

THE COURT: -- as it related to the property? And I'm trying to figure out how that's germane to this case.

MR. LEAVITT: Well, it was a dispute. And I'm

going to go through that. It was a dispute between one of the landowners who lived out in this area and our client.

THE COURT: Right.

MR. LEAVITT: You're right. It was a dispute between them two. But here's the important facts, is number one, the City was a party. So the City had an opportunity to be heard.

It was extensively briefed to the Court. And the sole issue that was presented to Judge Smith was, do the landowners have the vested right to develop the 250-acre property as a residential use? That was the sole and pointed issue.

The issue that the City of Las Vegas just argued to you here today that the landowners don't have the vested right to develop this property, that pointed issue was presented to Judge Smith. And here's what he held. He said:

> "Notwithstanding any alleged open-space land-use designation on the property, the zoning on the land is supported by the evidence is RPD7."

So Judge Smith said, Listen, I don't care if you have open space designation on the property, even if you have it, we have an RPD7 hard residential zoned

property.

THE COURT: But, I mean, that's not at issue, the zoning for the property in front of me; right? That's not an issue.

MR. LEAVITT: Understood. But the question is does the landowner have the vested right to use his property.

THE COURT: That's a different issue.

MR. LEAVITT: Absolutely. And so what Judge Smith said is, he said, Yes. And the reason they have the vested right to use their property is because it's hard zoned residential. Here's his second -- this one is a critical holding here, Judge. He says:

"The zoning" --

THE COURT: It was hard zoned RPD7 --

MR. LEAVITT: Right.

THE COURT: -- since 2001.

MR. LEAVITT: Your Honor, since 1990.

THE COURT: Oh, 1986 I think was the first.

MR. LEAVITT: 1986, absolutely.

And Judge Smith recognized that.

And here's another critical finding that he said:

"The zoning on the land dictates its use and defendant's right to develop their land."

Your Honor, that's an important finding by Judge Smith when we're talking about other judges and other rulings that they've made. He said this property right here is hard zoned RPD7, and that hard zoning dictates how the property will be developed and how it can be used.

He then said:

"Keeping the golf course for potential future development as a residential use was an intentional part of Mr. Peccole's plan."

We heard from counsel over here that the golf course was the end-all/be-all of this property, that the landowner could only use it for a golf course. That's not what Judge Smith held. He addressed that pointed issue again. Do the landowners have the vested right to use their property for residential use, and he say, yes, unequivocally.

And then he even said they have the right to close the golf course and not water it.

Your Honor, there's not a separate zoning in the Judge Smith case and a separate zoning in this case. There's not a separate open space in the Judge Smith case and an open space designation -- a different open space designation in this case. He said that that zoning grants our client, our landowner, the

right to develop his land.

In other words, that hard RPD7 zoning gives our client, the landowner, the vested right to use that property.

And now what the government is going to stay, they're going to stand up and they're going to say that's just a dispute between two private people. I already know it. The Nevada Supreme Court and Judge Smith both --

THE COURT: It sounds like that in a way.

MR. LEAVITT: It is. And you know what? It is, Judge. But the Nevada Supreme Court and Judge Smith said they looked at the public maps and the record. What public maps would they have looked at, your Honor, to make this determination that this property is hard zoned RPD7 which gives the landowner the right to develop this property? The City maps.

So, your Honor, that's reason number two that the landowners have the vested right to use their property for residential use.

Okay. Reason number three we have the right -- that our landowners has the vested right sufficient to bring a taking in this case is the City's past, current, and future designation on our -- on the landowner's property here is residential.

As you just stated, your Honor, and I'm going to go through these quickly, in 1986 the property was zoned residential. It was zoned again residential in 1990. In 1996 the City provided a zoning confirmation letter. In 2001, like you said, your Honor, the City passed an ordinance specifically designating again the hard residential zoning on the landowner's property. In 2014 the landowner went to the City and said, What is the use of this property? What is the zoning? And the City again confirmed in a zoning confirmation letter that the landowners have the right to use the property for a residential use.

In 2016 Tom Perrigo, the head of planning, confirmed that. And in 2018 Brad Jerbic again confirmed it.

Now, your Honor, this is why I say -- if you look here at my PowerPoint, I say, Listen, the past, current, and future designation of this property is for residential use. Here's why.

It's because this map right here is from the City's 2020 master plan. And what does it designate our client's property as? It's a zoning identification, and it designates the landowner's property in this case as a residential use.

And, your Honor, you saw that. I think you

saw this in the PJR hearing. Since the landowner's property has been designated as a hard zoned residential property from 1986 to the future in 2020, the hierarchy in the City of Las Vegas in applying the different kinds of plans and zoning says that that zoning trumps everything else. The zoning is at the pinnacle.

So, your Honor, that's the third reason that our -- that the landowner in this case has the vested right to use this property for a residential use is the City of Las Vegas confirmed repeatedly that the hard zoning on the property is RPD7.

Now, your Honor, reason number four that the landowners have a vested right to use the property is that the Peccole plan itself designates this specific 35-acre property as residential. So, your Honor, you heard the City of Las Vegas state repeatedly that this 35-acre property here was an open space or golf course property in the Peccole plan, and that's their number one argument in this case. I'm going to show you right now, your Honor, that this property is not an open space or golf course property, even on Mr. Peccole's plan.

Your Honor, you can see right here where the 35-acre property is located. It's right above the golf

course designation, your Honor. And that golf course designation, if you look right here, your Honor, with the yellow right here is where the -- where Mr. Peccole identified the golf course on the landowner's property.

And, your Honor, right here, this section right here, is the 35-acre property.

This is Mr. Peccole's own plan right here. So the Peccole plan that the City of Las Vegas has asked you to follow here puts our 35-acre property in the residential zone. So from the very beginning of Mr. Peccole's concept plan, your Honor, he identified our property here on the maps as a residential use.

And, your Honor, if you have any questions about this Peccole plan and the residential use, I can answer that right now.

THE COURT: Now, what -- I have a question. One issue was raised --

MR. LEAVITT: Um-hum.

THE COURT: -- from the moving papers and it hasn't been addressed yet was regarding the statute of limitations.

MR. LEAVITT: I'll get to that, your Honor.

THE COURT: Okay.

MR. LEAVITT: But as you see right here, even if we accept the argument that the Peccole plan applies

here -- now we've said it doesn't. But even if you accept the Peccole plan -- the argument that the Peccole plan applies, the Peccole plan -- this is an important point -- designates the landowner's property, the -- the specific 35-acre property in this case as a residential use. Therefore, there's no reason to even file a major modification in this case. The City has argued that this major modification has to be applied. The landowner didn't seek in this 35-acre property case to modify the Peccole plan.

All right, your Honor. This is the last reason, and I'm going to get to that -- to your other question. The last reason that the landowners have a vested right, in other words to use their property as a residential use, is even the Clark County Tax Assessor did an analysis of this property and made the determination that the property is a residential property. And, therefore, is taxing the landowner owner on an $88 million basis.

All right. So here's the conclusion, your Honor, on the vested property rights issue. The Nevada Supreme Court has generally held that we have the vested right. The Nevada Supreme Court has specifically held that we have the vested right to develop our property. The City agreed to the

residential hard zoning on the 35-acre property. And the Peccole concept plan itself identifies a residential land use on this specific 35-acre property.

That means, your Honor, we have an exhaustive list here where we're talking about the right to develop the property or this vested right. We have the Supreme Court weighing in on the issue. We have the City of Las Vegas identifying the zoning as a residential use. And we have the Peccole concept plan itself identifying the landowner's property as a residential use.

There's no other document or opinion from the City of Las Vegas or anybody else, even the Clark County Tax Assessor, that this property is anything other than a residential property.

Your Honor, you asked the questions about this statute of limitations, and I'm going to go to that right now. All right? This is whether the claims are time barred.

All right. This is issue number four, and I'm going to jump ahead to it. Here's the City's argument. They say that in 1990, the City identified on its master plan a PROS designation on our client -- on the landowner's property that somebody wrote PROS over the 250 acres.

THE COURT: PROS, that means?

MR. LEAVITT: Parks, recreation, open space.

THE COURT: Yes.

MR. LEAVITT: Now, keep in mind, this is just a planning document. And somebody at the City of Las Vegas wrote that PROS on the 250-acre property. And the City's attorney now asserts that that is a taking of the property and started the statute of limitations.

Your Honor, I've been on the other side of that argument, and I've actually made that argument. But guess what, Judge. I lost. The City of Las Vegas has absolutely and unequivocally argued in the past that the designation of a property on a master plan is not a taking. The City of Las Vegas stated that numerous times in the past, and the reason that the City said that, your Honor, is because there's an -- if the City was responsible for every single time that it designated a property on a master plan, it would be exposed to billions of dollars in damages.

In addition to do that, that very argument that the city made about the statute of limitations starting in 1990 was rejected by the Nevada Supreme Court in both the Sproul Homes and the Ad America case. In both of these cases, your Honor, the Nevada Supreme

Court stated unequivocally that coming over to a map and writing PROS on it is not a taking of property. And if it's not a taking of property, it cannot commence the statute of limitations.

So this very argument that the City of Las Vegas is making to you in regards to the statute of limitations has been presented to the Nevada Supreme Court twice; not once, your Honor, but twice and rejected twice by the Nevada Supreme Court.

Here's what the statute of limitations is. It's, number one, 15 years. It's the White Pine Lumber case.

And, number two, the statute of limitations doesn't start until the City tries to enforce the PROS that it places on its master plan.

So here's what -- here's the way it works, Judge, is the City planners can get together, and they can put together a master plan, and they can designate certain property uses on that master plan, and they're not responsible for a taking. But once the City tries to enforce that master plan against the landowner, then the taking starts and then, and only then, are they responsible for a taking.

So when did that happen in this case? That did not happen until about 2014, 2015, or thereafter

when the City of Las Vegas began denying the use of our -- of our landowner's property in this case based upon this open space and -- and golf course or PROS designation. So, therefore, your Honor, this statute of limitations argument has no place in this case and it's been rejected.

Now, once we did that in our opposition, Judge, we laid this all out, in the reply the City came with a second statute of limitations argument.

And the second statute of limitations argument is this: The landowners use their property for a golf course, and, therefore, they effectuated what I'm assuming the City refers to a self-taking of their own property. That's never been the law. There's no case on that.

In other words, Judge, if people in the state of Nevada have only used their property for a vacant use for the past 15 years, then that property is stuck at a vacant use.

That's the government's second argument on this statute of limitations. Once you start using your property for vacant use, you're stuck at that use. And if it's been vacant for 15 years, the City of Las Vegas can take your property without paying for it. That has never been the law, Judge, and it never will be the

law.

Your Honor, do you have a question about that statute of limitations issue?

THE COURT: No.

MR. LEAVITT: Okay. If there's any question there, Judge, I want to address it, because it, again, has been presented to the Nevada Supreme Court and rejected.

Now, I want to talk specifically about the Crockett order. And, your Honor, this is the interchange that you had with Mr. Ogilvie. And I want to show you specifically in this case why the Crockett order cannot apply in this inverse condemnation case.

The Crockett order says that this 17-acre property right here is within the open space designation on Mr. Peccole's plan. It's within the golf course designated area. And, therefore, the landowner needed to do a major modification to modify Mr. Peccole's plan from a golf course to residential use if he wanted to use that property for a residential use.

Okay. In other words, the 17-acre property was going to be used for something contrary to Mr. Peccole's plan and therefore the landowner had to file a major modification. That argument does not

apply here in this case.

And the reason the Crockett order argument doesn't apply here in this case is because this 35-acre property right here, your Honor, was never in an open space or golf course designation on Mr. Peccole's plan.

This 35-acre property right here has always been designated for a residential use, even on Mr. Peccole's plan. Therefore, if the landowner wanted to develop that 35-acre property for a residential use, it would be consistent with Mr. Peccole's plan. And if it's consistent with Mr. Peccole's plan, then there's no reason to file a major modification.

And, your Honor, so in conclusion, that's why it's entirely improper to argue the 17-acre Crockett order in this 35-acre case. It absolutely does not apply.

I'll just point out one more time. The 17-acre property was in an open space or golf course designation on Mr. Peccole's plan. The 35-acre property case was not in an open space or golf course designation on Mr. Peccole's plan, meaning there's nothing to modify.

All right. And, your Honor, I just have a couple additional reasons here. I mean, the 17-acre Crockett order is contrary to the Judge Smith orders.

Obviously, we believe that the Judge Smith order should apply over the Crockett order in this inverse condemnation case.

And the Crockett order doesn't include all of the facts of this case. Like you noted, your Honor, the Crockett order was decided at a time before all of these facts developed.

And here -- and, your Honor, I don't know. Did you see this in our last filing right here where we compared the petition for judicial review and the eminent domain law? You can't see it. It's too small.

But we did a comparison and this shows --

THE COURT: I think I remember seeing this somewhere.

MR. LEAVITT: Okay. We did a comparison to show --

THE COURT: I understand there's a distinct difference.

MR. LEAVITT: It's a distinct difference, your Honor.

THE COURT: I think I made that clear in open court.

MR. LEAVITT: And I understand -- okay, your honor, then I'm not going to go through.

THE COURT: If you want to make a record --

MR. LEAVITT: Well, your Honor, it's all in our pleadings so we've made the record, but I just want to make sure that there's that -- so that I can point out that additional reason for why the Crockett order doesn't apply, it was in a petition for judicial review where land-use law was applicable. It wasn't in an eminent domain case where constitutionally based eminent domain law applies.

And, your Honor, you discussed the Sturman order, the Bixler order in your prior orders. If we're going to apply any type of issue preclusion here, it certainly shouldn't be for the Crockett orders. If it's going -- if we're going to have issue preclusion, it should be for the Sturman, Bixler, and your prior order because all of those orders were entered in inverse condemnation cases, not petition for judicial review cases like the -- like the Crockett order.

So, your Honor, here's our request, and then I'm done. All right.

Our request is to grant our motion to amend or supplement the inverse condemnation complaint. We did a countermotion where what we did, your Honor, is we took our allegations that we put in our motion for summary judgment and we put them into a complaint. And we laid out all of our facts, all of the facts that

support our taking claim, all of the facts that rebut the government's arguments here for why our claim should be dismissed, and we put those within the four corners of our complaint.

Now, Judge, do we think that was necessary? Absolutely not. But I'm afraid that if we don't do that, next week we're going to get a motion to strike answer, which is just disguised as a fourth or fifth attempt to dismiss the claims in this case. So we respectfully request that you grant our motion to amend and supplement the pleadings and allow that pleading to be filed in this case.

And, secondly, that you deny the City's motion to dismiss. There -- your Honor, if there's -- I've laid this out in our pleadings in detail. We believe that not only should the City's motion to dismiss be denied, but we think the summary judgment is appropriate for liability in this case, and we've laid those facts out there.

And then, of course, our last request is to grant our motion for judicial determination of the taking.

Your Honor, do you have any questions for me on any of these issues, on the statute of limitations, on the ripeness issue, on whether we have a vested

property right or not?

THE COURT: The only comment is I'm not going to grant the motion for judicial determination of a taking.

MR. LEAVITT: We understand that. We're going to go through 16.1.

THE COURT: I'm not going to grant that.

MR. LEAVITT: Okay.

THE COURT: I mean, I'll deal with the other issues at the very end, but I just feel that procedurally it would be a very difficult issue to resolve at this time without formally conducting a 16.1, conducting a little discovery or whatever is necessary. And that's up to you, you fine ladies and gentlemen, to decide.

But I'm concerned about that one.

MR. LEAVITT: No, your Honor, and I totally understand.

Let me point out one final thing, your Honor, if I can get back through this PowerPoint. I just want to point out one last thing because we're talking about whether the City's motion to dismiss should be denied -- or should be granted or not.

THE COURT: Yes.

MR. LEAVITT: Okay. As I stated at the

beginning, these cases don't lend themselves to a dismissal. And here's why. The Nevada Supreme Court and the United States Supreme Court have held unequivocally that when you determine whether a taking has occurred or not, you actually have to look at the facts. You actually have to consider the complex fact -- you have to do a complex factual assessment. But there's no -- you -- there's no set formula. There's no magic formula. There's an infinite variety of ways in which a taking can occur.

And so the Nevada Supreme Court and the United States Supreme Court has sent a message unequivocally to all the trial court judges, the federal district court judges, the state district court judges that you don't dismiss these cases. You got to let them be heard on the merits.

And we've sufficiently pled all of our claims, your Honor. We sufficiently pled five different inverse condemnation claims. We've laid out in our pleadings how each and every one of those five different inverse condemnation claims is supported -- well supported in Nevada and United States Supreme Courts law. There's absolutely no basis or reason to dismiss them at this time.

That is what I have, your Honor. Do you have

any other questions for me?

THE COURT: None at this time, sir.

MR. LEAVITT: All right. Thank you.

THE COURT: Mr. Ogilvie, sir. Thank you for your patience.

MR. OGILVIE: Thank you, your Honor.

MS. LEONARD: Jim, can you turn off your PowerPoint?

MR. LEAVITT: Oh, yeah.

MR. OGILVIE: The reason I started off the way I did, objecting to factual contentions, was because of what I heard. And even -- even with the contention that -- or representation that this is going to just address the City's motion for judgment on the pleadings, still it was chock-full of facts. And one of the reasons that -- one of the many reasons that the summary judgment is inappropriate, and I won't belabor the point --

THE COURT: You don't --

MR. OGILVIE: I understand where you are going, your Honor. I'm not going to --

THE COURT: I am not going to invite instant review.

MR. OGILVIE: I understand. I just want to state for the record --

THE COURT: Yes.

MR. OGILVIE: -- of all the facts that -- the purported facts that I heard in that presentation, the City disclaims the validity of almost every one of them.

THE COURT: I get it.

MR. OGILVIE: So the facts are in dispute. But we don't get to the facts because this case at this stage must be dismissed as a matter of law on the pleadings.

And, again, I want to refer --

THE COURT: What about the amendment issue, Mr. Ogilvie?

MR. OGILVIE: Okay. So I'll get to the amendment issue, but I want to -- I want to focus on the pleadings again because I heard it's in our pleadings. And I want it to be very clear that the pleadings are not the briefs supported in -- or submitted in support of or in opposition to the motion.

The pleadings are what Rule 7 calls the pleadings. And none of what I heard today -- well, I shouldn't say none. That would be an overstatement. Very little of what I heard in the developer's presentation today is submitted -- is contained within the four corners of that amended complaint that is the

subject of the motion for judgment on the pleadings.

Now -- I'm sorry, the Court's question was? I lost my train of thought.

THE COURT: I did too. It's probably -- it's 4:15.

MS. LEONARD: The amendment.

THE COURT: Yeah, the amendment.

MR. OGILVIE: A, it's futile. There is no -- as established in our briefs and in my presentation earlier, there is no vested right to develop this property. I challenge the developer to show where Judge Smith found that the developer had a vested right. He didn't find that. There isn't such a finding because it doesn't exist.

And as it relates to Sisolak, there is no relation to this case. Sisolak involved a per se taking and a physical invasion.

What we have before the Court today involved no affirmative negative conduct towards the property. Nothing was taken away from the developer in the four applications that were denied that are before this Court as an -- as the claim for inverse condemnation.

The only thing -- so the record --

THE COURT: So tell me this. How was that different from Sisolak?

MR. OGILVIE: Sisolak was a physical invasion. That is a per se taking. There's no way to see it otherwise. There's nothing that the City did in this case in denying these four applications that relates in any way to what happened in Sisolak where the property owner's rights, the property owner's property was being invaded by the restrictions -- by the airplanes that are flying within 500 feet above the level of the property. Where the City passed ordinances, Ordinance 1221 and 1599 which reduced the property owner's ability to develop that property.

None of that exists in this case. This is not a physical invasion. This is not a per se taking. This is the City exercising its discretionary authority to approve or deny land-use applications.

Nothing has been taken from the developer. The developer has everything today that it purchased in 2015. And that's why Sisolak is absolutely inapplicable. So --

THE COURT: Now, here's my question as far as that is concerned. And the property was purchased in 2015. And we're talking more specifically the 35 acres. When it was purchased, it was purchased with RDP7, right?

MR. OGILVIE: RPD7. And, again, Judge, the

City has maintained for -- let's see we filed our opposition to the PJR, I believe, in late May. So for ten months now in this case the City has conceded that this property is zoned RPD7. It is totally irrelevant. Because as this Court found, as -- and, again, I was saying in my opening remarks, findings of fact 35 through 38, those -- of the Court's findings of fact and conclusions of law that were entered on November 21st, 2018. Those aren't just findings of fact. Those are legal determinations that this Court is bound by under Nevada law.

Those -- there is no vested right, therefore, there is no taking. Therefore, the complaint cannot state a cause of action for -- upon which relief can be granted, because there -- if there's no vested right, if the City has discretionary authority, which this Court found that it did, and the City exercises that discretionary authority -- if the City has discretionary authority, which this Court found that it did, there is no vested right. So, therefore --

THE COURT: Now, here's my next question. I think this is a really, really important question. And I remember this. You were very, very strident at the time we were reviewing the petition for judicial review. And you said, Look, Judge. They can't go

outside of the record. I remember you were very, very strident on that issue.

MR. OGILVIE: I was right.

THE COURT: Yeah. And I accepted that.

MR. OGILVIE: Thank you.

THE COURT: Okay. Now, we have a different scenario here. Are you saying that under the current claim for relief sought in this matter that the plaintiff, not the petitioner, can go, not just what happened at the time there was a petition for judicial review filed, but look at the entire action of the City of Las Vegas as it relates to specifically its decisions as it relates to the 38-acre parcel of property that's at issue?

MR. OGILVIE: I will answer it this way.

THE COURT: Okay.

MR. OGILVIE: And I'm -- I'm not sure that I'm answering your question, and if I'm not --

THE COURT: That's okay.

MR. OGILVIE: -- it's not because I'm dodging it.

The action that the developer has claimed constitutes a taking is the June 21, 2017, denial of four land-use applications. That is at -- what is at issue before this Court. That is the claimed taking.

That is what the complaint -- the amended complaint that is before the Court today is -- it is that action sought -- alleged in that amended complaint that is deemed to be the taking that we are challenging.

THE COURT: Now, the reason why I asked that question -- and I can't find it at my fingertips. This is just based upon recollection. For example, there were allegations made regarding the conduct of the City council as it relates to passing or attempt to pass ordinances that -- that are not general in nature, but target a -- the plaintiff in this case; right? And I think didn't that happen in October 2018, something like that?

MR. LEAVITT: Around that area. It was in 2018, your Honor.

THE COURT: 2018. And so -- and so that's why -- I mean, I sit back and I think about it. I remember reading everything. And although I've read a lot in between, but I thought that was -- I understand it's not accepted. It's not a factual issue and those types of things, but when I'm looking at this, and that's why at the very outset of our rigorous discussion, I always looked at it as you have one type of action. And my review is very limited. In fact, I agreed with you, you know. Limited to what happened,

and you were strident on that issue. I remember. And I thought, You know what, Mr. Ogilvie might be right here. And that's probably why I ruled the way I did.

However, now we're in a different scenario, a different forum, a different review. In fact, it's not a review. It's a -- yeah, potentially some of the actions of the City council might be in play, but it's a much different forum. That's probably the best way I can say that.

So with that happening, and those allegations out there -- and understand this, we're a notice pleading jurisdiction. We all understand that under Rule 8.

How can a trial court perform a judgment on the pleadings when I think there is some sort of accord in this regard, there's a lot of factual disputes here; right? And that's my point. It becomes very difficult for the trial court to do that.

MR. OGILVIE: Okay. And that gets to my point: Factual contentions are not resolved at this stage of the litigation.

THE COURT: Oh, I agree with that. I do.

MR. OGILVIE: Okay.

THE COURT: There's no doubt. You don't even have to argue that.

MR. OGILVIE: Okay.
THE COURT: And that's not where I was going at all.
MR. OGILVIE: Okay. But I want to go back to --
THE COURT: 100 percent right there.
MR. OGILVIE: Thank you.
But I want to go back to what I said. The alleged taking is the denial of four land-use applications on June 21, 2017. Any action that occurred after that is not part of the claimed taking here. It's just an attempt by the developer to throw everything against the wall in an attempt to -- that some of it sticks.
So what took place over a year after the passage of an ordinance? Well, if they deem that to be a taking, they have the ability to file an action on that taking in and of itself. But that's not what this case is about.
This case is very, very narrow. It's -- and this case wasn't -- wasn't framed by the City. We didn't -- we didn't bring this action. The developer brought the action.
And the developer said, This is what we're complaining about. The City improperly denied four

land-use applications.

That was the basis of the petition for judicial review, seeking this Court to substitute its consideration of those four applications in place of the City council's. And it also forms the basis -- that is the only thing that forms the basis for the inverse condemnation claims.

So it is -- that is the taking. It's nothing else. And that's why the Court can't take those into consideration. And that's why the amendment -- that's one of the reasons, okay. It's one of the reasons that the amendment would be -- should be denied.

A, it's futile as I stated. There can't be a taking without vested rights, and there's no vested rights because the City had the discretion to approve or deny those land-use applications.

B, the taking is limited to those four land-use applications so anything that happened subsequent to that is inapplicable and can't be considered and shouldn't be part of this taking. Could be considered in a separate action.

And also the developer engages in claims splitting. It wants to bring in everything into -- all the allegations of all the denials into this action when it has separate actions pending before

Judge Sturman and previously Judge Israel. We don't know where that case is going now.

But those are the actions that are the subject of the 133 acres and the 65 acres. That developer now wants to bring all that in here. That's claims splitting. And we briefed that at length in our -- in our motion and in our reply that it's improper. You can't have the same claim being determined by two different departments.

THE COURT: Now, tell me this. I mean, and I do understand that. But we're dealing with different parcels of property. What impact does that have, if any?

MR. OGILVIE: Again, well, not -- yeah.

This action relates to the 35 acres.

THE COURT: Yes.

MR. OGILVIE: The four applications related to the -- those 35 acres. Doesn't relate to the 133 acres, doesn't relate to the 65 acres, doesn't relate to anything other than those four land-use applications that were denied. And if those were a taking, then -- then the result is what the result is. The City maintains it can't be a taking because there's no vested right to redevelop that property.

So -- and I'll go back to what I said in my

opening remarks, your Honor: Whether evidence of that comes in or not into this proceeding is an issue for another day, and I'm not even sure --

THE COURT: Absolutely. I agree 100 percent with that. I mean, because I don't have an answer. I don't. That's something I would anticipate could potentially be hotly litigated. And as you were talking about that, one thing for sure it appears like, for example, in the Sisolak case, and I was just looking at it, and they did have -- where they -- they did discuss the developmental history of the project.

But I get where you're going. But I'm wondering -- and this would be my query, and I don't know the answer. Do you look at the actions of the City council as a whole? You know, for example, would the plaintiff's specific ordinances come in? I mean, those are a lot of issues that have to be resolved. But I'm not going to make a decision on that today. But I clearly recognize that as an issue.

And I'm not going to jump ahead and say that comes in or it doesn't come in. That's -- I agree 100 percent. Another day; right?

MR. OGILVIE: Okay.

So one of the things I heard in the presentation today was that the City rejected the major

modification. That is absolutely -- well, the City council, yeah -- I heard that the City council rejected the application for major modification. That is absolutely not true. It was the planning commission. And I refer the Court to the hearing before Judge Crockett on January 11, 2018. Reporter's transcript of proceedings at page 16.

Chris Kaempfer, the developer's counsel, was providing his comments, said:

> "So when we talk about when the major modification is required, it's required when they ask us to do the whole thing. Now, ironically then we present the whole thing in front of the City council. the planning commission, the planning commission denies it. So we withdraw that portion of it and we move forward only with the 17 acres."

So, again, these factual presentations that were made today are disputed. This is just one example of it wasn't the City council that denied any portion of the major modification. It was the planning commission. And because of that, the developer withdrew the major modification.

From a 40,000-foot view, the developer's predecessor, Peccole, sought the PROS designation. It

obtained it. It built a golf course. That is what the developer purchased. The developer submitted four applications to redevelop that property, which this Court has already found was within the Court -- the City council's decision-making authority to deny. In fact, they were denied.

Because the City had that decision-making authority, there is no vested right. There was no vested right. Therefore, there is no taking. And that's the end of the inquiry.

Whether or not the Court takes into consideration the preclusive effect of Judge Crockett, I submit that it's appropriate and it's a separate and independent fact for denying -- for granting the motion and dismissing these inverse condemnation actions. The point is as a matter of law, there is no vested right because the City was simply exercising its decision-making authority.

And if there is no vested right, then there can't be a taking. Because if there was a taking -- I heard Mr. Bice say this during the break. He wants to build a condominium in the back of his house, zoned residential. So if he -- the City council denies it, then he's going to sue the City for it. There are -- there is discretionary authority for it.

Now, that might be an absurd example because certainly there's different density, but the point is made; that you have to have a vested right to do the thing that you are seeking before you can claim that your property has been taken.

There hasn't been a taking. There has been no adverse action against this property. The only thing that's happened is the City properly exercised its discretion-making authority to deny four land-use applications. And, therefore, as a matter of law, the motion must be granted and the inverse condemnation claims must be dismissed.

MR. LEAVITT: Your Honor, may I reply to the motion to amend?

THE COURT: Well, yeah -- I mean, procedurally I have to give you that opportunity.

MR. LEAVITT: All right. And I'll be brief, your Honor.

What the -- what Mr. Ogilvie has stated is that we only get to argue one of our government actions. We only get to argue Government Action -- or City Action No. 1 to you. And, your Honor, I -- because of what you said, I didn't go through each and every one of those City actions all up to No. 11. But, your Honor, our claims against the City of Las Vegas

are not just limited to one denial, as Mr. Ogilvie just represented to you.

Our claims are that the City of Las Vegas has engaged in 11 different types of actions toward our property, which amount to a taking of the property. They're not limited to just one. And Mr. Ogilvie doesn't get to dictate what our claims state.

Now, as far as the motion to amend is concerned, your Honor, the law is very clear. They should be freely given. I heard Mr. Ogilvie argue that this is such an early part of the case that we shouldn't have a motion for summary judgment granted. If we're in such an early part of this case, then motion for leave to grant an amendment to a complaint should absolutely be given. And that was --

THE COURT: Well, I think what he said, he wasn't dealing -- we wasn't specifically concerned about the time. He said it was futile. That was the argument.

MR. LEAVITT: Well, your Honor --

THE COURT: I'm just saying what he said.

MR. LEAVITT: I --

THE COURT: Whether it's not or not, I'm not --

MR. LEAVITT: It's a --

THE COURT: -- in a moment from now I will.

MR. LEAVITT: Well -- I get it. But we're early -- I get it.

But we're early in the proceedings, your Honor. Your Honor even recognized that, that we're so early in the proceedings that a motion for summary judgment shouldn't be granted. Well, we should have the opportunity to amend our pleadings because, your Honor, many of the actions that the government engaged in occurred after our original complaint.

And what Mr. Ogilvie is saying is that we have to file a separate complaint for every single action that the government engages in. That would actually be improper claim splitting because it's to one piece of property. You have to bring all of those actions into one case, against -- against one piece of property. And that's what we've done with our motion to amend, was to include all of the government action in one pleading. And we ask that you give us that opportunity.

The other argument that Mr. Ogilvie stated is that there are factual disputes. Okay. And, therefore, the motion for summary judgment shouldn't be granted. Well, the problem with that argument is, is when there's a motion for a judgment on the pleadings

or a motion to dismiss, you have to assume that our facts are true. And, your Honor, if you assume that all of our facts are true that we've laid out in our complaint, we've unequivocally stated that we filed a major modification. We've unequivocally stated that we have -- that our claims are ripe. We've unequivocally stated that the government engaged in these taking actions. Therefore, for purposes of a motion to dismiss, these facts have to be assumed true. And if they're assumed to be true, you can't dismiss the claims at this point in time because we've made the proper allegations and we've alleged the proper five claims.

Now, the last issue that Mr. Ogilvie mentions is this claim splitting, that it's improper. You know, your Honor, we're asked them to consolidate. They said no. And then they come into this case and they say, Judge, you're claim splitting.

If the government wants to add the 65-acre, the 133-acre, and the 17-acre case into this case, which is the lowest case number, we would consider that. I sent an email to Mr. Ogilvie and said, Hey, the 65-acre case, why don't we join it with this 35-acre case? I heard nothing back. Yet, they come to you and they say it's improper to split these claims,

after refusing that consolidation.

Now, Mr. Bice's example about being able to build a condo in the back of his yard, that the government should have discretion to do that, listen, I agree the government has discretion to prohibit Mr. Bice from building the condos in the back of his house. But what the government doesn't have discretion to do is to tell a landowner who has a hard-zoned residential property, and his property is the land use designated residential by the City of Las Vegas, that he can't even turn a piece of dirt on that -- on that property.

Your Honor, they won't even let him build a fence --

THE COURT: I read all that. I did.

MR. LEAVITT: All right, your Honor.

But I'm just saying, the example is an outrageous example that has no application in this case that the government hasn't allowed us to use the property for anything. And the Courts are unequivocally clear that when the government does that, when the government substantially interfered with the use and enjoyment of the property, that's a taking. And that's exactly what the government has done here.

So if you dismiss this complaint, you're going

to dismiss a case where we've unequivocally established the taking facts. We don't think it's appropriate. We think you should allow us to amend. Deny the City's motion, and then let's do a 16.1 next week and move forward in this case.

Thank you, your Honor.

THE COURT: All right. Thank you, sir.

Okay. I just want to -- when I think of this case, and understand we have a 12(c) motion, you don't see those as often as you see the 12(b) types of motions. But under (c):

"The rule is designed to provide a means of disposing of cases when material facts are not in dispute, and a judgment on the merits can be achieved by focusing on the contents of the pleadings. It has utility only when all material allegations of facts are admitted in the pleadings and only questions of law remain."

And the reason why I went back to Rule 12(c) for everyone, we've had about three and a half, four hours of factual disputes and arguments throughout this entire hearing. And nobody can agree on what the appropriate facts are, number one.

Secondly, I can't say as a matter of law under

any set of facts as alleged in the complaint, although that's a slightly different standard, that the plaintiffs have no case. I can't say that.

Just as important, too, in listening to the argument, when I go back and I'm charged with reviewing the complaints in this case, the plaintiff alleges a vested property right, and I accept that; right? I do. You know, that's a factual dispute. I get it. But nonetheless, this is the pleading stage of the case.

Just as important, too, there's issues regarding whether there's a taking or not. Another important issue that has to be resolved factually.

Right now we've discussed a lot -- what I would consider very -- a lot of significant issues regarding -- number one, we talked about the distinction between the evidentiary burdens in a petition for judicial review versus a general civil litigation case where the primary standard is by a preponderance of the evidence, and that's a much different standard too. It's a heightened standard. And I think we can all agree in determining whether there's substantial evidence in the record and whether the decision of the fact finders on an administrative level, or maybe legislative like the City council, are arbitrary and capricious, or plain error as a matter of

law. That's the whole standard there.

So we -- you know, that's important to point out. And that might give us guidance going down the road.

Just as important, too, and this is a unique issue, but -- as it deals with the statute of limitations. I thought about it, and typically all statutes of limitations are triggered by some sort of act or actions; right? That's the triggering event. And in this case, whether it's 2014, 2015, I'm going to make a determination that the date that would potentially trigger the statute of limitations wouldn't be the master plan or necessarily the designation of the property as RDP7, but it's the acts of the City council that would control. I just want to tell you that.

And consequently, what I'm going to do is this: Regarding the motion pursuant to NRCP 12(c) to dismiss, I'm going to deny that; right? It's very early in the pleading stage.

I can't say as a matter of law the claims sought for are futile in the amendment. I'm going to grant that.

Last, but not least, like I said before, I think it would -- it would have been plain error as a

matter of law to even consider the Rule 56 motion for summary judgment, and that's denied.

Consequently, we can move forward with this litigation.

Last, but not least, as far as time for a 16.1, I have no clue what's on my calendar next week. I can just tell you that. We can check. We'll try to be very efficient. This is what Lynn said. We anticipated this question.

Oh, Lynn verified answer filed. Next available 16.1 conference in business court is 4/2/19. So I can give you a date right now. We're pretty efficient.

MR. HUTCHISON: 9:00 a.m.?

THE COURT: No. We do those at 10:30. So if there's no conflict, you got a date.

MR. LEAVITT: Your Honor, we're going to make it work.

THE COURT: All right. That's the next date I have available.

And, Mr. Leavitt?

MR. LEAVITT: Yes, your Honor.

THE COURT: Prepare the order, sir.

MR. LEAVITT: We'll prepare the order, your Honor.

THE COURT: Make sure Mr. Ogilvie gets a copy and all those wonderful things.

MS. LEONARD: Just to clarify, the motion is estopped?

THE COURT: We have something here. I don't even know if this is -- I'm trying to figure this out. Plaintiff landowner's motion to estop the City's private attorney from making major modification arguments, we didn't even -- that's moot; isn't it?

MR. LEAVITT: It is, your Honor.

THE COURT: Okay.

MR. BICE: Well, that's the only reason I'm here. I don't know how it's moot.

THE COURT: Well --

MR. BICE: I mean, if they were withdrawing it --

THE COURT: Okay.

MR. BICE: But that's the only reason I'm here, is because --

THE COURT: Mr. Bice, I respect that.

That's been withdrawn; is that correct?

MR. LEAVITT: Your Honor, what we'll do, we will withdraw that at this point in time. If we -- if we think it has merit for a later time, we'll bring it at that time.

MR. BICE: Well, I guess, then I'll just have to monitor, your Honor. Because I agree. When you made the observation that you don't think my clients are really properly in an inverse condemnation action, I generally agree with that proposition.

THE COURT: Yeah.

MR. BICE: That's why I didn't file any briefs on this.

THE COURT: I know.

MR. BICE: But this pleading, your Honor, this is just a back door around the rulings that my clients spent a lot of money to obtain against this developer.

THE COURT: I understand, sir.

MR. BICE: And so I'm not going to -- I respect the Court saying that you're not -- I agree with the general proposition that you're not bound by the other Court's decision, unless the law says that you're bound.

THE COURT: Right.

MR. BICE: And that's my point, is my client litigated an issue, prevailed. And my client actually has the right to enforce that ruling.

THE COURT: I understand.

MR. BICE: And that ruling -- and that -- the developer can't circumvent it by just going into

another courtroom and saying, Well, you know, let's just disregard what Judge Crockett ruled about this golf course.

THE COURT: Right.

MR. BICE: That's the only reason I'm here. I don't -- I didn't really care to spend my Friday afternoon when it's 70 degrees outside sitting in the back here. So next time --

THE COURT: And it's the second day of the tournament.

MR. BICE: Exactly. Exactly. That's what I'm particularly outraged about --

THE COURT: I know.

MR. BICE: -- is that I'm missing basketball games right now.

THE COURT: I agree.

MR. BICE: But that's the only reason we're here. We do not intend to participate in any 16.1, your Honor. I actually think for the record you're actually -- they prepared the order. It says "bifurcation." It didn't severe --

THE COURT: Yes.

MR. BICE: -- the claims. But nonetheless, we don't intend to participate, but if they're going to try and end run that prior adverse ruling, my client

does have standing to enforce that ruling. And that's the only reason we're here.

THE COURT: I understand. Right.

MR. HUTCHISON: Your Honor, I was going to handle the argument on this. I won't because it's been withdrawn; right? So as I understand it, we are not substantively arguing the motion today; is that correct?

THE COURT: We're not.

MR. HUTCHISON: Okay. So we have responses to everything that Mr. Bice just said, but we'll wait for another day. We think the Court is absolutely right, as far as standing. And standing has to do with what's going on in this case.

THE COURT: Correct.

MR. HUTCHISON: Thank you, your Honor.

THE COURT: And I don't know what happened -- I mean, I didn't prepare the order because, you know, technically when you bifurcate, and we do -- we did that all the time in construction defect -- that's just having certain phases of the trial tried -- I know you know what I'm talking about.

MR. HUTCHISON: Yes. Thank you.

THE COURT: So technically it's a severance, you know.

MR. LEAVITT: All right. Thank you, your Honor.

MR. OGILVIE: Thank you.

Your Honor.

THE COURT: Sir?

MR. OGILVIE: Before we break, I thought the Court was going to issue a ruling on the Motion for Reconsideration today.

THE COURT: Yeah. And I have a minute order ready to go as far as -- I'll tell you what it is. I'm denying the motion for reconsideration.

MR. OGILVIE: Thank you.

MR. HUTCHISON: Thank you, your Honor.

THE COURT: And we'll issue a minute order on that.

MR. OGILVIE: Thank you.

THE COURT: And you can prepare the order on that.

MR. OGILVIE: Thank you. If I could approach, your Honor.

THE COURT: Yes.

(Proceedings were concluded.)

* * * * * * * *

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

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

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

_____
PEGGY ISOM, RMR, CCR 541

Exhibit 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION FOR JUDICIAL REVIEW**

OCT 30 2018

JACK B. BINION, an individual; DUNCAN R. and IRENE LEE, individuals and Trustees of the LEE FAMILY TRUST; FRANK A. SCHRECK, an individual; TURNER INVESTMENTS, LTD., a Nevada Limited Liability Company; ROGER P. and CAROLYN G. WAGNER, individuals and Trustees of the WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC.; JASON AND SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE AND KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE KENNETH J. SULLIVAN FAMILY TRUST, AND DR. GREGORY BIGLER AND SALLY BIGLER,

Intervenors.

McDONALD CARANO
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PHONE 702.873.4100 • FAX 702.873.9966

Petitioner 180 Land Company, LLC filed a petition for judicial review ("Petition") of the Las Vegas City Council's June 21, 2017 decision to deny four land use applications ("Applications") filed by Petitioner to develop a 34.07-acre portion of the Badlands Golf Course ("the 35-Acre Property"). The Court granted a motion to intervene filed by surrounding homeowners ("Intervenors") whose real property is adjacent to and affected by the proposed development of the 35-Acre Property. The Court having reviewed the briefs submitted in support of and in opposition to the Petition, having conducted a hearing on the Petition on June 29, 2018, having considered the written and oral arguments presented, and being fully informed in the premises, makes the following findings of facts and conclusions of law:

I. FINDINGS OF FACT

A. The Badlands Golf Course and Peccole Ranch Master Development Plan

1. The 35-Acre Property is a portion of 250.92 acres of land commonly referred to as the Badlands Golf Course ("the Badlands Property"). (ROR 22140-201; 25819).

. . .

2. The Badlands Property is located between Alta Drive (to the north), Charleston Boulevard (to the south), Rampart Boulevard (to the east), and Hualapai Way (to the west), and is spread out within existing residential development, primarily the Queensridge Common Interest Community. (ROR 18831; 24093).

3. The Badlands Property is part of what was originally the Venetian Foothills Master Development Plan on 1,923 acres of land, which was approved by the Las Vegas City Council (the "Council") on May 7, 1986. (ROR 25820).

4. The plan included two 18-hole golf courses, one of which would later become known as "Badlands." (ROR 2635-36; 2646).

5. Both golf courses were designed to be in a major flood zone and were designated as flood drainage and open space. (ROR 2595-2604; 2635-36; 4587).

6. The Council required these designations when approving the plan to address flooding, and to provide open space in the master planned area. (*Id.*).

7. The City's General Plan identifies the Badlands Property as Parks, Recreation and Open Space ("PR-OS"). (ROR 25546).

8. The City holds a drainage easement within the Badlands Property. (ROR 4597; 5171; 5785).

9. The original master plan applicant, William Peccole/Western Devcor, Inc., conveyed its interest to an entity called Peccole Ranch Partnership. (ROR 2622; 20046-47; 25968).

10. On February 15, 1989, the Council approved a revised master development plan for 1,716.30 acres, known as "the Peccole Ranch Master Development Plan" ("the Master Development Plan"). (ROR 25821).

11. On April 4, 1990, the Council approved an amendment to the Master Development Plan to make changes related to Phase Two, and to reduce the overall acreage to 1,569.60 acres. (*Id.*).

12. Approximately 212 acres of land in Phase Two was set aside for a golf course, with the overall Peccole Ranch Master Plan having 253.07 net acres for golf course, open space and

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drainage. (ROR 2666; 25821).

13. Like its predecessor, the Master Development Plan identified the golf course area as being for flood drainage and golf course purposes, which satisfied the City's open space requirement. (ROR 2658-2660).

14. Phase Two of the Master Plan was completed such that the golf course is now surrounded by residential development. (ROR 32-33).

15. The 35-Acre Property that is the subject of the Applications at issue here lies within the Phase Two area of the Master Plan. (ROR 10).

16. Through a number of successive conveyances, Peccole Ranch Partnership's interest in the Badlands Property, amounting to 250.92 acres, was transferred to an entity called Fore Stars, Ltd., an affiliate of Petitioner. (ROR 24073-75; 25968).

17. On June 18, 2015, Fore Stars transferred 178.27 acres to Petitioner and 70.52 acres to Seventy Acres, LLC, another affiliate, and retained the remaining 2.13 acres. (*Id.*).

18. The three affiliated entities – Petitioner (i.e., 180 Land Co., LLC), Seventy Acres LLC and Fore Stars, Ltd. (collectively, "the Developer") – are all managed by EHB Companies, LLC, which, in turn, is managed by Paul Dehart, Vicki Dehart, Yohan Lowie and Frank Pankratz. (ROR 1070; 1147; 1154; 3607-3611; 4027; 5256-57; 5726-29). The Court takes judicial notice of the complaint filed by 180 Land Co., LLC, Fore Stars, Ltd., Seventy Acres, LLC, and Yohan Lowie in the United States District Court, Case No. 2:18-cv-00547-JCM-CWH ("the Federal Complaint"), which alleges these facts.

19. Mr. Lowie and various attorneys represented the Developer with regard to its development applications before the Council. (ROR 24466-24593).

B. The Developer's Prior Applications to Develop the Badlands Property

20. On November 15, 2015, the Developer filed applications for a General Plan Amendment, Re-zoning and Site Development Plan Review to change the classification of 17.49 acres within the 250.92-acre Badlands Property from Parks Recreation/Open Space to High Density ("the 17-Acres Applications"). (ROR 25546; ROR 25602; ROR 25607).

21. The 17-Acre Property is located in the northeast corner of the Badlands Property,

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distant from and not adjacent to existing residential development. (ROR 33).

22. In reviewing the 17-Acres Applications, the City's planning staff recognized that the 17-Acre Property was part of the Master Development Plan and stated that any amendment of the Master Development Plan must occur through a major modification pursuant to Title 19.10.040 of the City's Unified Development Code. (ROR 25532).

23. Members of the public opposed the 17-Acre Applications on numerous grounds. (ROR 25768-78).

24. On February 25, 2016, the Developer submitted an application for a major modification to the Master Development Plan (the "Major Modification Application") and a proposed development agreement (which it named the "2016 Peccole Ranch Master Plan") for the entire 250.92-acre Badlands Property ("the proposed 2016 Development Agreement"). (ROR 25729; 25831-34).

25. In support of the Major Modification Application, the Developer asserted that the proposed 2016 Development Agreement was in conformance with the Las Vegas General Plan Planning Guidelines to "[e]ncourage the master planning of large parcels under single ownership in the growth areas of the City to ensure a desirable living environment and maximum efficiency and savings in the provision of new public facilities and services." (ROR 25986).

26. The Developer also asserted that it would "guarantee that the development of the golf course property would be accomplished in a way that ensures that Queensridge will retain the uniqueness that makes living in Queensridge so special." (ROR 25966).

27. Thereafter, the Developer sought abeyances from the Planning Commission on the 17-Acres Applications to engage in dialogue with the surrounding neighbors, and to allow the hearings on the Major Modification Application and the 17-Acre Applications to proceed simultaneously. (ROR 25569; 25613; 25716; 25795; 26014; 26195; 26667; 27989).

28. The Council heard considerable opposition to the Major Modification Application and the proposed 2016 Development Agreement regarding, among other things, traffic, conservation, quality of life and schools. (ROR 25988-26010; 26017-45; 26072-89; 26091-107).

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29. At a March 28, 2016 neighborhood meeting, 183 members of the public attended who were "overwhelmingly opposed" to the proposed development. (ROR 25823-24).

30. The City received approximately 586 written protests regarding the proposed 2016 Development Agreement plus multiple e-mails to individual Council members in opposition. (ROR 31053; ROR 989-1069).

31. In approximately April 2016, City Attorney Brad Jerbic became involved in the negotiation of the proposed 2016 Development Agreement to facilitate discussions between the Developer and the nearby residents. Over the course of the next year, Mr. Jerbic and Planning Director Tom Perrigo met with the Developer's representatives and various members of the public, including representatives of the Queensridge HOA and individual homeowners, in an effort to reach consensus regarding a comprehensive development plan for the Badlands Property. (ROR 27990).

32. The Mayor continued to inquire about the status of the negotiations, and Council members expressed their desire that the parties negotiate a comprehensive master plan that meets the City's requirements for orderly and compatible development. (ROR 17335).

33. Prior to the Council voting on the Major Modification Application, the Developer requested to withdraw it without prejudice. (ROR 1; 5; 6262).

34. Several members of the public opposed the "without prejudice" request, arguing that the withdrawal should be with prejudice to ensure that the Developer would create a development plan for the entire Badlands Property with input from neighbors. (ROR 1077-79, 1083).

35. In response, the Mayor received assurances from the Developer's lawyer that the Developer would engage in good-faith negotiations with neighboring homeowners. (ROR 1115).

36. The Developer also represented that it did not seek to develop the Badlands Property in a piecemeal fashion: "[I]t's not our desire to just build 17.49 acres of property that we wanted to build the rest of it, and that's why we agreed to the withdrawal without prejudice to meet [with neighboring property owners] to try to do everything we can." (ROR 1325). Based on these assurances, the Council approved the Developer's request to withdraw the Major

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Modification Application and proposed 2016 Development Agreement without prejudice. (ROR 2; 1129-1135).

37. The Mayor reiterated that the Council sought a comprehensive plan for the entire Badlands Property to ensure that any development would be compatible with surrounding properties and provide adequate flood control. (ROR 17321-22).

38. The Developer's counsel acknowledged the necessity for a master development plan for the entire Badlands Property. (ROR 17335).

39. City Planning Staff recommended approval of the 17-Acres Applications with several conditions, including the approval of both (1) the Major Modification Application and (2) the proposed 2016 Development Agreement. (ROR 27625-26, 27629).

40. On October 18, 2016, the City's Planning Commission recommended granting the 17-Acres Applications but denying the Major Modification Application. (ROR 1; 31691-92).

41. The Council heard the 17-Acres Applications at its November 16, 2016 meeting. (ROR 1075-76).

42. The Council members expressed that a comprehensive plan for the entire Badlands Property was necessary to avoid piecemeal development and ensure compatible land densities and uses. (ROR 1310-14).

43. Nevertheless, the Council and the Planning Director recognized the 17-Acre Property as distinct from the rest of the Badlands Property due to its configuration, lot size, isolation and distance from existing development. (ROR 1311-12).

44. To allow time for negotiations between the Developer and the project opponents on a comprehensive development agreement, the Council held the 17-Acres Applications in abeyance until February 15, 2017. (ROR 1342; 6465-6470, 11231).

45. On February 15, 2017, the Council again considered the 17-Acres Applications. (ROR 17235).

46. The Developer stated that it had reduced the requested number of units from 720 to 435 to match the compatibility of adjacent Queensridge Towers. (ROR 17237-38).

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47. Based on the reduction and compatibility effort made by the Developer, the Council approved the 17-Acres Applications with certain modifications and conditions. (ROR 11233; 17352-57).

48. Certain nearby homeowners petitioned for judicial review of the Council's approval of the 17-Acres Applications. *See Jack B. Binion, et al v. The City of Las Vegas, et al.*, A-17-752344-J.

49. On March 5, 2018, the Honorable James Crockett granted the homeowners' petition for judicial review, concluding that a major modification of the Master Development Plan to change the open space designation of the Badlands Golf Course was legally required before the Council could approve the 17-Acres Applications ("the Crockett Order"). The Court takes judicial notice of the Crockett Order.

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

50. The instant case seeks judicial review of the Council's denial of the Applications filed by Petitioner to develop the 35-Acre Property.

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

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

53. The Council members expressed concern that the Developer was not being forthcoming and was stringing along neighboring homeowners who were attempting to negotiate a comprehensive development plan that the Council could approve. (ROR 1305; 1319).

54. The Applications came up for consideration during the February 14, 2017 Planning Commission meeting. (ROR 33924).

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55. Numerous members of the public expressed opposition, specifically identifying the following areas of concern: (1) existing land use designations did not allow the proposed development; (2) the proposed development was inconsistent with the Master Development Plan and the City's General Plan; (3) the Planning Commission's decision would set a precedent that would enable development of open space and turn the expectations of neighboring homeowners upside down; (4) the Applications required a major modification of the Master Development Plan; (5) neighboring residents have a right to enjoyment of their property according to state statutes; (6) the proposed development would negatively affect property values and the characteristics of the neighborhood; and (7) the development would result in over-crowded schools. (ROR 33934-69).

56. Project opponents also expressed uncertainty and anxiety regarding the Developer's lack of a comprehensive development plan for the entire Badlands Property. (*Id.*).

57. The Planning Commission did not approve Petitioner's application for the General Plan Amendment, which required a super-majority vote, but did approve the Waiver, Site Development Review and the Tentative Map applications, subject to conditions as stated by City Staff and during the meeting. (ROR 33998-99; 34003).

58. After several abeyances (requested once by City Planning Staff and twice by Petitioner), the four Applications for the 35-Acre Property came before the Council on June 21, 2017. (ROR 17360; 18825-27; 20304-05; 24466).

59. The objections that had been presented in advance of and at the Planning Commission meeting were included in the Council's meeting materials. (ROR 22294-24196).

60. As had occurred throughout the two-year history of the Developer's various applications, the Council heard extensive public opposition, which included research, factual arguments, legal arguments and expert opinions. (ROR 22205-78; 22294-24196). The objections included, among others, the following:

a. The Council was allowing the Developer to submit competing applications for piecemeal development, which the City had never previously allowed for any other developer. (ROR 24205).

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b. The Applications did not follow the process required by planning principles. (Report submitted by Ngai Pindell, Boyd School of Law professor of property law, ROR 24222-23).

c. The General Plan Amendment application exceeds the allowable unit cap. (ROR 24225-229).

d. The Developer failed to conduct a development impact notice and assessment. (ROR 24231-36).

e. The Applications are not consistent with the Master Development Plan or the City's General Plan. (ROR 24231-36).

f. The design guidelines for Queensridge, which were approved by the City and recorded in 1996, reference the golf course, and residents purchased property and built homes in reliance on that document. (ROR 24237-38).

g. The Applications were a strategic effort by the Developer to gain leverage in the comprehensive development agreement negotiations that were ongoing. (Queensridge HOA attorney Shauna Hughes, ROR 24242-44).

h. Security would be a problem. (ROR 24246-47).

i. Approval of the Applications in the absence of a comprehensive plan for Badlands Property would be irresponsible. (ROR 24254-55).

j. The proposed General Plan Amendment would approve approximately 911 homes with no flood control or any other necessary requirements. (ROR 24262).

61. After considering the public's opposition, the Mayor inquired as to the status of negotiations related to a comprehensive development agreement for the entire Badlands Property. The City Attorney responded that no agreement had been reached. (ROR 24208-09).

62. The Developer and its counsel represented that only if the Council approved the four Applications would it then be willing to negotiate a comprehensive development agreement and plan for the entire Badlands Property. (ROR 24215, 24217, 24278-80).

63. The Council voted to deny the Applications. (ROR 24397).

64. On June 28, 2017, the City issued its final notices, which indicated that the

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Council's denial of the Applications was "due to significant public opposition to the proposed development, concerns over the impact of the proposed development on surrounding residents, and concerns on piecemeal development of the Master Development Plan area rather than a cohesive plan for the entire area." (ROR 35183-86).

65. The Petitioner filed this petition for judicial review to challenge the Council's denial of the Applications.

66. Petitioner has not presented any evidence to the Court that it has a pending application for a major modification for the 35-Acre Property at issue in this Petition for Judicial Review.

II. CONCLUSIONS OF LAW

A. Standard of Review

1. In a petition for judicial review under NRS 278.3195, the district court reviews the record below to determine whether the decision was supported by substantial evidence. *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 271, 236 P.3d 10, 15-16 (2010) (*citing Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006)).

2. "Substantial evidence is that which a reasonable mind could accept as sufficient to support a conclusion." *Id.*

3. The scope of the Court's review is limited to the record made before the administrative tribunal. *Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982).

4. The Court may "not substitute its judgment for that of a municipal entity if substantial evidence supports the entity's action." *Id.*

5. "[I]t is not the business of courts to decide zoning issues… Because of the [governing body's] particular expertise in zoning, courts must defer to and not interfere with the [governing body's] discretion if this discretion is not abused." *Nevada Contractors v. Washoe Cty.*, 106 Nev. 310, 314, 792 P.2d 31, 33 (1990).

6. The decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. *See Enterprise*

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Citizens Action Committee v. Clark County Bd. of Comm'rs, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996); *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004).

7. "If a discretionary act is supported by substantial evidence, there is no abuse of discretion." *Cty. of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998), *superseded by statute on other grounds*.

8. Zoning actions are presumed valid. *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92,94, 769 P.2d 721, 722 (1989).

9. A "presumption of propriety" attaches to governmental action on land use decisions. *City Council of City of Reno v. Irvine*, 102 Nev. 277, 280, 721 P.2d 371, 373 (1986). A disappointed applicant bears a "heavy burden" to overcome this presumption. *Id.*

10. On a petition for judicial review, the Court may not step into the shoes of the Council, reweigh the evidence, consider evidence not presented to the Council or make its own judgment calls as to how a land use application should have been decided. *See Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982).

B. Substantial Evidence Supported the City Council's Decision

11. The record before the Court amply shows that the Council's June 21, 2017 decision to deny the Applications for the 35-Acre Property ("the Decision") was supported by substantial evidence.

12. "Substantial evidence can come in many forms" and "need not be voluminous." *Comstock Residents Ass'n v. Lyon County Bd. of Comm'rs*, 385 P.3d 607 (Nev. 2016) (unpublished disposition), *citing McKenzie v. Shelly*, 77 Nev. 237, 240, 362 P.2d. 268, 269 (1961); *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

13. Public opposition to a proposed project is an adequate basis to deny a land use application. *Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760; *C.A.G.*, 98 Nev. at 501, 654 P.2d at 533.

14. "[A] local government may weigh public opinion in making a land-use decision." *Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760; *accord Eldorado Hills, LLC v. Clark*

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County Bd. of Commissioners, 386 P.3d 999, 2016 WL 7439360, *2 (Nev. Dec. 22, 2016) (unpublished disposition).

15. "[L]ay objections [that are] substantial and specific" meet the substantial evidence standard. *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) (distinguishing *City Council, Reno v. Travelers Hotel, Ltd.*, 100 Nev. 436, 683 P.2d 960 (1984)); *Stratosphere Gaming*, 120 Nev. at 529-30, 96 P.3d at 761.

16. "Section 19.18.050(E)(5) [of the Las Vegas Municipal Code] provides that the site development plan review process is intended to ensure that the proposed development is 'harmonious and compatible with development in the area' and that it is not 'unsightly, undesirable, or obnoxious in appearance.' The language of this ordinance clearly invites public opinion." *Stratosphere Gaming*, 120 Nev. at 528–29, 96 P.3d at 760.

17. The considerable public opposition to the Applications that was in the record before the Council meets the substantial evidence standard. That record included written and stated objections, research, legal arguments and expert opinions regarding the project's incompatibility with existing uses and with the vision for the area specified in the City's General Plan and the Peccole Ranch Master Development Plan. (ROR 2658-2666, 22294-24196, 24492-24504, 25821). The opponents argued that a development must be consistent with the General Plan, and what the Developer proposed was inconsistent with the Parks, Recreation and Open Space designation for the Badlands Golf Course in the City's General Plan. (ROR 24492-24504, 32820-21; 32842-55; 33935-36). If the applications were granted, they argued, it would set a precedent that would enable development of open space in other areas, thereby defeating the financial and other expectations of people who purchased homes in proximity to open space. (ROR 24492-24504, 33936). Because of the open space designation in the Peccole Ranch Master Development Plan, the opponents contended, the Applications required a major modification, which had not been approved. (ROR 24494-95; 33938). The opponents also expressed concerns regarding compatibility with the neighborhood, school overcrowding and lack of a development plan for the entire Badlands Property. (ROR 24492-24504, 24526, 33934-69).

18. The record before the Council constitutes substantial evidence to support the

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Decision. *See Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760.

19. The Court rejects the evidence that the Developer contends conflicts with the Council's Decision because the Court may not substitute its judgment for that of the Council. "[J]ust because there was conflicting evidence does not compel interference with the Board's decision so long as the decision was supported by substantial evidence." *Liquor & Gaming Licensing Bd.*, 106 Nev. at 98, 787 P.2d at 783. The Court's job is to evaluate whether substantial evidence supports the Council's decision, not whether there is substantial evidence to support a contrary decision. *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 836 n.36, 138 P.3d 486, 497 (2006). This is because the administrative body alone, not a reviewing court, is entitled to weigh the evidence for and against a project. *Liquor & Gaming Licensing Bd.*, 106 Nev. at 99, 787 P.2d at 784.

C. The Council's Decision Was Within the Bounds of the Council's Discretion Over Land Use Matters

20. "For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures." NRS 278.020(1).

21. The City's discretion is broad:

> A city board acts arbitrarily and capriciously when it denies a [land use application] without any reason for doing so.... [The essence of the abuse of discretion, of the arbitrariness or capriciousness of governmental action in denying a[n] ... application, is most often found in an apparent absence of any grounds or reason for the decision. We did it just because we did it. *.Irvine*, 102 Nev. at 279-80, 721 P.2d at 372-73 (quotations omitted).

22. The Council's Decision was free from any arbitrary or capricious decision making because it provided multiple reasons for denial of the Applications, all of which are well supported in the record.

23. The Council properly exercised its discretion to conclude that the development proposed in the Applications was not compatible with surrounding areas and failed to set forth an orderly development plan to alter the open space designation found in both the City's General Plan and the Peccole Ranch Master Development Plan.

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24. The concept of "compatibility" is inherently discretionary, and the Council was well within its discretion to decide that the development presented in the Applications was not compatible with neighboring properties, including the open space designation on the remainder of the Badlands Golf Course. *See Stratosphere*, 120 Nev. at 529, 96 P.3d at 761.

25. Residential zoning alone does not determine compatibility. The City's General Plan, the Peccole Ranch Master Development Plan, density, design and other factors do as well. The property adjacent to the 35-Acre Property remains used for open space and drainage, as contemplated by the City's planning documents, so the Developer's comparison to adjacent residential development is an incomplete "compatibility" assessment.

26. The City's Unified Development Code seeks to, among other things, promote "orderly growth and development" in order to "maintain … the character and stability of present and future land use and development." Title 19.00.030(G). One stated purpose is:

> To coordinate and ensure the execution of the City's General Plan through effective implementation of development review requirements, adequate facility and services review and other goals, policies or programs contained in the General Plan. Title 19.00.030(I).

27. The City's Unified Development Code broadly lays out the various matters the Council should consider when exercising its discretion. Those considerations, which include broad goals as well as specific factors for each type of land use application, circumscribe the limits of the Council's discretion. UDC 19.00.030, 19.16.030, 19.16.100, 19.16.130.

28. The Council was within the bounds of its discretion to request a development agreement for the Badlands Property before allowing a General Plan Amendment to change a portion of the property from Parks, Recreation and Open Space to residential uses. *See* Title 19.00.030(I). A comprehensive plan already exists for the Badlands Property; it is found in the city's General Plan, which designates the property as Parks, Recreation and Open Space. The Developer sought to change that designation. Under these circumstances, it was reasonable for the Council to expect assurances that the Developer would create an orderly and comprehensive plan for the entire open space property moving forward.

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29. The Court rejects the Developer's argument that a comprehensive development plan was somehow inappropriate because the parcels that make up the Badlands Property have different owners. (PPA 17:12-18:13, 23:9-14). In presenting the Developer's arguments in favor of these Applications and other land use applications relating to the development of the Badlands Property, Yohan Lowie has leveraged the fact that the three owner entities of the Badlands Property are affiliates managed by one entity – EHB Companies, LLC – which in turn is managed by Mr. Lowie and just three others. (ROR 1325; 4027; 5256-57; 17336; 24544; 25968). The Developer promoted the EHB brand and other projects it has built in Las Vegas to advance the Applications. (ROR 3607-3611; 5726-29; 5870-76; 17336; 24549-50). Additionally, by proposing the 2016 Development Agreement for the entire Badlands Property, the Developer acknowledged that the affiliated entities are one and the same. (ROR 25729).

30. The cases cited by the Developer did not involve properties owned by closely affiliated entities and are therefore inapplicable. (PPA 35:3-37:7, *citing Tinseltown Cinema, LLC v. City of Olive Branch*, 158 So.3d 367, 371 (Miss. App. Ct. 2015); *Hwy. Oil, Inc. v. City of Lenexa*, 547 P.2d 330, 331 (Kan. 1976)). They also did not involve areas that are within a master development plan area.

31. There is no evidence in the record to support the Developer's contention that it is somehow being singled out for "special treatment" because the Council sought orderly planned development within a Master Development Plan area (PPA 37:11-23).

32. Planning staff's recommendation is immaterial to whether substantial evidence supported the Council's decision because a governing body has discretion to make land use decisions separate and apart from what staff may recommend. *See Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 455, 254 P.3d 641, 644 (2011) (affirming County Commission's denial of special use permit even where planning staff recommended it be granted); *Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760 (affirming City Council's denial of site development plan application even where planning staff recommended approval). The Court notes that the Planning Commission denied the Developer's General Plan Amendment application.

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33. The statements of individual council members are not indicative of any arbitrary or capricious decision making. The action that the Court is tasked with reviewing is the decision of the governing body, not statements made by individual council members leading up to that decision. *See* NRS 278.3195(4); *Nevada Contractors*, 106 Nev. at 313, 792 P.2d at 33; *see also Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. Adv. Op. 40, 419 P.3d 140, 142 (2018) (discussing when action by board is required); *City of Corpus Christi v. Bayfront Assocs., Ltd.*, 814 S.W.2d 98, 105 (Tex. Ct. App. 1991) ("A city can act by and through its governing body; statements of individual council members are not binding on the city."). "The test is not what was said before or after, but what was done at the time of the voting." *Lopez v. Imperial Cty. Sheriff's Office*, 80 Cal. Rptr. 3d 557, 560 (Cal. Ct. App. 2008). The Council's action to deny the Applications occurred with its vote, not with the prior statements made by individual council members. NRS 241.03555(1). The Court finds nothing improper in the statements by individual Council members and rejects the Developer's contention that the statements of individual Council members require the Court to overturn the Council's Decision.

D. The City's Denial of the Applications Was Fully Compliant With the Law

34. The Court rejects the Developer's argument that the RPD-7 zoning designation on the Badlands Property somehow required the Council to approve its Applications.

35. A zoning designation does not give the developer a vested right to have its development applications approved. "In order for rights in a proposed development project to vest, zoning or use approvals ***must not be subject to further governmental discretionary action affecting project commencement***, and the developer must prove considerable reliance on the approvals granted." *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (emphasis added); *see also Stratosphere Gaming*, 120 Nev. at 527–28, 96 P.3d at 759–60 (holding that because City's site development review process under Title 19.18.050 involved discretionary action by Council, the project proponent had no vested right to construct).

36. "[C]ompatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest." *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *see also Nevada Contractors*, 106 Nev. at 311,

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792 P.2d at 31-32 (affirming county commission's denial of a special use permit even though property was zoned for the use).

37. The four Applications submitted to the Council for a general plan amendment, tentative map, site development review and waiver were all subject to the Council's discretionary decision making, no matter the zoning designation. *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112; *Doumani*, 114 Nev. at 53, 952 P.2d at 17; *Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nevada, Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983).

38. The Court rejects the Developer's attempt to distinguish the *Stratosphere* case, which concluded that the very same decision-making process at issue here was squarely within the Council's discretion, no matter that the property was zoned for the proposed use. *Id.* at 527; 96 P.3d at 759.

39. Statements from planning staff or the City Attorney that the Badlands Property has an RPD-7 zoning designation do not alter this conclusion. *See id.*

40. The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS) and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor. (ROR 24073-75; 25968).

41. The General Plan sets forth the City's policy to maintain the golf course property for parks, open space and recreation. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723.

42. The City has an obligation to plan for these types of things, and when engaging in its General Plan process, chose to maintain the historical use for this area that dates back to the 1989 Peccole Ranch Master Development Plan presented by the Developer's predecessor. (ROR 24492-24504).

43. The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course. (ROR 2595-2604; 2635-36; 4587; 25820).

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44. It is up to the Council – through its discretionary decision making – to decide whether a change in the area or conditions justify the development sought by the Developer and how any such development might look. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723.

45. The Clark County Assessor's assessment determinations regarding the Badlands Property did not usurp the Council's exclusive authority over land use decisions. The information cited by the Developer in support of this argument is not part of the record on review and therefore must be disregarded.[1] *See C.A.G.*, 98 Nev. at 500, 654 P.2d at 533. The Council alone and not the County Assessor, has the sole discretion to amend the open space designation for the Badlands Property. *See* NRS 278.020(1); *Doumani*, 114 Nev. at 53, 952 P.2d at 17.

46. The Applications included requests for a General Plan Amendment and Waiver. In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, no matter the zoning designation. UDC 19.00.030, 19.16.030, 19.16.050, 19.16.100, 19.16.130.

47. The City's General Plan provides the benchmarks to ensure orderly development. A city's master plan is the "standard that commands deference and presumption of applicability." *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723; *see also City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010) ("Master plans contain long-term comprehensive guides for the orderly development and growth for an area."). Substantial compliance with the master plan is required. *Nova*, 105 Nev. at 96-97, 769 P.2d at 723-24.

48. By submitting a General Plan Amendment application, the Developer acknowledged that one was needed to reconcile the differences between the General Plan

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[1] The documents attached as Exhibits 2-5 to Petitioner's points and authorities are not part of the Record on Review and are not considered by the Court. *See C.A.G.*, 98 Nev. at 500, 654 P.2d at 533. The documents attached as Exhibit 1, however, were inadvertently omitted from the Record on Review but were subsequently added by the City. *See Errata to Transmittal of Record on Review* filed June 20, 2018; ROR 35183-86.

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designation and the zoning. (ROR 32657). Even if the Developer now contends it only submitted the General Plan Amendment application at the insistence of the City, once the Developer submitted the application, nothing required the Council to approve it. Denial of the GPA application was wholly within the Council's discretion. *See Nevada Contractors*, 106 Nev. at 314, 792 P.2d at 33.

49. The Court rejects the Developer's contention that NRS 278.349(3)(e) abolishes the Council's discretion to deny land use applications.

50. First, NRS 278.349(3) merely provides that the governing body "shall consider" a list of factors when deciding whether to approve a tentative map. Subsection (e) upon which the Developer relies, however, is only one factor.

51. In addition, NRS 278.349(3)(e) relates only to tentative map applications, and the Applications at issue here also sought a waiver of the City's development standards, a General Plan Amendment to change the PR-OS designation and a Site Development Plan review. A tentative map is a mechanism by which a landowner may divide a parcel of land into five or more parcels for transfer or development; approval of a map alone does not grant development rights. NRS 278.019; NRS 278.320.

52. Finally, NRS 278.349(e) does not confer any vested rights.

53. "[M]unicipal entities must adopt zoning regulations that are in substantial agreement with the master plan." *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112, *quoting Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723; NRS 278.250(2).

54. The City's Unified Development Code states as follows:

> Compliance with General Plan
> Except as otherwise authorized by this Title, approval of all Maps, Vacations, Rezonings, *Site Development Plan Reviews*, Special Use Permits, Variances, *Waivers*, Exceptions, Deviations and Development Agreements shall be consistent with the spirit and intent of the General Plan. UDC 19.16.010(A).
>
> It is the intent of the City Council that all regulatory decisions made pursuant to this Title be consistent with the General Plan. For purposes of this Section, "consistency with the General Plan" means not only consistency with the Plan's land use and density designations, but also consistency with all policies and programs of the General Plan, including those that promote compatibility of uses and densities, and orderly development consistent with available resources. UDC 19.00.040.

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55. Consistent with this law, the City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development.

E. The Doctrine of Issue Preclusion Bars Petitioner from Relitigating Issues Decided by Judge Crockett

56. The Court further concludes that the doctrine of issue preclusion requires denial of the Petition for Judicial Review.

57. Issue preclusion applies when the following elements are satisfied: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008).

58. Having taken judicial notice of Judge Crockett's Order, the Court concludes that the issue raised by Intervenors, which once again challenges the Developer's attempts to develop the Badlands Property without a major modification of the Master Plan, is identical to the issue Judge Crockett decided issue in *Jack B. Binion, et al v. The City of Las Vegas, et al,* A-17-752344-J. The impact the Crockett Order, which the City did not appeal, requires both Seventy Acres and Petitioner to seek a major modification of the Master Plan before developing the Badlands Property. The Court rejects Petitioner's argument that the issue here is not the same because it involves a different set of applications from those before Judge Crockett; that is a distinction without a difference. "Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op. 28, 321 P.3d 912, 916–17 (2014).

59. Judge Crockett's decision in *Jack B. Binion, et al v. The City of Las Vegas, et al,* A-17-752344-J was on the merits and has become final for purposes of issue preclusion. A judgment is final for purposes of issue preclusion if it is "sufficiently firm" and "procedurally

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definite" in resolving an issue. *See Kirsch v. Traber,* 134 Nev., Adv. Op. 22, 414 P.3d 818, 822–23 (Nev. 2018) (citing Restatement (Second) of Judgments § 13 & cmt. g). "Factors indicating finality include (a) that the parties were fully heard, (b) that the court supported its decision with a reasoned opinion, and (c) that the decision was subject to appeal." *Id.* at 822-823 (citations and punctuation omitted). Petitioner's appeal of the Crockett Order confirms that it was a final decision on the merits.

60. The Court reviewed recent Nevada case law and the expanded concept of privity, which is to be broadly construed beyond its literal and historic meaning to encompass relationships where there is "substantial identity between parties, that is, when there is sufficient commonality of interest." *Mendenhall v. Tassinari*, 133 Nev. Adv. Op. 78, 403 P.3d 364, 369 (2017) (quoting *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081–82 (9th Cir. 2003) (internal quotation marks omitted). Applying the expanded concept of privity, the Court considered the history of the land-use applications pertaining to the Badlands Property and having taken judicial notice of the Federal Complaint, the Court concludes there is a substantial identity of interest between Seventy Acres and Petitioner, which satisfies the privity requirement. Petitioner's argument that it is not in privity with Seventy Acres is contradicted by the Federal Complaint, which reveals that Seventy Acres and Petitioner are under common ownership and control and acquired their respective interests in the Badlands Property through an affiliate, Fore Stars, Ltd.

61. The issue of whether a major modification is required for development of the Badlands Property was actually and necessarily litigated. "When an issue is properly raised and is submitted for determination, the issue is actually litigated." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. at 262, 321 P.3d at 918 (internal punctuation and quotations omitted) (citing *Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013)). "Whether an issue was necessarily litigated turns on 'whether the common issue was necessary to the judgment in the earlier suit.'" *Id.* (citing *Tarkanian v. State Indus. Ins. Sys.*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994)). Since Judge Crockett's decision was entirely dependent on this issue, the issue was necessarily litigated.

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62. Given the substantial identity of interest among Seventy Acres, LLC and Petitioner, it would be improper to permit Petitioner to circumvent the Crockett Order with respect to the issues that were fully adjudicated.

63. - 66.
previously removed by Order Nunc Pro Tunc

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ORDER

Accordingly, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Petition for Judicial Review is DENIED.

2nd paragraph previously removed by Order Nunc Pro Tunc

DATED: 11/18, 2018.

TIMOTHY C. WILLIAMS
District Court Judge

Submitted By:

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By: /s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 21st day of November, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION FOR JUDICIAL REVIEW** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

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Exhibit 3

PETER LOWENSTEIN

Madam Mayor, for point of clarification, there has been subsequent rezoning and general plans after that, which established One Queensridge Place, Tivoli, as well as parts of Boca Park, which did not include a major modification.

COUNCILMAN BARLOW

Okay. [inaudible 02:33:08]

MAYOR GOODMAN

Okay. I'm sorry. Councilman Barlow, I was in a conversation. What did you say?

COUNCILMAN BARLOW

I said [inaudible 02:33:15], Brad?

CITY ATTORNEY BRAD JERBIC

That's correct.

COUNCILMAN BARLOW

Okay. Thank you.

MAYOR GOODMAN

And so how are you voting on this?

COUNCILMAN BARLOW

I'm not in support of a major modification.

MAYOR GOODMAN

Okay. Thank you very much. So has everybody voted? Please. You've got Councilman Barlow.

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DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Plaintiff, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	Case No. A-17-758528-J Dept. No. XVI **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**

TO: ALL INTERESTED PARTIES

NOTICE IS HEREBY GIVEN that *Findings of Fact and Conclusions of Law Regarding Plaintiff's Motion for a New Trial, Motion to Alter or Amend and/or Reconsider the Findings of Fact and Conclusions of Law, and Motion to Stay Pending Nevada Supreme Court Directives* was entered in the above-entitled action on May 7, 2019, a copy of which is attached hereto.

Dated this 8th day of May, 2019.

HUTCHISON & STEFFEN, PLLC

/s/ Joseph S. Kistler

_____

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 8th day of May, 2019, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be served as follows:

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

☐ to be served via facsimile; and/or

X pursuant to NEFCR (9), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

☐ to be hand-delivered;

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A-17-758528-J

DEPT. NO.: XVI

~~[PROPOSED]~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING PLAINTIFF'S MOTION FOR A NEW TRIAL, MOTION TO ALTER OR AMEND AND/OR RECONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND MOTION TO STAY PENDING NEVADA SUPREME COURT DIRECTIVES

JACK B. BINION, an individual; DUNCAN R. and IRENE LEE, individuals and Trustees of the LEE FAMILY TRUST; FRANK A. SCHRECK, an individual; TURNER INVESTMENTS, LTD., a Nevada Limited Liability Company; ROGER P. and CAROLYN G. WAGNER, individuals and Trustees of the WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC.; JASON AND SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE AND KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE KENNETH J. SULLIVAN FAMILY TRUST, AND DR. GREGORY BIGLER AND SALLY BIGLER,

Intervenors.

Currently before the Court is Plaintiff 180 Land Co, LLC's Motion For A New Trial Pursuant To NRCP 59(e) And Motion To Alter Or Amend Pursuant To NRCP 52(b) And/Or Reconsider The Findings Of Fact And Conclusions Of Law And Motion To Stay Pending Nevada Supreme Court Directives ("the Motion") filed on December 13, 2018. The alternative relief sought by the Developer is a stay of the proceedings until the Nevada Supreme Court decides an appeal from the judgment entered March 5, 2018 by the Honorable James Crockett in Case No. A-17-752344-J ("Judge Crockett's Order"). The City filed an opposition, to which the Intervenors joined, and the Plaintiff filed a reply. The Court held oral argument on the Motion on January 22, 2019.

Having considered the record on file, the written and oral arguments presented, and being fully informed in the premises, the Court makes the following findings of facts and conclusions of law:

I. FINDINGS OF FACT

1. Plaintiff 180 Land Co, LLC ("the Developer") filed a Petition for Judicial Review (the "Petition") challenging the Las Vegas City Council's June 21, 2017 decision to deny its four land use applications ("the 35-Acre Applications") to develop its 34.07 acres of R-PD7 zoned property (the "35-Acre Property").

2. On November 21, 2018, this Court entered Findings of Fact and Conclusions of Law on Petition for Judicial Review ("FFCL") that denied the Petition and dismissed the alternative claims for inverse condemnation. The Court concluded that the Las Vegas City Council properly exercised its discretion to deny the 35-Acre Applications and that substantial evidence supported the City Council's June 21, 2017 decision. The Court further concluded that the Developer had no vested rights to have the 35-Acre Applications approved.

3. On February 6, 2019, the Court entered an Order Nunc Pro Tunc that removed those portions of the FFCL that dismissed the inverse condemnation claims. Specifically, the Order *Nunc Pro Tunc* removed FFCL page 23:4-20 and page 24:4-5 but left all findings of fact and all other conclusions of law intact.

4. The Developer seeks a new trial: however, because this matter is a petition for judicial review, no trial occurred.

5. While the Developer has raised new facts, substantially different evidence and new issues of law, none of these new matters warrant rehearing or reconsideration, as discussed infra.

6. The Developer identifies claimed errors in the Court's previous findings of fact in the FFCL and disagrees with the Court's interpretation of law.

7. The Developer has failed to show that the Court's previous findings that the City Council did not abuse its discretion or that sufficient privity exists to bar Plaintiff's Petition under issue preclusion were clearly erroneous.

8. The Developer repeats its arguments that it raised previously in support of its petition for judicial review; namely, that public opposition, the desire for a comprehensive and cohesive development proposal to amend the General Plan's open space designation, and the City

Council's choice not to follow Staff's recommendation purportedly were not ample grounds to affirm the City Council's June 21, 2017 decision.

9. The Developer also reasserts its contentions that: (a) NRS 278.349 gives it vested rights to have the 35-Acre Applications approved; (b) the Queensridge homeowners have no rights in the golf course; (c) no major modification is required; (d) Judge Crockett's Order should be disregarded; and (e) the County Assessor changed the assessed value of the property after the Developer stopped using it as a golf course. The Developer made each of these arguments in the briefs submitted by the Developer in support of the Petition. *See* Pet. Memo. of P&A in support of Second Amended PJR at 5:17-20, 6:3, 7:4-10, 10:4-14:17, 17:8-18:7, 22-42, 26:10-17, 29:10-30:24, n.6, n.37, n.42, n.45, n.79, n.112; Post Hearing Reply Br. at 2:2-4, 2:19-4:3, 7:18-13:14, 13-16, 26:16-29:15, n.79.

10. The Motion also cites to and attaches documents that were not part of the record on review at the time the City Council rendered its June 21, 2017 decision to deny the 35-Acre Applications. *See* Motion at 2:14-3:23, 8:1-21; n.2, n.3, n.18, n.20, n. 21, n.22, citing Exs. 1-6 to the Motion.

11. The transcripts and minutes from the August 2, 2017 and March 21, 2018 City Council meetings on which the Developer relies (Exs. 1 and 6 to the Motion) post-dated the City Council's June 21, 2017 decision to deny the 35-Acre Applications and are, therefore, not part of the record on review.

12. Similarly, the Developer's attacks on Councilmember Seroka are beyond the record on review because he was not on the City Council on June 21, 2017 when the City Council voted to deny the 35-Acre Applications.

13. The Supreme Court's order of affirmance and order denying rehearing related to Judge Smith's orders (Exs. 4 and 5 to the Motion) were entered on October 17, 2018 and November 27, 2018, respectively, after the City Council denied the 35-Acre Applications and, therefore, are not part of the record on review.

14. The Developer previously cited to Judge Smith's underlying orders before the Nevada Supreme Court's actions both before the City Council and before this Court. *See* Pet.'s

P&A at 9:5-10:10, 17:1-2; *see also* 6.29.18 Hrg. Trans. at 109:6-110:13, attached as Exhibit B to City Opp.

15. The Motion relies not only on the aforestated orders, but also the Nevada Supreme Court's decision affirming the orders Judge Smith issued in that case.

16. Judge Smith's orders interpreted the rights of the Queensridge homeowners under the Queensridge CC&Rs, which in the Court's view, have no relevance to the issues in this case or the reasons supporting the Court's denial of the Petition.

17. Judge Smith described the matter before him as the Queensridge homeowners' claims that ***their*** "vested rights" in the CC&Rs were violated. *See* 11.30.16 Smith FFCL at ¶¶2, 7, 29, 108, Ex. 2 to the Motion.

18. Whether the Developer had vested rights to have its development applications approved was not precisely at issue in the matter before Judge Smith. *See id.*

19. Indeed, Judge Smith confirmed that, notwithstanding the zoning designation for the golf course property, the Developer is nonetheless "subject to City of Las Vegas requirements" and that the City is not obligated to make any particular decision on the Developer's applications. 1.31.17 FFCL ¶¶9, 16-17, 71.

20. The Supreme Court's affirmance of Judge Smith's orders has no impact on this Court's denial of the Developer's Petition for Judicial Review.

21. In the Motion, the Developer challenges the Court's application of issue preclusion to Judge Crockett's Order. The Developer reargues its attacks on the substance of Judge Crockett's Order (Motion at 17:21-20:7) and also reargues the application of issue preclusion to Judge Crockett's Order.

22. The Court finds no conflict between Judge Crockett's Order and Judge Smith's orders and therefore rejects the Developer's argument that such orders are "irreconcilable."

23. In its Motion, the Developer argues that this Court's factual findings are incorrect and need amendment. Two findings from the FFCL the Developer argues are incorrect are ¶¶12-13, which the Developer contends are different than Judge Smith's findings. Motion at 20, n.67.

24. As stated supra in finding No. 17, Judge Smith's orders are irrelevant to this Petition for Judicial Review. Thus, the Court finds no cause exists to alter or amend the findings in the FFCL.

II. CONCLUSIONS OF LAW

A. The Court May Not Consider Matters Outside The Record On Review

1. The scope of the Court's review is limited to the record made before the administrative tribunal. *Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982). That scope cannot be expanded with a motion for reconsideration of the Court's denial of a petition for judicial review. *See id.*

2. The Developer's Motion cites to matters that post-dated the City Council's June 21, 2017 Decision and that are otherwise outside the record on review.

3. Because the Court's review is limited to the record before the City Council on June 21, 2017, the Court may not consider the documents that post-date the City Council's June 21, 2017 decision submitted by the Developer. *See Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982).

B. No "Retrial" Is Appropriate For A Petition For Judicial Review

4. Under NRCP 59(a), the Court may grant a new trial on some or all issues based upon certain grounds specifically enumerated in that rule.

5. Where a petition for judicial review is limited to the record and does not involve the Court's consideration of new evidence, a motion for a new trial is not the appropriate mechanism to seek reconsideration of the denial of a petition for judicial review.

6. "Retrial" presupposes that a trial occurred in the first instance, but no trial occurred here or is allowed for a petition for judicial review because the Court's role is limited to reviewing the record below for substantial evidence to support the City Council's decision. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 271, 236 P. 3d 10, 15-16 (2010) (citing *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006)).

7. Moreover, a motion for a new trial under NRCP 59(a), which is the authority cited by the Developer (at 16:22-23), may only be granted based upon specific enumerated grounds

cited in the rule, none of which is invoked by the Developer. As a result, no "retrial" may be granted.

C. The Developer's Repetition of its Previous Arguments is Not Grounds for Reconsideration

8. Pursuant to EDCR 2.24(a), no motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court.

9. "Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000), quoting 12 Moore's Federal Practice §59.30[4] (3d ed. 2000) (discussing the federal corollary of NRCP 59(e)).

10. A Rule 59(e) motion may not be used "to relitigate old matters." 11 Fed. Prac. & Proc. Civ. §2810.1 (3d ed.); *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008).

11. "Rehearings are not granted as a matter of right and are not allowed for the purpose of re-argument, unless there is a reasonable probability that the court may have arrived at an erroneous conclusion." *Geller v. McCowan*, 64 Nev. 106, 108, 178 P.2d 380, 381 (1947) (citations omitted) (discussing petition for rehearing of appellate decision).

12. Because the Developer has not raised sufficient new facts, substantially different evidence or new issues of law for rehearing or reconsideration showing an erroneous conclusion, the Court rejects the Developer's repetitive arguments.

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

13. Although it brings its motion to alter or amend pursuant to NRCP 52(b), that rule is directed only at amendment of factual "findings," not legal conclusions. *See id.* "Rule 52(b) merely provides a method for amplifying and expanding the lower court's findings, and is not intended as a vehicle for securing a re-hearing on the merits." *Matter of Estate of Herrmann*, 100 Nev. 1, 21 n.16, 677 P.2d 594, 607 n.16 (1984).

14. The only findings mentioned in the Motion (at ¶¶12-13) are supported by the portion of the record cited by the Court, namely, the Peccole Ranch Master Development Plan. Judge Smith's findings in support of his interpretation of the Queensridge CC&Rs do not alter the Court's findings.

15. Because the Developer has not identified any findings that should be amended under NRCP 52(b), the Court declines to amend any of its findings.

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

16. The Developer's Motion cannot be granted based upon arguments the Developer could have raised earlier but chose not to.

17. "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters.*, 229 F.3d at 890.

18. "Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing." *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996).

19. Contrary to the Developer's assertion (Motion at 16:1-2), the Court considered all of the arguments in its Petition related to Judge Smith's orders. The Court simply rejected them because Judge Smith's interpretation of the Queensridge CC&R's does not affect the City Council's discretion under NRS Chapter 278 and the City's Unified Development Code to deny the 35-Acre Applications.

F. The Supreme Court's Affirmance of Judge Smith's Orders Has No Impact on this Court's Denial of the Developer's Petition for Judicial Review

20. The fact that the Supreme Court affirmed Judge Smith's orders is not grounds for reconsideration because Judge Smith's orders interpreted the Queensridge homeowners' rights under the CC&R's, not the City Council's discretion to deny re-development applications.

21. As a result, the Developer's assertion (at 3:4-5) that Judge Smith's Orders are "irreconcilable" with Judge Crockett's Decision does not accurately reflect the scope of the matter before Judge Smith.

22. This Court correctly concluded that the Developer does not have vested rights to have the 35-Acre Applications approved, and neither Judge Smith's orders, nor the Supreme Court's orders of affirmance, alter that conclusion.

G. The Court Correctly Determined That Judge Crockett's Order Has Preclusive Effect Here

23. The Developer has failed to show that the Court's conclusion that sufficient privity exists to bar the Developer's petition under the doctrine of issue preclusion was clearly erroneous.

24. The Court correctly determined that Judge Crockett's Order has preclusive effect here and, as a result, the Developer must obtain the City Council's approval of a major modification to the Peccole Ranch Master Developer Plan before it may develop the 35-Acre Property.

25. The Court's conclusion that the City Council's decision was supported by substantial evidence was independent of its determination that Judge Crockett's Order has preclusive effect here. Judge Crockett's Order was only a "further" (i.e., not exclusive) reason to deny the Developer's petition for judicial review.

H. The Developer Does Not Identify Any Clear Error That Warrants Reconsideration

26. The sole legal grounds for reconsideration asserted by the Developer is purported "clear error."

27. The only legal conclusions in the FFCL with which the Developer takes issue are the Court's determinations that public opposition constitutes substantial evidence for denial of the 35-Acre Applications and that the City Council properly exercised its discretion to insist on comprehensive and orderly development for the entirety of the property of which the 35-Acre Property was a part. Motion at 20:8-24:7. In making these arguments, however, the Developer never contends that the Court incorrectly interpreted the law cited in the FFCL. *See id.* It therefore

cannot satisfy its burden of showing "clear error." The Developer has failed to show that the Court's previous conclusion that the City Council did not abuse its discretion was clearly erroneous.

28. The Court's analysis of these issues was correct. The *Stratosphere* and *C.A.G.* cases hold that public opposition from neighbors, even if rebutted by a developer, constitutes substantial evidence to support denial of development applications. *See Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760; *C.A.G.*, 98 Nev. at 500-01, 654 P.2d at 533. The Developer's Motion is silent as to this point.

29. Citing NRS 278.349(3)(e), the Developer contests the Court's reliance on *Nova Horizon* and *Cold Springs* that zoning must substantially conform to the master plan and that the master plan presumptively governs a municipality's land use decisions. *Nova Horizon*, 105 Nev. at 97, 769 P.2d at 724; *Citizens for Cold Springs*, 126 Nev. at 266, 236 P.3d at 12. The Developer's discussion fails to discredit the *Nova Horizon* decision given NRS 278.349(3)(a) and does not address the *Cold Springs* case.

30. Having failed to demonstrate any clear error in the Court's decision, the Developer fails to satisfy its burden for reconsideration.

31. Nothing presented in the Motion alters the Court's conclusion that the City Council properly exercised its discretion to deny the 35-Acre Applications and the June 21, 2017 decision was supported by substantial evidence. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 271, 236 P.3d 10, 15-16 (2010) (*citing Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006)); *Cty. of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998), *superseded by statute on other grounds*; *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004).

32. As the Court correctly concluded, its job was to evaluate whether substantial evidence supports the City Council's decision, not whether there is substantial evidence to support a contrary decision. *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 836 n.36, 138 P.3d 486, 497 (2006).

33. This is because the administrative body alone, not a reviewing court, is entitled to weigh the evidence for and against a project. *Liquor & Gaming Licensing Bd.*, 106 Nev. at 99, 787 P.2d at 784.

I. The Developer Failed to Advance Any Argument to Justify a Stay

34. The Motion lacks any argument or citation whatsoever related to its request for a stay.

35. "A party filing a motion must also serve and file with it a memorandum of points and authorities in support of each ground thereof. The absence of such memorandum may be construed as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds not so supported." EDCR 2.20(c) (emphasis added).

36. Because the Developer provides no points and authorities in support of its motion for stay, the motion for stay must be denied.

J. Effect On The Developer's Inverse Condemnation Claims

37. The Developer's petition for judicial review and its inverse condemnation claims involve different evidentiary standards.

38. Relative to the petition for judicial review, the Developer had to demonstrate that the City Council abused its discretion in that the June 21, 2017 decision was not supported by substantial evidence; whereas, relative to its inverse condemnation claims, the Developer must prove its claims by a preponderance of the evidence.

39. Because of these different evidentiary standards, the Court concludes that its conclusions of law regarding the petition for judicial review do not control its consideration of the Developer's inverse condemnation claims.

ORDER

Accordingly, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Motion For A New Trial Pursuant To NRCP 59(e) And Motion To Alter Or Amend Pursuant To NRCP 52(b) And/Or Reconsider The Findings Of Fact And Conclusions Of Law And Motion To Stay Pending Nevada Supreme Court Directives is DENIED.

IT IS FURTHER ORDERED THAT the Court's conclusions of law regarding the petition for judicial review do not control its consideration of the Developer's inverse condemnation claims, which will be subject to further action by the Court.

DATED: April 6th, 2019.

TIMOTHY C. WILLIAMS
District Court Judge

CB + TCW

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Petitioners, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Respondents.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **REPLY IN SUPPORT OF CITY OF LAS VEGAS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF WRIT PETITION TO THE NEVADA SUPREME COURT ON ORDER SHORTENING TIME** **AND** **OPPOSITION TO COUNTERMOTION FOR *NUNC PRO TUNC* ORDER** OST Hearing Date: May 15, 2019 OST Hearing Time: 9:00 a.m.

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I. INTRODUCTION

Most notable about the Developer's Opposition to the Motion to Stay is not what it says, but what it ***does not*** say. The Developer fails to address all of the criteria for a stay under NRAP 8(a). Instead, the Developer regurgitates the same arguments the Court has already rejected multiple times, most recently in its Findings of Fact and Conclusions of Law entered on May 7, 2019. Because (i) the object of the City's writ petition will be defeated absent a stay; (ii) the City will suffer serious and irreparable injury if the stay is denied; (iii) the Developer will suffer no injury should the stay be granted; and (iv) the City is likely to prevail on the merits, the City respectfully requests that the Motion to Stay be granted. Because the Developer's countermotion for *nunc pro tunc* order is nothing but a rehash of its now-denied motion for retrial of the Court's denial of its petition for judicial review ("PJR"), it should likewise be denied.

II. LEGAL ARGUMENT – REPLY TO MOTION TO STAY

A. By Failing to Address the City's Arguments, the Developer Acknowledges They Are Meritorious and Warrant a Stay

In its Motion to Stay, the City argued that the purpose of its Writ Petition would be defeated and the City would be irreparably harmed in the absence of a stay. The City also argued that a stay would not prejudice the Developer. In its Opposition, the Developer did not even address these arguments. As a result, the Developer concedes that the City's position on three out of four criteria is meritorious. *See* EDCR 2.20(e).

B. The Developer's Arguments Regarding the Merits of a Writ Petition Do Not Defeat the City's Request for a Stay

1. There is No Factual Dispute Regarding the Principles of Law at Issue in the City's Motion for Judgment on the Pleadings

The City's motion for judgment on the pleadings was based solely on issues of law for which no facts are in dispute. In denying the Developer's petition for judicial review, the Court concluded as a matter of law that: (1) the Developer had no vested right to have the Applications approved; and (2) the Developer must first give the City Council the opportunity to consider an application for a major modification to the Peccole Ranch Master Development

Plan ("Major Mod Application") before it can redevelop the golf course property. The Court reiterated these conclusions of law in its May 7, 2019 Findings of Fact and Conclusions of Law Regarding Plaintiff's Motion For A New Trial, Motion To Alter Or Amend And/Or Reconsider The Findings Of Fact And Conclusions Of Law, And Motion To Stay Pending Nevada Supreme Court Directives ("May 7 FFCL"). These conclusions of law require dismissal of the Developer's inverse condemnation claims, as a matter of law, and no factual dispute exists as to these dispositive points.

To advance its factual dispute argument, the Developer cites to a portion of the March 22, 2019 transcript. However, as the Court will recall, the motions being heard at that hearing were both the City's motion for judgment on the pleadings and the Developer's countermotion for judicial determination of liability (i.e., motion for summary judgment). The Developer's opposition to the instant motion conflates the arguments on those two motions. In support of its summary judgment countermotion, the Developer attached reams of exhibits and asserted that judgment should be entered in its favor. The City's argument in opposition to that motion was that there was a sufficient factual dispute ***as to the Developer's countermotion*** to prevent summary judgment against the City. With regard to the purely legal issues presented in the City's motion for judgment on the pleadings, the City was clear (and still maintains) that no factual disputes relevant to that motion exist.

2. The City's Writ Petition Will Satisfy the Requirements for Writ Relief

For multiple reasons, the legal principles at issue here are an appropriate subject of writ relief from the Supreme Court. First, under the binding authority of *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004), and similar precedent, because the City Council had discretion to deny the 35-Acre Applications, the Developer has no vested right to have the 35-Acre Applications approved. *Bowers v. Whitman*, 671 F.3d 905, 913 (9th Cir. 2012); *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949). Absent vested rights, there can be no regulatory taking, as a matter of law. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994).

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Even though, when denying the Developer's PJR, the Court concluded that the Developer lacks vested rights to redevelop the golf course, the Court declined to dismiss the inverse condemnation claims. The Court recently reiterated that conclusion in the May 7 FFCL, stating, "[t]his Court correctly concluded that the Developer does not have vested rights to have the 35-Acre Applications approved, and neither Judge Smith's orders, nor the Supreme Court's order of affirmance, alter that conclusion." *See* May 7 FFCL ¶22.

The Developer's argument that the law of what constitutes a vested right changes depending on the type of proceeding in which the alleged vested right is asserted is nonsensical. To make that incorrect point, the Developer relies exclusively on takings cases that involved physical invasions of land, rather than discretionary land use decisions by a government agency that are at issue here. *See* Developer's Opposition at 10, *citing McCarran v. Sisolak*, 122 Nev. 645, 137 P.3d 1110, 1119 (2006), etc. The net result of the Court's denial of the City's motion for judgment on the pleadings is that the City – and, if the Court's determination were accepted as Nevada law, every other land use authority in the State – is now exposed to takings liability for decisions that are squarely within governmental discretion, in contravention of *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60. That constitutes a "potentially significant, recurring question of law" for which the Supreme Court considers writ relief appropriate. *Buckwalter v. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010).

Second, a district court acting without subject matter jurisdiction is precisely the circumstances under which the Supreme Court will issue a writ of prohibition. NRS 34.320; *see Nevada Power Co. v. Eighth Jud. Dist. Ct.*, 120 Nev. 948, 954, 102 P.3d 578, 582-83 (2004). The Court has repeatedly stated that the Developer must obtain approval of major modification before the City Council could approve the Applications at issue here, most recently in its May 7 FFCL. The Developer's failure and refusal to submit such a major modification application divests the Court of subject matter jurisdiction over the inverse condemnation claims because they are not ripe for review. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). The Nevada Supreme Court has not hesitated to issue a writ of prohibition when a district court acts without jurisdiction. *See Gaming Control Bd. v.*

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Breen, 99 Nev. 320, 324, 661 P.2d 1309, 1311 (1983); *Gray Line Tours v. Eighth Jud. Dist. Ct.*, 99 Nev. 124, 126, 659 P.2d 304, 305 (1983).

The Court explained the inconsistencies between its denial of the City's motion for judgment on the pleadings and its order denying the Developer's PJR based on the different evidentiary standard of proof between a petition for judicial review and inverse condemnation claims. The City submits that different evidentiary standards do not allow the Court to disregard its earlier legal conclusions. The standard of proof addresses a litigant's duty to convince the fact finder to view the facts in a way that favors that litigant. It does not alter the applicable substantive law because the law stays the same, no matter what the standard of proof is.

Finally, the Court granted the Developer leave to amend its complaint to add claims that the Developer is litigating in other pending cases. This amounts to impermissible claim splitting. *See Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977). The Developer is attempting to shop its claims to the most receptive judge, thereby unfairly requiring the City to defend duplicative claims, exposing the City to potentially conflicting results and undermining the integrity of the judiciary.

Because these are all important legal questions, of which the Supreme Court's review "would promote sound judicial economy and administration," the City has a high likelihood of prevailing on the merits of its writ petition. *Int'l Game Tech. v. Sec. Jud. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

Because the Developer's Opposition fails to address these issues, it effectively concedes them pursuant to EDCR 2.20(e). As such, the City's request for a stay should be granted.

III. LEGAL ARGUMENT – OPPOSITION TO COUNTERMOTION FOR NUNC PRO TUNC ORDER

Because the Developer's countermotion for a *nunc pro tunc* order is just another meritless motion for reconsideration of the Court's denial of the PJR, and because no grounds exist for a *nunc pro tunc* order, the countermotion should be denied. The purpose of a *nunc pro tunc* order is for a court to "correct mere clerical errors or omissions" so that "the record

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speak[s] the truth as to what was actually determined or done or intended to be determined or done by the court." *Finley v. Finley*, 65 Nev. 113, 119, 189 P.2d 334, 337 (1948), *overruled on other grounds by Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964). A court "may not use a *nunc pro tunc* order to change a 'judgment actually rendered to one which the court neither rendered nor intended to render.'" *McClintock v. McClintock*, 122 Nev. 842, 845, 138 P.3d 513, 515 (2006).

Through its May 7 FFCL denying the Developer's motion for new trial, the Court has been abundantly clear that it stands firm on its order denying the Developer's PJR. The Court correctly decided the PJR, and nothing presented in the Developer's latest attack casts any doubt on the correctness of the Court's decision. The countermotion for *nunc pro tunc* order should likewise be denied.

IV. CONCLUSION

Because the City has satisfied the requirements of a stay, it respectfully requests an order staying all further proceedings in this action pending the Supreme Court's resolution of the City's Writ Petition. The City also requests that the Developer's countermotion be denied as duplicative and meritless.

Respectfully submitted this 10th day of May 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 10th day of May, 2019, a true and correct copy of the foregoing **REPLY IN SUPPORT OF CITY OF LAS VEGAS' MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF THE CITY'S WRIT PETITION TO THE NEVADA SUPREME COURT ON ORDER SHORTENING TIME AND OPPOSITION TO COUNTERMOTION FOR *NUNC PRO TUNC* ORDER** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

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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, CITY OF LAS VEGAS, a political subdivision of the State of Nevada, et al, Defendants.	Case No.: A-17-758528-J Dept. No. XVI LANDOWNERS' REPLY RE: COUNTERMOTION FOR *NUNC PRO TUNC* ORDER OST Hearing Date: May 15, 2019 OST Hearing Time: 9:00 AM

(Oral Arguments Requested)

MEMORANDUM OF POINTS AND AUTHORITIES RE: COUNTERMOTION FOR *NUNC PRO TUNC* ORDER

Both the City and Intervenors represent to this Court that a nunc pro tunc order is limited to correcting mere clerical errors or omissions: "[t]he purpose of a *nunc pro tunc* order is for a court to 'correct mere clerical errors or omissions' so that 'the record speak[s] the truth as to what was actually determined or done or intended to be determined or done by the Court.'" City Opp:5:27-6:3. However, this limitation on nunc pro tunc orders appears nowhere in any Nevada case; nunc pro tunc orders have never been limited to "correct mere clerical error or omissions" as stated by the City and Intervenors.

Instead, the nunc pro tunc test is much broader and allows amendment to achieve the "intent" of the Court. In Mack v. Estate of Mack, 125 Nev. 80, 93 (2009), the Nevada Supreme Court held "[t]he purpose of an order nunc pro tunc is to 'make the record speak the truth concerning acts done.'" And, in Finley v. Finley, 65 Nev. 113, 119 (1948)(*overturned on other grounds*), the Court held "that the test of whether a judgment may be amended nunc pro tunc is whether the change will make the record speak the truth as to what was actually determined or done or intended to be determined or done by the court or whether it will alter such action or intended action." Simply put, this Court has the inherent authority to amend its orders nunc pro tunc at any time to meet this court's intent.

As explained in the Landowners' Countermotion for Nunc Pro Tunc Order, the City is repeatedly attempting to apply superfluous language from the Findings of Fact and Conclusions of Law (FFCL) from the Petition for Judicial Review hearing in this inverse condemnation proceeding, despite repeated explanations by this Court that this was not the Court's intent. Therefore, to further the intent of this Court, the language the Landowners have highlighted in the FFCL should be removed. *See Exhibit 2* to Landowners' Countermotion for Nunc Pro Tunc Order. For consistency purposes, it is requested that this Court also remove two small parts of the Findings of Fact and

/ / /

Conclusions of Law filed on May 7, 2019. *See Exhibit 4, Findings of Fact and Conclusions of Law, filed May 7, 2019, with language for removal highlighted.*

RESPECTFULLY SUBMITTED this 14th day of May, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 14th day of May, 2019, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the foregoing document(s): **LANDOWNERS' REPLY RE: COUNTERMOTION FOR *NUNC PRO TUNC ORDER*** 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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Exhibit 4

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A-17-758528-J

DEPT. NO.: XVI

~~[PROPOSED]~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING PLAINTIFF'S MOTION FOR A NEW TRIAL, MOTION TO ALTER OR AMEND AND/OR RECONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND MOTION TO STAY PENDING NEVADA SUPREME COURT DIRECTIVES

JACK B. BINION, an individual; DUNCAN R. and IRENE LEE, individuals and Trustees of the LEE FAMILY TRUST; FRANK A. SCHRECK, an individual; TURNER INVESTMENTS, LTD., a Nevada Limited Liability Company; ROGER P. and CAROLYN G. WAGNER, individuals and Trustees of the WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC.; JASON AND SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE AND KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE KENNETH J. SULLIVAN FAMILY TRUST, AND DR. GREGORY BIGLER AND SALLY BIGLER,

Intervenors.

Currently before the Court is Plaintiff 180 Land Co, LLC's Motion For A New Trial Pursuant To NRCP 59(e) And Motion To Alter Or Amend Pursuant To NRCP 52(b) And/Or Reconsider The Findings Of Fact And Conclusions Of Law And Motion To Stay Pending Nevada Supreme Court Directives ("the Motion") filed on December 13, 2018. The alternative relief sought by the Developer is a stay of the proceedings until the Nevada Supreme Court decides an appeal from the judgment entered March 5, 2018 by the Honorable James Crockett in Case No. A-17-752344-J ("Judge Crockett's Order"). The City filed an opposition, to which the Intervenors joined, and the Plaintiff filed a reply. The Court held oral argument on the Motion on January 22, 2019.

Having considered the record on file, the written and oral arguments presented, and being fully informed in the premises, the Court makes the following findings of facts and conclusions of law:

I. FINDINGS OF FACT

1. Plaintiff 180 Land Co, LLC ("the Developer") filed a Petition for Judicial Review (the "Petition") challenging the Las Vegas City Council's June 21, 2017 decision to deny its four land use applications ("the 35-Acre Applications") to develop its 34.07 acres of R-PD7 zoned property (the "35-Acre Property").

2. On November 21, 2018, this Court entered Findings of Fact and Conclusions of Law on Petition for Judicial Review ("FFCL") that denied the Petition and dismissed the alternative claims for inverse condemnation. The Court concluded that the Las Vegas City Council properly exercised its discretion to deny the 35-Acre Applications and that substantial evidence supported the City Council's June 21, 2017 decision. The Court further concluded that the Developer had no vested rights to have the 35-Acre Applications approved.

3. On February 6, 2019, the Court entered an Order Nunc Pro Tunc that removed those portions of the FFCL that dismissed the inverse condemnation claims. Specifically, the Order *Nunc Pro Tunc* removed FFCL page 23:4-20 and page 24:4-5 but left all findings of fact and all other conclusions of law intact.

4. The Developer seeks a new trial: however, because this matter is a petition for judicial review, no trial occurred.

5. While the Developer has raised new facts, substantially different evidence and new issues of law, none of these new matters warrant rehearing or reconsideration, as discussed infra.

6. The Developer identifies claimed errors in the Court's previous findings of fact in the FFCL and disagrees with the Court's interpretation of law.

7. The Developer has failed to show that the Court's previous findings that the City Council did not abuse its discretion or that sufficient privity exists to bar Plaintiff's Petition under issue preclusion were clearly erroneous.

8. The Developer repeats its arguments that it raised previously in support of its petition for judicial review; namely, that public opposition, the desire for a comprehensive and cohesive development proposal to amend the General Plan's open space designation, and the City

Council's choice not to follow Staff's recommendation purportedly were not ample grounds to affirm the City Council's June 21, 2017 decision.

9. The Developer also reasserts its contentions that: (a) NRS 278.349 gives it vested rights to have the 35-Acre Applications approved; (b) the Queensridge homeowners have no rights in the golf course; (c) no major modification is required; (d) Judge Crockett's Order should be disregarded; and (e) the County Assessor changed the assessed value of the property after the Developer stopped using it as a golf course. The Developer made each of these arguments in the briefs submitted by the Developer in support of the Petition. *See* Pet. Memo. of P&A in support of Second Amended PJR at 5:17-20, 6:3, 7:4-10, 10:4-14:17, 17:8-18:7, 22-42, 26:10-17, 29:10-30:24, n.6, n.37, n.42, n.45, n.79, n.112; Post Hearing Reply Br. at 2:2-4, 2:19-4:3, 7:18-13:14, 13-16, 26:16-29:15, n.79.

10. The Motion also cites to and attaches documents that were not part of the record on review at the time the City Council rendered its June 21, 2017 decision to deny the 35-Acre Applications. *See* Motion at 2:14-3:23, 8:1-21; n.2, n.3, n.18, n.20, n. 21, n.22, citing Exs. 1-6 to the Motion.

11. The transcripts and minutes from the August 2, 2017 and March 21, 2018 City Council meetings on which the Developer relies (Exs. 1 and 6 to the Motion) post-dated the City Council's June 21, 2017 decision to deny the 35-Acre Applications and are, therefore, not part of the record on review.

12. Similarly, the Developer's attacks on Councilmember Seroka are beyond the record on review because he was not on the City Council on June 21, 2017 when the City Council voted to deny the 35-Acre Applications.

13. The Supreme Court's order of affirmance and order denying rehearing related to Judge Smith's orders (Exs. 4 and 5 to the Motion) were entered on October 17, 2018 and November 27, 2018, respectively, after the City Council denied the 35-Acre Applications and, therefore, are not part of the record on review.

14. The Developer previously cited to Judge Smith's underlying orders before the Nevada Supreme Court's actions both before the City Council and before this Court. *See* Pet.'s

P&A at 9:5-10:10, 17:1-2; *see also* 6.29.18 Hrg. Trans. at 109:6-110:13, attached as Exhibit B to City Opp.

15. The Motion relies not only on the aforestated orders, but also the Nevada Supreme Court's decision affirming the orders Judge Smith issued in that case.

16. Judge Smith's orders interpreted the rights of the Queensridge homeowners under the Queensridge CC&Rs, which in the Court's view, have no relevance to the issues in this case or the reasons supporting the Court's denial of the Petition.

17. Judge Smith described the matter before him as the Queensridge homeowners' claims that ***their*** "vested rights" in the CC&Rs were violated. *See* 11.30.16 Smith FFCL at ¶¶2, 7, 29, 108, Ex. 2 to the Motion.

18. Whether the Developer had vested rights to have its development applications approved was not precisely at issue in the matter before Judge Smith. *See id.*

19. Indeed, Judge Smith confirmed that, notwithstanding the zoning designation for the golf course property, the Developer is nonetheless "subject to City of Las Vegas requirements" and that the City is not obligated to make any particular decision on the Developer's applications. 1.31.17 FFCL ¶¶9, 16-17, 71.

20. The Supreme Court's affirmance of Judge Smith's orders has no impact on this Court's denial of the Developer's Petition for Judicial Review.

21. In the Motion, the Developer challenges the Court's application of issue preclusion to Judge Crockett's Order. The Developer reargues its attacks on the substance of Judge Crockett's Order (Motion at 17:21-20:7) and also reargues the application of issue preclusion to Judge Crockett's Order.

22. The Court finds no conflict between Judge Crockett's Order and Judge Smith's orders and therefore rejects the Developer's argument that such orders are "irreconcilable."

23. In its Motion, the Developer argues that this Court's factual findings are incorrect and need amendment. Two findings from the FFCL the Developer argues are incorrect are ¶¶12-13, which the Developer contends are different than Judge Smith's findings. Motion at 20, n.67.

24. As stated supra in finding No. 17, Judge Smith's orders are irrelevant to this Petition for Judicial Review. Thus, the Court finds no cause exists to alter or amend the findings in the FFCL.

II. CONCLUSIONS OF LAW

A. The Court May Not Consider Matters Outside The Record On Review

1. The scope of the Court's review is limited to the record made before the administrative tribunal. *Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982). That scope cannot be expanded with a motion for reconsideration of the Court's denial of a petition for judicial review. *See id.*

2. The Developer's Motion cites to matters that post-dated the City Council's June 21, 2017 Decision and that are otherwise outside the record on review.

3. Because the Court's review is limited to the record before the City Council on June 21, 2017, the Court may not consider the documents that post-date the City Council's June 21, 2017 decision submitted by the Developer. *See Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982).

B. No "Retrial" Is Appropriate For A Petition For Judicial Review

4. Under NRCP 59(a), the Court may grant a new trial on some or all issues based upon certain grounds specifically enumerated in that rule.

5. Where a petition for judicial review is limited to the record and does not involve the Court's consideration of new evidence, a motion for a new trial is not the appropriate mechanism to seek reconsideration of the denial of a petition for judicial review.

6. "Retrial" presupposes that a trial occurred in the first instance, but no trial occurred here or is allowed for a petition for judicial review because the Court's role is limited to reviewing the record below for substantial evidence to support the City Council's decision. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 271, 236 P. 3d 10, 15-16 (2010) (citing *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006)).

7. Moreover, a motion for a new trial under NRCP 59(a), which is the authority cited by the Developer (at 16:22-23), may only be granted based upon specific enumerated grounds

cited in the rule, none of which is invoked by the Developer. As a result, no "retrial" may be granted.

C. The Developer's Repetition of its Previous Arguments is Not Grounds for Reconsideration

8. Pursuant to EDCR 2.24(a), no motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court.

9. "Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000), quoting 12 Moore's Federal Practice §59.30[4] (3d ed. 2000) (discussing the federal corollary of NRCP 59(e)).

10. A Rule 59(e) motion may not be used "to relitigate old matters." 11 Fed. Prac. & Proc. Civ. §2810.1 (3d ed.); *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008).

11. "Rehearings are not granted as a matter of right and are not allowed for the purpose of re-argument, unless there is a reasonable probability that the court may have arrived at an erroneous conclusion." *Geller v. McCowan*, 64 Nev. 106, 108, 178 P.2d 380, 381 (1947) (citations omitted) (discussing petition for rehearing of appellate decision).

12. Because the Developer has not raised sufficient new facts, substantially different evidence or new issues of law for rehearing or reconsideration showing an erroneous conclusion, the Court rejects the Developer's repetitive arguments.

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

13. Although it brings its motion to alter or amend pursuant to NRCP 52(b), that rule is directed only at amendment of factual "findings," not legal conclusions. *See id.* "Rule 52(b) merely provides a method for amplifying and expanding the lower court's findings, and is not intended as a vehicle for securing a re-hearing on the merits." *Matter of Estate of Herrmann*, 100 Nev. 1, 21 n.16, 677 P.2d 594, 607 n.16 (1984).

14. The only findings mentioned in the Motion (at ¶¶12-13) are supported by the portion of the record cited by the Court, namely, the Peccole Ranch Master Development Plan. Judge Smith's findings in support of his interpretation of the Queensridge CC&Rs do not alter the Court's findings.

15. Because the Developer has not identified any findings that should be amended under NRCP 52(b), the Court declines to amend any of its findings.

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

16. The Developer's Motion cannot be granted based upon arguments the Developer could have raised earlier but chose not to.

17. "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters.*, 229 F.3d at 890.

18. "Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing." *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996).

19. Contrary to the Developer's assertion (Motion at 16:1-2), the Court considered all of the arguments in its Petition related to Judge Smith's orders. The Court simply rejected them because Judge Smith's interpretation of the Queensridge CC&R's does not affect the City Council's discretion under NRS Chapter 278 and the City's Unified Development Code to deny the 35-Acre Applications.

F. The Supreme Court's Affirmance of Judge Smith's Orders Has No Impact on this Court's Denial of the Developer's Petition for Judicial Review

20. The fact that the Supreme Court affirmed Judge Smith's orders is not grounds for reconsideration because Judge Smith's orders interpreted the Queensridge homeowners' rights under the CC&R's, not the City Council's discretion to deny re-development applications.

21. As a result, the Developer's assertion (at 3:4-5) that Judge Smith's Orders are "irreconcilable" with Judge Crockett's Decision does not accurately reflect the scope of the matter before Judge Smith.

22. This Court correctly concluded that the Developer does not have vested rights to have the 35-Acre Applications approved, and neither Judge Smith's orders, nor the Supreme Court's orders of affirmance, alter that conclusion.

G. The Court Correctly Determined That Judge Crockett's Order Has Preclusive Effect Here

23. The Developer has failed to show that the Court's conclusion that sufficient privity exists to bar the Developer's petition under the doctrine of issue preclusion was clearly erroneous.

24. The Court correctly determined that Judge Crockett's Order has preclusive effect here and, as a result, the Developer must obtain the City Council's approval of a major modification to the Peccole Ranch Master Developer Plan before it may develop the 35-Acre Property.

25. The Court's conclusion that the City Council's decision was supported by substantial evidence was independent of its determination that Judge Crockett's Order has preclusive effect here. Judge Crockett's Order was only a "further" (i.e., not exclusive) reason to deny the Developer's petition for judicial review.

H. The Developer Does Not Identify Any Clear Error That Warrants Reconsideration

26. The sole legal grounds for reconsideration asserted by the Developer is purported "clear error."

27. The only legal conclusions in the FFCL with which the Developer takes issue are the Court's determinations that public opposition constitutes substantial evidence for denial of the 35-Acre Applications and that the City Council properly exercised its discretion to insist on comprehensive and orderly development for the entirety of the property of which the 35-Acre Property was a part. Motion at 20:8-24:7. In making these arguments, however, the Developer never contends that the Court incorrectly interpreted the law cited in the FFCL. *See id.* It therefore

cannot satisfy its burden of showing "clear error." The Developer has failed to show that the Court's previous conclusion that the City Council did not abuse its discretion was clearly erroneous.

28. The Court's analysis of these issues was correct. The *Stratosphere* and *C.A.G.* cases hold that public opposition from neighbors, even if rebutted by a developer, constitutes substantial evidence to support denial of development applications. *See Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760; *C.A.G.*, 98 Nev. at 500-01, 654 P.2d at 533. The Developer's Motion is silent as to this point.

29. Citing NRS 278.349(3)(e), the Developer contests the Court's reliance on *Nova Horizon* and *Cold Springs* that zoning must substantially conform to the master plan and that the master plan presumptively governs a municipality's land use decisions. *Nova Horizon*, 105 Nev. at 97, 769 P.2d at 724; *Citizens for Cold Springs*, 126 Nev. at 266, 236 P.3d at 12. The Developer's discussion fails to discredit the *Nova Horizon* decision given NRS 278.349(3)(a) and does not address the *Cold Springs* case.

30. Having failed to demonstrate any clear error in the Court's decision, the Developer fails to satisfy its burden for reconsideration.

31. Nothing presented in the Motion alters the Court's conclusion that the City Council properly exercised its discretion to deny the 35-Acre Applications and the June 21, 2017 decision was supported by substantial evidence. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 271, 236 P.3d 10, 15-16 (2010) (*citing Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006)); *Cty. of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998), *superseded by statute on other grounds*; *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004).

32. As the Court correctly concluded, its job was to evaluate whether substantial evidence supports the City Council's decision, not whether there is substantial evidence to support a contrary decision. *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 836 n.36, 138 P.3d 486, 497 (2006).

33. This is because the administrative body alone, not a reviewing court, is entitled to weigh the evidence for and against a project. *Liquor & Gaming Licensing Bd.*, 106 Nev. at 99, 787 P.2d at 784.

I. The Developer Failed to Advance Any Argument to Justify a Stay

34. The Motion lacks any argument or citation whatsoever related to its request for a stay.

35. "A party filing a motion must also serve and file with it a memorandum of points and authorities in support of each ground thereof. The absence of such memorandum may be construed as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds not so supported." EDCR 2.20(c) (emphasis added).

36. Because the Developer provides no points and authorities in support of its motion for stay, the motion for stay must be denied.

J. Effect On The Developer's Inverse Condemnation Claims

37. The Developer's petition for judicial review and its inverse condemnation claims involve different evidentiary standards.

38. Relative to the petition for judicial review, the Developer had to demonstrate that the City Council abused its discretion in that the June 21, 2017 decision was not supported by substantial evidence; whereas, relative to its inverse condemnation claims, the Developer must prove its claims by a preponderance of the evidence.

39. Because of these different evidentiary standards, the Court concludes that its conclusions of law regarding the petition for judicial review do not control its consideration of the Developer's inverse condemnation claims.

ORDER

Accordingly, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Motion For A New Trial Pursuant To NRCP 59(e) And Motion To Alter Or Amend Pursuant To NRCP 52(b) And/Or Reconsider The Findings Of Fact And Conclusions Of Law And Motion To Stay Pending Nevada Supreme Court Directives is DENIED.

IT IS FURTHER ORDERED THAT the Court's conclusions of law regarding the petition for judicial review do not control its consideration of the Developer's inverse condemnation claims, which will be subject to further action by the Court.

DATED: April 6th, 2019.

TIMOTHY C. WILLIAMS
District Court Judge

CB + TCW

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