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. 23

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability company, FORE STARS, LTD., DOE INDIVIDUALS, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF** **VOLUME 2**

Plaintiff Landowners hereby submit this Appendix of Exhibits in Support of Their Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief.

Exhibit No.	Description	Vol. No.	Bates No.
1	Findings of Fact and Conclusions of Law Regarding Plaintiff Landowners' Motion to Determine "Property Interest"	1	000001-000005
2	Map 1 of 250 Acre Land	1	000006

3	Map 2 of 250 Acre Land	1	000007
4	Notice of Related Cases	1	000008-000012
5	April 15, 1981 City Commission Minutes	1	000013-000050
6	December 20, 1984 City of Las Vegas Planning Commission hearing on General Plan Update	1	000051-000151
7	Findings of Fact and Conclusions of Law Regarding Plaintiffs' Motion for New Trial, Motion to Alter or Amend and/or Reconsider the Findings of Fact and Conclusions of Law, Motion to Stay Pending Nevada Supreme Court Directives	2	000152-000164
8	ORDER GRANTING the Landowners' Countermotion to Amend/Supplement the Pleadings; DENYING the Landowners' Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims	2	000165-000188
9	City's Opposition to Motion to Determine "Property Interest"	2	000189-000216
10	City of Las Vegas' Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims	2	000217-000230
11	Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition	2	000231-000282
12	Supreme Court Order Denying Petition for Writ of Mandamus or Prohibition	2	000283-000284
13	Supreme Court Order Denying Rehearing	2	000285-000286
14	Supreme Court Order Denying En Banc Reconsideration	2	000287-000288
15	Motion to Dismiss Complaint for Declaratory and Injunctive Relief and in Inverse Condemnation, *Fore Stars, Ltd. Seventy Acres, LLC v. City of Las Vegas, et al.*, Case No. A-18-773268-C	2	000289-000308
16	City's Sur Reply Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint for Declaratory and Injunctive Relief and Inverse Condemnation, *Fore Stars, Ltd. Seventy Acres, LLC v. City of Las Vegas, et al.*, Case No. A-18-773268-C	2	000309-000319

17	City's Proposed Findings of Fact and Conclusion of Law Granting City's Motion to Dismiss Complaint, *Fore Stars, Ltd. Seventy Acres, LLC v. City of Las Vegas, et al.*, Case No. A-18-773268-C	2	000320-000340
18	Order Denying City of Las Vegas' Motion to Dismiss, *Fore Stars, Ltd. Seventy Acres, LLC v. City of Las Vegas, et al.*, Case No. A-18-773268-C	2	000341-000350
19	City of Las Vegas' Motion to Dismiss, *180 Land Co., LLC v. City of Las Vegas, et al.*, Case No. A-18-775804-J	2	000351-000378
20	2.15.19 Minute Order re City's Motion to Dismiss	2	000379
21	Respondents' Answer Brief, Supreme Court Case No. 75481	2	000380-000449
22	Order Granting Plaintiffs' Petition for Judicial Review, *Jack B. Binion, et al vs. The City of Las Vegas,* Case No. A-17-752344-J	2	000450-000463
23	Supreme Court Order of Reversal	2	000464-000470
24	Supreme Court Order Denying Rehearing	2	000471-000472
25	Supreme Court Order Denying En Banc Reconsideration	2	000473-000475
26	Findings of Fact, Conclusions of Law and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz's NRCP 12(b)(5) Motion to Dismiss Plaintiffs' Amended Complaint	2	000476-000500
27	Notice of Entry of Findings of Fact, Conclusions of Law, Final Order of Judgment, *Robert Peccole, et al v. Peccole Nevada Corporation, et al.,* Case No. A-16-739654-C	2	000501-000545
28	Supreme Court Order of Affirmance	2	000546-000550
29	Supreme Court Order Denying Rehearing	2	000551-000553
30	November 1, 2016 Badlands Homeowners Meeting Transcript	2	000554-000562
31	June 13, 2017 Planning Commission Meeting Verbatim Transcript	2	000563-000566
32	Notice of Entry of Findings of Fact and Conclusions of Law Granting City of Las Vegas' Motion for Summary Judgment, *180 Land Co. LLC, et al v. City of Las Vegas,* Case No. A-18-780184-C	3	000567-000604

33	June 21, 2017 City Council Meeting Combined Verbatim Transcript	3	000605-000732
34	Declaration of Yohan Lowie	3	000733-000739
35	Declaration of Yohan Lowie in Support of Plaintiff Landowners' Motion for New Trial and Amend Related to: Judge Herndon's Findings of Fact and Conclusion of Law Granting City of Las Vegas' Motion for Summary Judgment, Entered on December 30, 2020	3	000740-000741
36	Master Declaration of Covenants, Conditions Restrictions and Easements for Queensridge	3	000742-000894
37	Queensridge Master Planned Community Standards - Section C (Custom Lot Design Guidelines)	3	000895-000896
38	Custom Lots at Queensridge Purchase Agreement, Earnest Money Receipt and Escrow Instructions	3	000897-000907
39	Public Offering Statement for Queensridge North (Custom Lots)	4	000908-000915
40	Deposition of Yohan Lowie, *In the Matter of Binion v. Fore Stars*	4	000916-000970
41	The City of Las Vegas' Response to Requests for Production of Documents, Set One	4	000971-000987
42	Respondent City of Las Vegas' Answering Brief, *Jack B. Binion, et al v. The City of Las Vegas, et al.*, Case No. 17-752344-J	4	000988-001018
43	Ordinance No. 5353	4	001019-001100
44	Original Grant, Bargain and Sale Deed	4	001101-001105
45	May 23, 2016 Par 4 Golf Management, Inc.'s letter to Fore Stars, Ltd. re Termination of Lease	4	001106-001107
46	December 1, 2016 Elite Golf Management letter to Mr. Yohan Lowie re: Badlands Golf Club	4	001108
47	October 30, 2018 Deposition of Keith Flatt, *Fore Stars, Ltd. v. Allen G. Nel*, Case No. A-16-748359-C	4	001109-001159
48	Declaration of Christopher L. Kaempfer	4	001160-001163
49	Clark County Real Property Tax Values	4	001164-001179
50	Clark County Tax Assessor's Property Account Inquiry - Summary Screen	4	001180-001181
51	Assessor's Summary of Taxable Values	5	001182-001183
52	State Board of Equalization Assessor Valuation	5	001184-001189

53	June 21, 2017 City Council Meeting Combined Verbatim Transcript	5	001190-001317
54	August 2, 2017 City Council Meeting Combined Verbatim Transcript	5	001318-001472
55	City Required Concessions signed by Yohan Lowie	5	001473
56	Badlands Development Agreement CLV Comments	5	001474-001521
57	Development Agreement for the Two Fifty, Section Four, Maintenance of the Community	5	001522-001529
58	Development Agreement for the Two Fifty	5	001530-001584
59	The Two Fifty Design Guidelines, Development Standards and Uses	5	001585-001597
60	The Two Fifty Development Agreement's Executive Summary	5	001598
61	Development Agreement for the Forest at Queensridge and Orchestra Village at Queensridge	5	001599-002246
62	Department of Planning Statement of Financial Interest	6	002247-002267
63	December 27, 2016 Justification Letter for General Plan Amendment of Parcel No. 138-31-702-002 from Yohan Lowie to Tom Perrigo	6	002268-002270
64	Department of Planning Statement of Financial Interest	6	002271-002273
65	January 1, 2017 Revised Justification letter for Waiver on 34.07 Acre Portion of Parcel No. 138-31-702-002 to Tom Perrigo from Yohan Lowie	6	002274-002275
66	Department of Planning Statement of Financial Interest	6	002276-002279
67	Department of Planning Statement of Financial Interest	6	002280-002290
68	Site Plan for Site Development Review, Parcel 1 @ the 180, a portion of APN 138-31-702-002	6	002291-002306
69	December 12, 2016 Revised Justification Letter for Tentative Map and Site Development Plan Review on 61 Lot Subdivision to Tom Perrigo from Yohan Lowie	6	002307-002308
70	Custom Lots at Queensridge North Purchase Agreement, Earnest Money Receipt and Escrow Instructions	7	002309-002501

71	Location and Aerial Maps	7	002502-002503
72	City Photos of Southeast Corner of Alta Drive and Hualapai Way	7	002504-002512
73	February 14, 2017 Planning Commission Staff Recommendations	7	002513-002538
74	June 21, 2017 Planning Commission Staff Recommendations	7	002539-002565
75	February 14, 2017 Planning Commission Meeting Verbatim Transcript	7	002566-002645
76	June 21, 2017 Minute re: City Council Meeting	7	002646-002651
77	June 21, 2017 City Council Staff Recommendations	7	002652-002677
78	August 2, 2017 City Council Agenda Summary Page	7	002678-002680
79	Department of Planning Statement of Financial Interest	7	002681-002703
80	Bill No. 2017-22	7	002704-002706
81	Development Agreement for the Two Fifty	7	002707-002755
82	Addendum to the Development Agreement for the Two Fifty	8	002756
83	The Two Fifty Design Guidelines, Development Standards and Permitted Uses	8	002757-002772
84	May 22, 2017 Justification letter for Development Agreement of The Two Fifty, from Yohan Lowie to Tom Perrigo	8	002773-002774
85	Aerial Map of Subject Property	8	002775-002776
86	June 21, 2017 emails between LuAnn D. Holmes and City Clerk Deputies	8	002777-002782
87	Flood Damage Control	8	002783-002809
88	June 28, 2016 Reasons for Access Points off Hualapai Way and Rampart Blvd. letter from Mark Colloton, Architect, to Victor Balanos	8	002810-002815
89	August 24, 2017 Access Denial letter from City of Las Vegas to Vickie Dehart	8	002816
90	19.16.100 Site Development Plan Review	8	002817-002821
91	8.10.17 Application for Walls, Fences, or Retaining Walls	8	002822-002829
92	August 24, 2017 City of Las Vegas Building Permit Fence Denial letter	8	002830

93	June 28, 2017 City of Las Vegas letter to Yohan Lowie Re Abeyance Item - TMP-68482 - Tentative Map - Public Hearing City Council Meeting of June 21, 2017	8	002831-002834
94	Declaration of Vickie Dehart, *Jack B. Binion, et al. v. Fore Stars, Ltd.*, Case No. A-15-729053-B	8	002835-002837
95	Supreme Court Order of Affirmance, *David Johnson, et al. v. McCarran International Airport, et al.,* Case No. 53677	8	002838-002845
96	De Facto Taking Case Law From State and Federal Jurisdictions	8	002846-002848
97	Department of Planning Application/Petition Form	8	002849-002986
98	11.30.17 letter to City of Las Vegas Re: 180 Land Co LLC ("Applicant"t - Justification Letter for General Plan Amendment [SUBMITTED UNDER PROTEST] to Assessor's Parcel ("APN(st") 138-31-601-008, 138-31- 702-003, 138-31-702-004 (consisting of 132.92 acres collectively "Property"t - from PR-OS (Park, Recreation and Open Space) to ML (Medium Low Density Residential) as part of applications under PRJ-11990, PRJ-11991, and PRJ-71992	8	002987-002989
99	January 9, 2018 City Council Staff Recommendations	8	002990-003001
100	Item #44 - Staff Report for SDR-72005 [PRJ-71990] - amended condition #6 (renumbered to #7 with added condition)	8	003002
101	January 9, 2018 WVR-72007 Staff Recommendations	8	003003-003027
102	January 9, 2018 WVR-72004, SDR-72005 Staff Recommendations	8	003028-003051
103	January 9, 2018 WVR-72010 Staff Recommendations	8	003052-003074
104	February 21, 2018 City Council Meeting Verbatim Transcript	8	003075-003108
105	May 17, 2018 City of Las Vegas Letter re Abeyance - TMP-72012 [PRJ-71992] - Tentative Map Related to WVR-72010 and SDR-72011	9	003109-003118
106	May 16, 2018 Council Meeting Verbatim Transcript	9	003119-003192
107	Bill No. 2018-5, Ordinance 6617	9	003193-003201

108	Bill No. 2018-24, Ordinance 6650	9	003202-003217
109	November 7, 2018 City Council Meeting Verbatim Transcript	9	003218-003363
110	October 15, 2018 Recommending Committee Meeting Verbatim Transcript	9	003364-003392
111	October 15, 2018 Kaempfer Crowell Letter re: Proposed Bill No. 2018-24 (part 1 of 2)	10	003393-003590
112	October 15, 2018 Kaempfer Crowell Letter re: Proposed Bill No. 2018-24 (part 2 of 2)	11	003591-003843
113	July 17, 2018 Hutchison & Steffen letter re Agenda Item Number 86 to Las Vegas City Attorney	11	003844-003846
114	5.16.18 City Council Meeting Verbatim Transcript	11	003847-003867
115	5.14.18 Bill No. 2018-5, Councilwoman Fiore Opening Statement	11	003868-003873
116	May 14, 2018 Recommending Committee Meeting Verbatim Transcript	11	003874-003913
117	August 13, 2018 Meeting Minutes	11	003914-003919
118	November 7, 2018 transcript In the Matter of Las Vegas City Council Meeting, Agenda Item 50, Bill No. 2018-24	12	003920-004153
119	September 4, 2018 Recommending Committee Meeting Verbatim Transcript	12	004154-004219
120	State of Nevada State Board of Equalization Notice of Decision, *In the Matter of Fore Star Ltd., et al.*	12	004220-004224
121	August 29, 2018 Bob Coffin email re Recommend and Vote for Ordinance Bill 2108-24	12	004225
122	April 6, 2017 Email between Terry Murphy and Bob Coffin	12	004226-004233
123	March 27, 2017 letter from City of Las Vegas to Todd S. Polikoff	12	004234-004235
124	February 14, 2017 Planning Commission Meeting Verbatim Transcript	12	004236-004237
125	Steve Seroka Campaign letter	12	004238-004243
126	Coffin Facebook Posts	12	004244-004245
127	September 17, 2018 Coffin text messages	12	004246-004257
128	September 26, 2018 email to Steve Seroka re: meeting with Craig Billings	12	004258

129	Letter to Mr. Peter Lowenstein re: City's Justification	12	004259-004261
130	August 30, 2018 email between City Employees	12	004262-004270
131	February15, 2017 City Council Meeting Verbatim Transcript	12	004271-004398
132	May 14, 2018 Councilman Fiore Opening Statement	12	004399-004404
133	Map of Peccole Ranch Conceptual Master Plan (PRCMP)	12	004405
134	December 30, 2014 letter to Frank Pankratz re: zoning verification	12	004406
135	May 16, 2018 City Council Meeting Verbatim Transcript	13	004407-004480
136	June 21, 2018 Transcription of Recorded Homeowners Association Meeting	13	004481-004554
137	Pictures of recreational use by the public of the Subject Property	13	004555-004559
138	Appellees' Opposition Brief and Cross-Brief, *Del Monte Dunes at Monterey, Ltd., et al. v. City of Monterey*	13	004560-004575
139	Respondent City of Las Vegas' Answering Brief, *Binion, et al. v. City of Las Vegas, et al.*	13	004576-004578
140	Grant, Bargain and Sale Deed	13	004579-004583
141	City's Land Use Hierarchy Chart	13	004584
142	August 3, 2017 deposition of Bob Beers, pgs. 31-36 - *The Matter of Binion v. Fore Stars*	13	004585-004587
143	November 2, 2016 email between Frank A. Schreck and George West III	13	004588
144	January 9, 2018 email between Steven Seroka and Joseph Volmar re: Opioid suit	13	004589-004592
145	May 2, 2018 email between Forrest Richardson and Steven Seroka re Las Vegas Badlands Consulting/Proposal	13	004593-004594
146	November 16, 2017 email between Steven Seroka and Frank Schreck	13	004595-004597
147	June 20, 2017 representation letter to Councilman Bob Coffin from Jimmerson Law Firm	13	004598-004600

148	September 6, 2017, City Council Verbatim Transcript	13	004601-004663
149	December 17, 2015 LVRJ Article, Group that includes rich and famous files suit over condo plans	13	004664-04668
150	Affidavit of Donald Richards with referenced pictures attached	14, 15, 16	004669-004830

DATED this 26th day of March, 2021.

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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 26th day of March, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the foregoing document(s):**APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF - VOLUME 2** 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 7

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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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Exhibit 8

ORD
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendant.

Case No.: A-17-758528-J
Dept. No.: XVI

ORDER GRANTING The Landowners' Countermotion to Amend/Supplement the Pleadings; DENYING The City's Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims; and DENYING the Landowners' Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims

Hearing Date: March 22, 2019
Hearing Time: 1:30 p.m.

04-24-19P02:49 RCVD

ORDER GRANTING The Landowners' Countermotion to Amend/Supplement the Pleadings; DENYING The City's Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims; and DENYING the Landowners' Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims

The City of Las Vegas's (The City") Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims; Plaintiff, 180 LAND COMPANY, LLC's ("Landowner") Opposition to City's Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims and Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims and Countermotion to Supplement/amend the Pleadings, if Required; and Plaintiff Landowners' Motion to Estop the City's Private Attorney from Making the Major Modification Argument or for an Order to Show Cause Why the Argument May Proceed in this Matter on Order Shortening Time along with the City's and the Intervenors' (from the Petition for Judicial Review[1]) Oppositions and the Landowners Replies[2] to the same having come for hearing on March 22, 2019 at 1:30 p.m. in Department XVI of the Eighth Judicial District Court, Kermitt L. Waters, Esq., James J. Leavitt, Esq., Mark Hutchison, Esq., and Autumn Waters, Esq., appearing for and on behalf of the Landowners, George F. Ogilvie III Esq., and Debbie Leonard, Esq., appearing for and on behalf of the City, and Todd Bice, Esq., and Dustun H. Holmes, Esq., appearing for and on behalf of Intervenors (from the Petition for Judicial Review). The Court having read the briefings, conducted a hearing and after considering the writings and oral arguments presented and being fully informed in the premise makes the following findings of facts and conclusions of law:

I. The Landowners' Countermotion to Supplement/Amend the Pleadings

The Landowners moved this Court to supplement/amend their pleadings. The Landowners attached a copy of their proposed amended/supplemental complaint to their request pursuant to NRCP Rule 15. This matter is in its early stages, as discovery has yet to commence so no prejudice

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[1] The Intervenors have not moved nor been granted entry into this case dealing with the Landowners' inverse condemnation claims, they have moved and been granted entry into the severed petition for judicial review.

[2] The Landowners withdrew this Motion to Estop the City's Private Attorney from Making the Major Modification Argument or for an Order to Show Cause Why the Argument May Proceed in this Matter on Order Shortening Time, accordingly, no arguments were taken nor rulings issued.

or delay will result in allowing the amendment. The City argues that permitting the amendment would result in impermissible claim splitting as the Landowners currently have other litigation pending which also address the City action complained of in the amended/supplemental complaint. However, those other pending cases deal with other property also allegedly affected by the City action and do not seek relief for the property at issue in this case.

Leave to amend should be freely given when justice so requires. NRCP Rule 15(a)(2); Adamson v. Bowker, 85 Nev. 115, 121 (1969). Absent undue delay, bad faith or dilatory motive on the part of the movant, leave to amend should be freely given. Stephens v. Southern Nev. Music Co., 89 Nev. 104 (1973). Justice requires leave to amend under the facts of this case and there has been no showing of bad faith or dilatory motive on the part of the Landowners.

Accordingly, IT IS HEREBY ORDERED that the Landowners' Countermotion to Supplement/Amend the Pleadings is **GRANTED**. The Landowners may file the amended / supplemental complaint in this matter.

II. The City's Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims

The City moved this Court for judgment on the pleadings on the Landowners' inverse condemnation claims pursuant to NRCP 12(c). Only under rare circumstances is dismissal proper, such as where plaintiff can prove no set of facts entitling him to relief. Williams v. Gerber Prod., 552 F.3d 934, 939 (9th Cir. 2008). The Nevada Supreme Court has held that a motion to dismiss "is subject to a rigorous standard of review on appeal," that it will recognize all factual allegations as true, and draw all inferences in favor of the plaintiff. Buzz Stew, LLC v. City of North Las Vegas, 181 P.3d 670, 672 (2008). The Nevada Supreme Court rejected the reasonable doubt standard and held that a complaint should be dismissed only where it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief. Id., *see also* fn. 6. Additionally, Nevada is a notice pleading state. NRCP Rule 8; Liston v. Las Vegas Metropolitan Police Dep't, 111 Nev. 1575 (1995) (referring to an amended complaint, deposition testimony, interrogatory responses and pretrial demand statement as a basis to provide notice of facts that support a claim). Moreover, the Nevada Supreme Court has adopted the "policy of this state that

cases be heard on the merits, whenever possible." Schulman v. Bongberg-Whitney Elec., Inc., 98 Nev. 226, 228 (1982).

A. The Landowners' Inverse Condemnation Claims

The Landowners have asserted five (5) separate inverse condemnation claims for relief, a Categorical Taking, a Penn Central Regulatory Taking, a Regulatory Per Se Taking, a Non-regulatory Taking and, finally, a Temporary Taking. Each of these claims is a valid claim in the State of Nevada:

Categorical Taking - "Categorical [taking] rules apply when a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical use of her property." McCarran Intern. Airport v. Sisolak, 122 Nev. 645, 663, 137 P. 3d 1110, 1122 (2006).

Penn Central Regulatory Taking - A Penn Central taking analysis examines three guideposts: the regulations economic impact on the property owner; the regulations interference with investment backed expectations; and, the character of the government action. Sisolak, supra, at 663.

Regulatory Per Se Taking - A Per Se Regulatory Taking occurs where government action "preserves" property for future use by the government. Sisolak, supra, at 731.

Non-regulatory Taking / De Facto Taking - A non-regulatory/de facto taking occurs where the government has "taken steps that directly and substantially interfere with [an] owner's property rights to the extent of rendering the property unusable or valueless to the owner." State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015). "To constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property rights." Richmond Elks Hall Assoc. v. Richmond Red. Agency, 561 F.2d 1327, 1330 (9th Cir. Ct. App. 1977).

Temporary Taking - "[T]emporary deprivations of use are compensable under the Taking Clause." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1011-12 (1992); Arkansas Game & Fish Comm's v. United States, 568 U.S. 23, 133 S.Ct. 511 (2012).

Here, the Landowners have alleged facts and provided documents sufficient to sustain these inverse condemnation claims as further set forth herein, which is sufficient to defeat the City's motion for judgment on the pleadings.

B. The Landowners' Property Interest

"An 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* Sisolak 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 and defeat a judgment on the pleadings. The Landowners have made such an allegation.

The Landowners assert that they have a property interest and vested property rights in the Subject Property for the following reasons:

1) The Landowners assert that they 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; all of which acreage is more particularly described as Assessor's Parcel Numbers 138-31-702-003, 138-31-601-008, 138-31-702-004; 138-31-201-005; 138-31-801-002; 138-31-801-003; 138-32-301-007; 138-32-301-005; 138-32-210-008; and 138-32-202-001 ("250 Acre Residential Zoned Land"). 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").

2) The Landowners assert that they had a property interest in the 35 Acre Property; that they had the vested right to use and develop the 35 Acre Property; that the hard zoning on the 35 Acre Property has always been 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.

3) The Landowners assert that they had the vested right to use and develop the 35 Acre Property up to a density of 7.49 residential units per acre as long as the development is comparable and compatible with the existing adjacent and nearby residential development. 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.

4) The Landowners assert that their property interest and vested right to use and develop the 35 Acre Property is further confirmed by the following:

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.

Any determination of whether the Landowners have a "property interest" or the vested right to use the 35 Acre Property must be based on eminent domain law, rather than the land use law. The 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.

Here, the Landowners have alleged facts and provided documents sufficient to show they have a property interest in and a vested right to use the 35 Acre Property for a residential use, which is sufficient to defeat the City's motion for judgment on the pleadings.

C. City Actions the Landowners Claim Amount to A Taking

In determining whether a taking has occurred, Courts must look at the aggregate of all of the government actions because "the form, intensity, and the deliberateness of the government actions toward the property must be examined … All actions by the [government], in the aggregate, must be analyzed." Merkur v. City of Detroit, 680 N.W.2d 485, 496 (Mich.Ct.App. 2004). *See also* State v. Eighth Jud. Dist. Ct., 351 P.3d 736 (Nev. 2015) (*citing* Arkansas Game & Fish Comm's v. United States, 568 U.S. --- (2012)) (there is no "magic formula" in every case for determining whether particular government interference constitutes a taking under the U.S. Constitution; there are "nearly infinite variety of ways in which government actions or regulations can effect property interests." Id., at 741); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (inverse condemnation action is an "ad hoc" proceeding that requires "complex factual assessments." Id., at 720.); Lehigh-Northampton Airport Auth. v. WBF Assoc., L.P., 728 A.2d 981 (Comm. Ct. Penn. 1999) ("There is no bright line test to determine when government action shall be deemed a de facto taking; instead, each case must be examined and decided on its own facts." Id., at 985-86).

The City has argued that the Court is limited to the record before the City Council in considering the Landowners' applications and cannot consider all the other City action towards the Subject Property, however, the City cites the standard for petitions for judicial review, not inverse condemnation claims. A petition for judicial review is one of legislative grace and limits a court's review to the record before the administrative body, unlike an inverse condemnation, which is of

constitutional magnitude and requires all government actions against the property at issue to be considered.

The Landowners assert that the following City actions individually and/or cumulatively amount to a taking of their Property:

1. City Denial of the 35 Acre Property Applications.

The Landowners submitted complete applications to develop the 35 Acre Property for a residential use consistent with the R-PD7 hard zoning. *Exhibit 22:App LO 00000932-949.* The City Planning Staff determined that the proposed residential development was consistent with the R-PD7 hard zoning, that it met all requirements in the Nevada Revised Statutes, and in the City's Unified Development Code (Title 19), and appropriately recommended approval. *Exhibit 22: 4 App LO 00000932-949 and Exhibit 23: 4 App LO 00000950-976.* Tom Perrigo, the City Planning Director, stated at the hearing on the Landowners' applications that the proposed development met all City requirements and should be approved. *Exhibit 5: 2 App LO 00000376 line 566 - 377 line 587.* The City Council denied the 35 Acre Property applications, stating as the sole basis for denial that the City did not want piecemeal development and instead wanted to see the entire 250 Acre Residential Zoned Land developed under one Master Development Agreement ("MDA").

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

To comply with the City demand to have one unified development, for over two years (between July, 2015, and August 2, 2017), the Landowners worked with the City on an MDA that would allow development on the 35 Acre Property along with all other parcels that made up the 250 Acre Residential Zoned Land. *Exhibit 25: 5 App LO 00001132-1179.* The Landowners complied with each and every City demand, making more concessions than any developer that has ever appeared before this City Council. A non-exhaustive list of the Landowners' concessions, as part of the MDA, include: 1) donation of approximately 100 acres as landscape, park equestrian facility, and recreation areas (*Exhibit 29: 8 App LO 00001836; Exhibit 24: 4 App LO 00000998 lines 599-601; Exhibit 30: 8 App LO 00001837*); 2) building two new parks, one with a vineyard; (Id.) and, 3) reducing the number of units, increasing the minimum acreage lot size, and reducing the number and height of towers. *Exhibit 5: 2 App LO 00000431 lines 2060-2070; Exhibit 29: 8 App LO*

00001836; and Exhibit 30: 8 App LO 00001837. In total, the City required at least 16 new and revised versions of the MDA. *Exhibit 28: 5-7 App LO 00001188-00001835.* The City's own Planning Staff, who participated at every step in preparing the MDA, recommended approval, stating the MDA "is in conformance with the requirements of the Nevada Revised Statutes 278" and "the goals, objectives, and policies of the Las Vegas 2020 Master Plan" and "[a]s such, staff [the City Planning Department] is in support of the development Agreement." *Exhibit 24: 4 App LO 00000985 line 236 – 00000986 line 245; LO 00001071-00001073; and Exhibit 40: 9 App LO 00002047-2072.* And, as will be explained below, the MDA also met and exceeded any and all major modification procedures and standards that are set forth in the City Code.

On August 2, 2017, the MDA was presented to the City Council and the City denied the MDA. *Exhibit 24: 5 App LO 00001128-112.* The City did not ask the Landowners to make more concessions, like increasing the setbacks or reducing the units per acre, it simply and plainly denied the MDA altogether. *Id.* As the 35 Acre Property is vacant, this meant that the property would remain vacant.

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

After denial of the MDA, the City adopted two Bills that solely target the 250 Acre Residential Zoned Land and preserve the Landowners' Property for public use. City Bill No. 2018-5 and Bill No. 2018-24 (now City Ordinances LVMC 19.16.105) not only target solely the Landowners' Property (no other golf course in the City is privately owned with residential zoning and no deed restrictions); but also requires the Landowners to preserve their Property for public use (LVMC 19.16.105 (E)(1)(d), (G)(1)(d)), provide ongoing public access to their Property (LVMC 19.16.105(G)(1)(d)), and provides that failure to comply with the Ordinances will result in a misdemeanor crime punishable by imprisonment and $1,000 per day fine. (LVMC 19.16.105 (E)(1)(d), (G)(5)(b)&(c)). The Ordinance requires the Landowners to perform an extensive list of requirement, beyond any other development requirements in the City for residential development, before development applications will be accepted by the City. LVMC 19.16.105.

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

The Landowners have sufficiently alleged that in August of 2017, the Landowners filed with the City a routine over the counter request (specifically excluded from City Council review - LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii)) for three access points to streets the 250 Acre Residential Zoned Land abuts – one on Rampart Blvd. and two on Hualapai Way. *Exhibit 58: 10 App LO 00002359-2364.* The City denied the access applications citing as the sole basis for the denial, "the various public hearings and subsequent debates concerning the development on the subject site." *Exhibit 59: 10 App LO 00002365.* The City required that the matter be presented to the City Council through a "Major Review." The City has required that this extraordinary standard apply only to the Landowners to gain access to their property.

The Nevada Supreme Court has held that a landowner cannot be denied access to abutting roadways, because all property that abuts a public highway has a special right of easement to the public road for access purposes and this is a recognized property right in Nevada. Schwartz v. State, 111 Nev. 998 (1995). The Court held that this right exists "despite the fact that the Landowner had not yet developed access."Id., at 1003.

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

The Landowners have sufficiently alleged that in August, 2017, the Landowners filed with the City a routine request to install chain link fencing to enclose two water features/ponds that are located on the 250 Acre Residential Zoned Land. *Exhibit 55: 10 App LO 00002345-2352.* The City Code expressly states that this application is similar to a building permit review that is granted over the counter and not subject to City Council review. LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii). The City denied the application, citing as the sole basis for denial, "the various public hearings and subsequent debates concerning the development on the subject site." *Exhibit 56: 10 App LO 2343.* The City then required that the matter be presented to the City Council through a "Major Review" pursuant to LVMC 19.16.100(G)(1)(b) which states that "the Director determines that the proposed development could significantly impact the land uses on the site or on surrounding properties." *Exhibit 57: 10 App LO 00002354-2358.*

The Major Review Process contained in LVMC 19.16.100 is substantial. It requires a pre-application conference, plans submittal, circulation to interested City departments for comments/recommendation/requirements, and publicly noticed Planning Commission and City Council hearings. The City has required that this extraordinary standard apply despite the fact that LVMC 19.16.100 F(3) specifically prohibits review by the City Council, "[t]he Provisions of this Paragraph (3) shall not apply to *building permit level reviews* described in Paragraph 2(a) of this Subsection (F). Enumerated in Paragraph 2(a) as only requiring a "building level review" are "onsite signs, walls and fences."

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

The Landowners have sufficiently alleged that in an attempt to clear the property, replace drainage facilities, etc., the Landowners submitted an application for a technical drainage study, which should have been routine, because the City and the Landowners already executed an On-Site Drainage Improvements Maintenance Agreement that allows the Landowners to remove and replace the flood control facilities on their property. *Exhibit 78: 12 App LO 00002936-2947.* Additionally, the two new City Ordinances referenced in City Action #3 require a technical drainage study. However, the City has refused to accept an application for a technical drainage study from the Landowners claiming the Landowners must first obtain entitlements, however, the new City Ordinances will not provide entitlements until a drainage study is received.

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

The Landowners have sufficiently alleged that as part of the numerous development applications filed by the Landowners over the past three years to develop all or portions of the 250 Acre Residential Zoned Land, in October and November 2017, the necessary applications were filed to develop residential units on the 133 Acre Property (part of the 250 Acre Residential Zoned Land) consistent with the R-PD7 hard zoning. *Exhibit 47: 9 App LO 00002119-10 App LO 2256. Exhibit 49: 10 App LO 00002271-2273.* The City Planning Staff determined that the proposed residential development was consistent with the R-PD7 hard zoning, that it met all requirements in the Nevada Revised Statutes, the City Planning Department, and the Unified Development Code (Title 19), and recommended approval. *Exhibit 51: 10 App. LO 00002308-2321.* Instead of approving the

development, the City Council delayed the hearing for several months until May 16, 2018 - the same day it was considering the Yohan Lowie Bill (now LVMC 19.16.105), referenced above in City Action #3. *Exhibit 50: 10 App LO 00002285-2287.* The City put the Yohan Lowie Bill on the morning agenda and the 133 Acre Property applications on the afternoon agenda. The City then approved the Yohan Lowie Bill in the morning session. Thereafter, Councilman Seroka asserted that the Yohan Lowie Bill applied to deny development on the 133 Acre Property and moved to strike all of the applications for the 133 Acre Property filed by the Landowners. *Exhibit 6: 2 App LO 00000490 lines 206-207.* The City then refused to allow the Landowners to be heard on their applications for the 133 Acre Property and voted to strike the applications. *Exhibit 51: 10 App LO 00002308-2321 and Exhibit 53: 10 App LO 00002327-2336.*

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

The Landowners have sufficiently alleged that in documents obtained from the City it was discovered that the City has already allocated $15 million to acquire the Landowners' private property - "$15 Million-Purchase Badlands and operate." *Exhibit 35: 8 App LO 00001922.* In this same connection, Councilman Seroka issued a statement during his campaign entitled "The Seroka Badlands Solution" which provides the intent to convert the Landowners' private property into a "fitness park." *Exhibit 34: 8 App LO 00001915.* In an interview with KNPR Seroka stated that he would "turn [the Landowners' private property] over to the City." *Id. at LO 00001917.* Councilman Coffin agreed, stating his intent referenced in an email as follows: "I think your third way is the only quick solution...Sell off the balance to be a golf course with water rights (key). Keep the bulk of Queensridge green." *Exhibit 54: 10 App LO 00002344.* Councilman Coffin and Seroka also exchanged emails wherein they state they will not compromise one inch and that they "need an approach to accomplish the desired outcome," which, as explained, is to prevent all development on the Landowners' Property so the City can take it for the City's park and only pay $15 Million. *Exhibit 54: 10 App LO 00002340.* In furtherance of the City's preservation for public use, the City has announced that it will never allow any development on the 35 Acre Property or any other part of the 250 Acre Residential Zoned Land.

As it is universally understood that tax assessed value is well below market value, to "Purchase Badlands and operate" for "$15 Million," (which equates to less than 6% of the tax assessed value and likely less than 1% of the fair market value) shocks the conscience. And, this shows that the City's actions are in furtherance of a City scheme to specifically target the Landowners' Property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

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

The Landowners have sufficiently alleged that the City has gone to unprecedented lengths to interfere with the use and enjoyment of the Landowners's Property. Council members sought "intel" against one of the Landowners so that the "intel" could, presumably, be used to deny any development on the 250 Acre Residential Zoned Land (including the 35 Acre Property). In a text message to an unknown recipient, Councilman Coffin stated:

> Any word on your PI enquiry about badlands [250 Acre Residential Zoned Land] guy?
> While you are waiting to hear **is there a fair amount of intel on the scum** behind [sic] the badlands [250 Acre Residential Zoned Land] takeover? **Dirt will be handy if I need to get rough.** *Exhibit 81: 12 App LO 00002969. (emphasis supplied).*

Instructions were then given by Council Members on how to hide communications regarding the 250 Acre Residential Zoned Land from the Courts. Councilman Coffin, after being issued a documents subpoena, wrote:

> "Also, his team has filed an official request for all txt msg, email, anything at all on my personal phone and computer under an erroneous supreme court opinion…So everything is subject to being turned over so, for example, your letter to the c[i]ty email is now public and this response might become public (to Yohan). I am considering only using the phone but awaiting clarity from court. **Please pass word to all your neighbors. In any event tell them to NOT use the city email address but call or write to our personal addresses. For now…PS. Same crap applies to Steve [Seroka]** as he is also being individually sued i[n] Fed Court and also his personal stuff being sought. This is no secret so let all your neighbors know." *Exhibit 54: 10 App LO 00002343. (Emphasis added).*

Councilman Coffin advised Queensridge residents on how to circumvent the legal process and the Nevada Public Records Act *NRS 239.001(4)* by instructing them on how not to trigger any of the search terms being used in the subpoenas. "Also, please pass the word for everyone to not use B…l..nds in title or text of comms. That is how search works." Councilman Seroka testified at the

Planning Commission (during his campaign) that it would be "over his dead body" before the Landowners could use their private property for which they have a vested right to develop. *Exhibit 21: 4 App LO 00000930-931.* And, In reference to development on the Landowners' Property, Councilman Coffin stated firmly "I am voting against the whole thing," (*Exhibit 54: 10 App LO 00002341*)

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

The Landowners have sufficiently alleged that in approving the 17 Acre Property applications the City agreed the Landowners had the vested right to develop without a Major Modification, now the City is arguing in other documents that: 1) the Landowners have no property rights; and, 2) the approval on the 17 Acre Property was erroneous, because no major modification was filed:

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

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

11. City Action #11: The City Retains Private Counsel to Advance an Open Space Designation on the 35 Acre Property.

The Landowners have sufficiently alleged that the City has retained and authorized private counsel to advance an "open space" designation/major modification argument in this case to prevent any and all development on the 35 Acre Property. This is a contrary position from that taken by the

City over the past 32 years on at least 1,067 development units in the Peccole Concept Plan area. *Exhibit 105.* As explained above, over 1,000 units have been developed over the past 32 years in the Peccole Concept Plan area and not once did the City apply the "open space"/major modification argument it is now advancing, even though those +1,000 units were developed contrary to the land use designation on the Peccole Concept Plan. The City has specifically targeted the Landowners and their Property and is treating them differently than it has treated all other properties and owners in the area (+1,000 other units in the area) for the purpose of forcing the Landowners' Property to remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

Here, the Landowners have alleged facts and provided documents sufficient to show their Property has been taken by inverse condemnation, which is sufficient to defeat the City's motion for judgment on the pleadings.

D. The City's Argument that the Landowners have No Vested Property Right

The City contends that the Landowners do not have a vested right to use their property for anything other than open space or a golf course. As set forth above, the Landowners have alleged facts and provided documents sufficient to show they have a property interest in and a vested right to use the 35 Acre Property for a residential use, which is sufficient to defeat the City's motion for judgment on the pleadings.

E. The City's Argument that the Landowners' Taking Claims are Not Ripe

The City contends that the Landowners's taking claims are not ripe, because they have not filed a major modification application, which the City contends is a precondition to any development on the Landowners' Property. This City argument is closely related to the City's vested rights argument as the City also contends the Landowners have no vested right to use their property for anything other than a golf course until such time as they submit a major modification application. The Landowners have alleged that a ripeness/exhaustion of administrative remedies analysis does not apply to the four inverse condemnation claims for which the Landowners' are requesting a judicial finding of a taking - regulatory per se, non-regulatory/de facto, categorical, or temporary

taking of property[4] and, therefore, the City's ripeness/exhaustion of administrative remedies argument has no application to these four inverse condemnation claims. The Landowners further allege that the ripeness analysis only applies to the Landowners' inverse condemnation Penn Central Regulatory Takings Claim and, if the Court applies the ripeness analysis, all claims are ripe,[5] including the Penn Central claim.

1. The Landowners Allege Facts Sufficient to Show They Made At Least One Meaningful Application and It Would be Futile to Seek Any Further Approvals From the City.

"While a landowner must give a land-use authority an opportunity to exercise its discretion, once [...] the permissible uses of the property are known to a reasonable degree of certainty, a [regulatory] taking claim [Penn Central claim] is likely to have ripened."[6] The purpose of this rule is to understand what the land use authority will and will not allow to be developed on the property at issue. But, "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[7] "[W]hen exhausting available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review."[8]

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

[5] The Nevada Supreme Court has stated regulatory takings claims are generally "not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41 (2015) (*quoting* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)).

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

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

[8] 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,

In City of Monterey v. Del Monte Dunes 526 U.S. 687, 119 S.Ct. 1624 (1999) the United States Supreme Court held that a taking claim was ripe where the City of Monterey required 19 changes to a development application and then asked the landowner to make even more changes. Finally, the landowner filed inverse condemnation claims. Similar to the City argument in this case, the City of Monterey asserted the landowners' inverse condemnation claims were not ripe for review. The City of Monterey asserted that the City's decision was not final and the landowners' claim was not ripe, because, if the landowner had worked longer with the City of Monterey or filed a different type of application with the City of Monterey, the City of Monterey may have approved development on the landowner's property. The United States Supreme Court approved the Ninth Circuit opinion as follows: "to require additional proposals would implicate the concerns about repetitive and unfair procedures" and "the city's decision was sufficiently final to render [the landowner's] claim ripe for review." Del Monte Dunes, at 698. The United States Supreme Court re-affirmed this rule in the Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001) holding the "Ripeness Doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted uses." Id at 622.

As set forth above, the Landowners have alleged facts and provided documents sufficient to show they submitted the necessary applications to develop the 35 Acre Property, that the City denied every attempt at development, and that it would be futile to seek any further development

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143 L.Ed. 2d 882 (1999) "[a]fter five years, five formal decisions, and 19 different site plans, [internal citation omitted] Del Monte Dunes decided the city would not permit development of the property under any circumstances." Id., at 698. "After reviewing at some length the history of attempts to develop the property, the court found that to require additional proposals would implicate the concerns about repetitive and unfair procedures expressed in MacDonld, Commer & Frates v. Yolo County, 477 U.S. 340, 350 n. 7, (1986) [*citing* Stevens concurring in judgment from Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 at 205-206, 105 S.Ct. 3108 at 3126 (1985)] and that the city's decision was sufficiently final to render Del Monte Dunes' claim ripe for review." Del Monte Dunes, at 698. The "Ripeness Doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted uses." Palazzolo v. Rhode Island, at 622.

applications from the City, which is sufficient to defeat the City's motion for judgment on the pleadings.

2. The Landowners Allege Facts Sufficient to Show That a Major Modification Application Was Not Required To Ripen Their Inverse Condemnation Claims

The Landowners further allege that no major modification of the Peccole Concept Plan was necessary to develop the 35 Acre Property, because the Landowners were seeking to develop the 35 Acre Property residentially and the land use designation on the Peccole Concept Plan for the 35 Acre Property is a residential use. *Exhibit 107.* Therefore, there was no need to "modify" the Peccole Concept Plan to develop the 35 Acre Property residentially.

The Landowners have also alleged that the City has never required a major modification application to develop properties included in the area of the Peccole Concept Plan. The Landowners allege the City has approved development for 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 were developed with a use contrary to the Peccole Concept Plan and not once did the City require a major modification application.

Here, the Landowners have alleged facts and provided documents sufficient to show that a major modification was not required to ripen their inverse condemnation claims, which is sufficient to defeat the City's motion for judgment on the pleadings.

3. The Landowners Allege Facts Sufficient to Show That, Even if a Major Modification Application was Necessary to Ripen Their Inverse Condemnation Claims, They Met this Requirement

Specific to the City's assertion that a major modification application is necessary to ripen the Landowners' inverse condemnation claims, the Landowners allege that even if a major modification application is required, the MDA the Landowners worked on with the City for over two years, referenced above, included and far exceeded all of the requirements of a major modification application. Exhibit 28. Moreover, the Landowners have cited to a statement by the City Attorney wherein he stated on the City Council record 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." Exhibit 61, City Council Meeting of January 3, 2018 Verbatim Transcript – Item 78, Page 80 of 83, lines 2353-2361. Additionally, the Landowners allege that they also submitted an application referred to as a General Plan Amendment (GPA), which includes and far exceeds the requirements of the City's major modification application and the City denied the GPA as part of its denial of any use of the 35 Acre Property. Exhibit 5.

Here, the Landowners have alleged facts and provided documents sufficient to show that, even if a major modification application is required to ripen their inverse condemnation claims, they met these requirements, which is sufficient to defeat the City's motion for judgment on the pleadings.

F. The City's Argument that the Statute of Limitation has Run on the Landowners Inverse Condemnation Claims

The City contends that, if there was a taking, it resulted from the City action related to adoption of the City's Master Plan and the City's Master Plan was adopted more than 15 years ago and, therefore, the statute of limitations has run on the Landowners' inverse condemnation claims. The Landowners contend that a City Plan cannot result in a taking, that the City must take action to implement the Plan on a specific property to make the City liable for a taking.

The statute of limitations for an inverse condemnation action in Nevada is 15 years. White Pine Limber v. City of Reno, 106 Nev. 778 (1990). Nevada 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." 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). 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. Sproul Homes, supra, at 444.

Accordingly, the date that would trigger the statute of limitations would not be the master plan or necessarily the designation of the Property as PR-OS, but it will be the acts of the City of Las Vegas / City Council that would control.

Here, the Landowners have alleged facts and provided documents sufficient to show their property has been taken by inverse condemnation based upon the acts of the City of Las Vegas / City Council that occurred less than 15 years ago. Therefore, the City's statute of limitations argument is denied.

G. The City's Argument that the Court Should Apply Its Holding in the Petition For Judicial Review to the Landowners Inverse Condemnation Claims

The City contends that the Court's holding in the Landowners' petition for judicial review should control in this inverse condemnation action. However, both the facts and the law are different between the petition for judicial review and the inverse condemnation claims. The City itself made this argument when it moved to have the Landowners' inverse condemnation claims dismissed from the petition for judicial review earlier in this litigation. Calling them "two disparate sets of claims" the City argued that:

> "The procedural and structural limitations imposed by petitions for judicial review and complaints, however, are such that they cannot afford either party ample opportunity to litigate, in a single lawsuit, all claims arising from the transaction. For instance, Petitioner's claim for judicial review will be "limited to the record below," and "[t]he central inquiry is whether substantial evidence supports the agency's decision." United Exposition Service Company v. State Industrial Insurance System, 109 Nev. 421,424, 851 P.2d 423,425 (1993). On the other hand, Petitioner's inverse condemnation claims initiate a new a civil action requiring discovery (not limited to the record below), and the central inquiry is whether Petitioner (as plaintiff) can establish its claims by a preponderance of the evidence. Thus, allowing Petitioner's four "alternative" inverse condemnation claims (i.e., the complaint) to remain on the Petition will create an impractical situation for the Court and parties, and may allow Petitioner to confuse the record for judicial review by attempting to augment it with discovery obtained in the inverse condemnation action." (October 30, 2017, City of Las Vegas Motion to Dismiss at 8:2)

The evidence and burden of proof are significantly different in a petition for judicial review than in civil litigation. And, as further recognized by the City, there will be additional facts in the inverse condemnation case that must be considered which were not permitted to be considered in the petition for judicial review. This is true, as only City Action #1 above was considered in the petition for judicial review, not City Actions #2-11. And, as stated above, this Court must consider all city actions in the aggregate in this inverse condemnation proceeding.

As an example, if the Court determined in a petition for judicial review that there was substantial evidence in the record to support the findings of a workers' compensation hearing officer's decision, that would certainly not be grounds to dismiss a civil tort action brought by the alleged injured individual, as there are different fact, different legal standards and different burdens of proof.

Furthermore, the law is also very different in an inverse condemnation case than in a petition for judicial review. Under inverse condemnation law, if the City exercises discretion to render a property valueless or useless, there is a taking. Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007), McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (Nev. 2006), City of Monterey v. Del Monte Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999), Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). In an inverse condemnation case, every landowner in the state of Nevada has the vested right to possess, use, and enjoy their property and if this right is taken, just compensation must be paid. Sisolak. And, the Court must consider the "aggregate" of all government action and the evidence considered is not limited to the record before the City Council. Merkur v. City of Detroit, 680 N.W.2d 485 (Mich.Ct.App. 2004), State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015), Arkansas Game & Fish Comm's v. United States, 568 U.S. 23, 133 S.Ct. 511 (2012). On the other hand, in petitions for judicial review, the City has discretion to deny a land use application as long as valid zoning laws are applied, there is no vested right to have a land use application granted, and the record is limited to the record before the City Council. Stratosphere Gaming Corp., v. City of Las Vegas, 120 Nev. 523, 96 P.3d 756 (2004).

The Court has previously entered a Nunc Pro Tunc Order in this case recognizing the petition for judicial review matter is different from the inverse condemnation matter:

> "this Court had no intention of making any findings, conclusions of law or orders regarding the Landowners' severed inverse condemnation claims as a part of the Findings of Fact and Conclusions of Law entered on November 21, 2018, ("FFCL"). Accordingly, as stated at the hearing on January 17, 2019, the findings, conclusions and order set forth at page 23:4-20 and page 24:4-5 of the FFCL are hereby removed nunc pro tunc." (Order filed February 6, 2019).

For these reasons, it would be improper to apply the Court's ruling from the Landowners' petition for judicial review to the Landowners' inverse condemnation claims.

H. Conclusion on The City's Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims

The City moved the Court for judgment on the pleadings pursuant to NRCP 12(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.

This Court reviewed extensive briefings and entertained three and a half to four hours of oral arguments which contained factual disputes and argument throughout the entire hearing. The Court cannot say as a matter of law that the Landowners have no case, there are still factual disputes that must be resolved. Moreover, the court finds that this case can be heard on the merits as that policy is provided in Schulman v. Bongberg-Whitney Elec., Inc., 98 Nev. 226, 228 (1982).

Accordingly, IT IS HEREBY ORDERED that The City's Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims is **DENIED**.

III. The Landowners Rule 56 Motion for Summary Judgment on Liability for the Landowners Inverse Condemnation Claims

The Landowners countermoved this Court for summary judgment on the Landowners' inverse condemnation claims. Discovery has not commenced nor as of the date of the hearing have the parties had a NRCP 16.1 case conference. The Court finds it would be error to consider a Rule 56 motion at this time.

Accordingly, IT IS HEREBY ORDERED that the Landowners' Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims is **DENIED** without prejudice.

IT IS SO ORDERED.

DATED this ~~4th~~ day of ~~April~~, 2019. CII
May 14,

DISTRICT COURT JUDGE

Respectfully Submitted By:
LAW OFFICES OF KERMITT L. WATERS

By: _____

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Exhibit 9

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **CITY'S OPPOSITION TO "MOTION TO DETERMINE PROPERTY INTEREST"** **Hearing Date: September 10, 2020** **Hearing Time: 9:00 a.m.**

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Developer claims that zoning confers a "vested right" to develop its property. It claims that merely because the 35-Acre Property was zoned R-PD7, which *permits* construction of up to seven houses per acre, the zoning gives the Developer a *right* to construct seven houses per acre. The difficulty with the Developer's argument is that unanimous Nevada and federal authority hold the opposite. It has been a fundamental principle of zoning law since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that zoning *limits* rights to use property; it does not *grant* rights.

This Court agreed. In denying the Developer's Petition for Judicial Review ("PJR"), the Court followed long-standing and unequivocal decisions of the Nevada Supreme Court to conclude that as a matter of law, zoning does not confer vested rights to develop property. *E.g.*, *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004); *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995). The Court correctly held that cities retain the discretion to limit development regardless of the numerical maximum units per acre allowed by zoning. City's Appendix of Exhibits in Support of Opposition to Motion to Determine Property Interest, Ex. A at 17-18 (Findings of Fact and Conclusions of Law filed 11-21-2018 ("2018 FFCL")). In addition to finding that the zoning of the 35-Acre Property confers no vested right to develop the property for housing, the Court also ruled that the 35-Acre Property has long been designated for parks and open space (PR-OS) in the City's General Plan. *Id.* at 3, 18. The Court concluded the City has discretion to decline to amend the PR-OS designation to allow housing development, and instead may require that the property continue in its historic use as parks and open space. *Id.* at 19, 20. To find that zoning confers vested rights, it would necessarily follow that local governments in Nevada have no discretion in approving applications for development. The Court was not prepared to turn Nevada land use law upside down, particularly where the Developer had presented no authority to do so.

On May 7, 2019, the Court affirmed its conclusion of law: "This Court correctly concluded that the Developer does not have vested rights to have the 35-Acre Applications approved . . . ." Ex. TT, Findings of Fact and Conclusions of Law Etc., at 811 ¶ 22. On May 15, 2019, however, the

Court signed a form of order prepared by the Developer that appears to be inconsistent with the Court's prior rulings. The Court stated: "Landowners have alleged facts and provided documents sufficient to show they have a property interest in and a vested right to use the 35 Acre Property for a residential use." Ex. UU, Order Granting Landowner's Countermotion to Amend/Supplement the Pleadings Etc. ("2019 Order"), at 823, 831. The 2019 Order cites no authority whatever for this statement, nor does any authority exist.

The facts that the Developer asks the Court to "acknowledge and apply" the zoning to find that the Developer "by right" can compel the City to approve its construction project (Developer's Motion to Determine "Property Interest" ("Motion") at 3), despite the Court's May 15 Order where the Court appeared already to acknowledge such a right, and the Developer's failure to cite to that order in this motion, speaks volumes. The clear implication is that the Developer knows that it was not entitled to a finding that zoning confers vested rights – because the law is overwhelmingly to the contrary – and that the Developer had led the Court into error. The Developer continues to fail to present any authority to support its position in this motion. The motion should be denied.

STATEMENT OF FACTS

I. The Badlands has served as open space for the Peccole Ranch Master Plan since its inception

In 1980, the City approved William Peccole's petition to annex 2,243 acres of undeveloped land to the City. Ex. B at 26-36.[1] Mr. Peccole's intent was to develop the entire parcel as a master planned development. *Id.* at 26. After the annexation, the City approved an integrated plan to develop the land with a variety of uses, called the "Peccole Property Land Use Plan." Ex. C at 37-43. In 1986, Mr. Peccole requested approval of an amended master plan featuring two 18-hole golf courses, one of which was in the general area where the Badlands golf course was later developed. Ex. D at 56-58, 69-70; Ex. E.

[1] City Ordinances, Resolutions, legislative history, transcripts of public hearings, and other documents subject to judicial notice are attached as Exhibits to the Appendix to this Motion. The City requests that the Court take judicial notice of the Exhibits under NRS 47.130, 47.140, and 47.150.

In 1988, the Peccole Ranch Partnership ("Peccole") submitted a revised master plan known as the Peccole Ranch Master Plan ("PRMP") and an application to rezone 448.8 acres for the first phase of development ("Phase I"). Ex. F at 77-121. The City approved the PRMP and the Phase I rezoning application in 1989, after Peccole agreed to limit the overall density in Phase I and reserved 207.1 acres for a golf course and drainage in the second phase of development. *Id*. at 111-12.

In 1989, the City allowed Peccole Ranch to be included in a Gaming Enterprise District ("GED"). Inclusion in the GED permitted Peccole to develop a resort hotel in the PRMP so long as Peccole provided a recreational amenity such as an 18-hole golf course. Ex. G at 131. Peccole's reservation of 207 acres for a golf course satisfied this requirement. *See* Ex. F at 111, 1138; Ex. G at 132.

In 1990, Peccole applied to amend the PRMP for the second phase of development ("Phase II"). Ex. H at 146-169. The revised PRMP highlighted an "extensive 253 acre golf course and linear open space system winding throughout the community [that] provides a positive focal point while creating a mechanism to handle drainage flows." *Id*. at 153. The City approved the Phase II rezoning application under a resolution of intent subject to all conditions of approval for the revised PRMP. *Id*. at 191-202.

II. The Badlands has been designated PR-OS in the City's General Plans since 1992

The City's 1992 General Plan designated the Badlands for parks, recreation, and open space. On April 1, 1992, the City Council adopted a new Las Vegas General Plan, including revisions approved by the Planning Commission. Ex. I at 203-12, 220-26. The 1992 General Plan included maps showing existing land uses and proposed future land uses. *Id.* at 254. The future land use map for the Southwest Sector designated the area set aside by Peccole for an 18-hole golf course as "Parks/Schools/Recreation/Open Space." *Id.* at 256. That designation allowed "large public parks and recreation areas such as public and private golf courses, trails and easements, drainage ways and detention basins, and any other large areas of permanent open land." *Id.* at 242-43.

Between 1992 and 1998, Peccole developed the 18-hole golf course in the location depicted in the 1992 General Plan, and a 9-hole course to the north of the 18-hole course. *Compare id.* at

256 *with* Ex. J; Exs. K, L. The 9-hole course was also designated for "P" for "Parks" in the City's general plan. *See* Ex. M.

When the City adopted a new General Plan in 2000 to project growth over the following 20 years (the "2020 Master Plan"), it retained the land use classifications of the 1992 General Plan, including the "P" classification for "Parks/Recreation/Open Space," Ex. N at 268, 275, 279. It also retained the "parks, recreation, and open space" designation for the Badlands. *Compare id.* at 279 *with* Ex. I at 242-435.

In 2005, the City Council incorporated an updated Land Use Element in the 2020 Master Plan. Ex. O at 284-88. This 2005 Land Use Element designated all 27 holes of the Badlands golf course as PR-OS for "Park/Recreation/Open Space." *Id.* at 297. Each update to the Land Use Element since 2005 has designated the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged. *See id.* at 296; Ex. P at 298, 306-07; Ex. Q at 308-10, 322-23; Ex. R at 324, 337-38.

III. The City zoned the Badlands R-PD7

In 1972, the City established R-PD7 zoning (Residential-Planned Unit Development, 7 units/acre). Ex. S. "The purpose of a Planned Unit Development [was] to allow a maximum flexibility for imaginative and innovative residential design and land utilization in accordance with the General Plan." *Id.* at 339. R-PD zoning is an example of cluster zoning, which is "[z]oning that permits planned-unit development by allowing a modification in lot size and frontage requirements under the condition that other land in the development be set aside for parks, schools, or other public needs." *Zoning*, *Black's Law Dictionary* (11th ed. 2019). The R-PD district was intended "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns." Ex. S at 339.

During the 1990's, the City in some instances approved rezoning requests by a resolution of intent, meaning that a rezoning was provisional until rezoned property was developed. Once rezoned property was developed, the City would adopt an ordinance amending the Official Zoning Map Atlas to make the rezoning permanent. *See*, *e.g.*, Ex. T at 347. In 1990, the City adopted a

resolution of intent to rezone 996.4 acres of Phase II in accordance with the amended PRMP. Ex. H at 197-202. To obtain approval of R-PD7 zoning for 614.24 acres in Phase II, Peccole agreed to set aside 211.6 acres of this area for a golf course and drainage. *Id*. at 167, 171-73, 175-76, 179-80, 195-96.

In 2001, the City amended the Zoning Map to formally rezone to R-PD7 the 614.24-acre area of Phase II previously approved for R-PD zoning under the resolution of intent. Ex. U at 348-73. In 2011, the City discontinued the R-PD zoning district for new developments but did not alter the R-PD7 zoning of the Badlands and surrounding residential areas of Phase II. Ex. V at 374-75.

IV. The Developer acquired and divided the Badlands

As of 2015, when the Developer bought the Badlands, Peccole owned the Badlands under the name Fore Stars Ltd. Ex. W at 377-81; Ex. X. In March 2015, the Developer acquired Fore Stars, thereby acquiring the Badlands. Ex. Y at 392. Between 2015 and 2017, the Developer recorded parcel maps subdividing the Badlands into nine parcels. Ex. Z at 395-423; Ex. AA. The Developer transferred 178.27 acres to 180 Land Co. LLC and 70.52 acres to Seventy Acres LLC, leaving Fore Stars Ltd. with 2.13 acres. Ex. Y at 392; *see also* Ex. W at 382-89. Each of these entities is controlled by the Developer's EHB Companies LLC. *See* Ex. Ex. W at 383 and 387 (deeds executed by EHB Companies LLC); *see also* Ex. Y at 394. The Developer segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for each segment. At issue in this case is approximately 35 acres of property owned by 180 Land, Fore Stars and Seventy Acres (the "35-Acre Property"). *See* Ex. BB (Second Amendment and First Supplement to Complaint for Severed Alternative Verified Claims in Inverse Condemnation) ¶¶ 1, 7-8.

V. The City approved the Developer's 17-Acre Property Applications

In November 2015, the Developer applied for a General Plan Amendment, Re-Zoning, and Site Development Plan Review to redevelop the 17-Acre Property from golf course to condominiums ("17-Acre Applications"). Ex. CC at 463-83. In February 2017, the City Council approved the 17-Acre Applications for 435 units of luxury housing, approving a change of the property's General Plan designation from PR-OS to M for Medium Density Residential, and a

change in its zoning from R-PD7 to R-3 for Medium Density Residential. Ex. DD at 484, 486, 488-89, 491-97. Neighbors subsequently sued, and the Eighth Judicial District Court found that the City should have required the Developer to file a Major Modification Application to amend the PRMP before the City could approve applications to redevelop the Badlands. Ex. EE at 510-11. However, the Nevada Supreme Court reversed, upholding the City's position that a Major Modification Application was not required to develop the 17-Acre Property. Ex. FF at 515, 517 (*Seventy Acres, LLC v. Binion,* Case No. 75481 (Nev. 2020) (unpublished table decision)). The City informed the Developer that the Supreme Court's reversal validated the City's approval of its applications, and that the discretionary entitlements the City had approved for the 17-Acre Property would be reinstated once remittitur issued.[2] Ex. GG.

VI. The Developer applied to develop the 35-Acre Property

In December 2016, the Developer submitted land use applications to redevelop the 35-Acre Property with a 61-lot single-family subdivision. Ex. JJ at 525-52-71. These applications included a General Plan Amendment to change the General Plan land use designation from PR-OS to L, for Low Density (GPA-68385); a Site Development Plan Review Application, (SDR-68481); a

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[2] To determine whether a government regulation has effected a taking, courts must determine the scope of the relevant property alleged to have been taken, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017), and must focus on the alleged "interference with rights in the parcel as a whole." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 130-31 (1978); *see also Kelly v. Tahoe Reg'l Plan. Agency*, 109 Nev. 638, 651, 855 P.2d 1027, 1035 (1993). In this case, despite the Developer's segmentation of the 250-Acre Badlands into the 35-Acre Property and three others, the parcel as a whole is either the PRMP or the Badlands. The PRMP is a master planned development that was historically owned by a single landowner, is physically contiguous, and has historically been treated as a single, integrated project. *See* Ex. B at 26; Ex. F at 77-101; Ex. H at 148-169. The City has permitted full build-out of roughly 1,319 acres of the PRMP for residential, commercial, and retail development, constituting 84% of the total area of the whole parcel. The Badlands is only 16% of the PRMP. Accordingly, even if the City had denied all development of the Badlands, the City would not be liable for a taking of the parcel as a whole as a matter of law. *See* Ex. HH. Even if the PRMP were not considered the parcel as a whole, at the very least the Badlands would be. The Badlands is a physically contiguous area with a homogenous topography, was owned by a single landowner when the Developer purchased it, has been in single use since at least 1998, and the Developer purchased the entire Badlands in a single transaction. *See* Ex. F at 81; Ex. H at 153, 155, 159, 161; Ex. II at 521-524; Ex. W at 377-389; Ex. Y at 392; Ex. Z at 395-423; Ex. AA. The Developer split the Badlands into the 17, 35, 65, and 133-acre segments *after* it purchased the property. Accordingly, even if the 250-Acre Badlands is the parcel as a whole, the City's approval of development of 435 units of luxury housing in the Badlands negates the Developer's takings claim in this and the other three regulatory takings cases.

Tentative Map application (TMP-68482), and a waiver application to allow for particular street dimensions (WVR-68480), (collectively the "35-Acre Applications"). *Id.* at 525-31. The Developer's applications stated that the property was designated PR-OS, for "Parks Recreation and Open Space." *Id.* at 533. As a result, the Developer requested to change the PR-OS designation to a designation allowing residential use. *Id.*

While the 35-Acre Applications were pending, the Developer also sought a new development agreement for the entire Badlands that was inconsistent with the development proposed in the 35-Acre Applications. *See* Ex. KK (Development Agreement Application for "The Two Fifty," DIR-70539); Ex. LL at 646. On June 21, 2017, the City Council denied the 35-Acre Applications. *Id.* at 640-45. At the City Council meeting, a point of discussion included the inconsistency between the 35-Acre Applications and the Developer's proposed development agreement. *Id.* at 646.

Following the City's denial of the 35-Acre Applications, the Developer filed a PJR and complaint for a taking, and then a second amended PJR to sever alternative verified claims in inverse condemnation. Ex. MM at 647, 659, 683. This Court concluded, among other things, that (1) substantial evidence supported the City's denial of the 35-Acre Applications, (2) the R-PD7 zoning of the 35-Acre Property did not confer a vested right for any development of the property, and (3) the City had discretion to amend, or refuse to amend, the PR-OS General Plan designation of the property to allow residential use.[3] Ex. A at 12-15, 17-19, ¶¶ 11, 35, 44. The Developer then filed a Second Amendment and First Supplement to Complaint for Severed Alternative Claims in Inverse Condemnation, which is pending in Court after the federal district court remanded it

[3] Contrary to the Developer's statement that "this Court is aware [that] the City engaged in systematic and aggressive actions to preclude the Landowners from using their 35 Acre Property for any purpose," (Motion at 3) the Developer does not provide any facts substantiating such a claim, nor has this Court made any finding consistent with the Developer's claims. Regardless, the City approved 435 housing units in the Badlands, at a minimum the parcel as a whole, negating any claim that the City has "taken" a 35-acre segment of the Badlands.

following the City's removal.[4] *See* Ex. BB, Ex. NN; Ex. QQ.

LEGAL ARGUMENT

The Developer's request that this Court find that R-PD7 zoning creates a vested right to residential development on the 35-Acre Property, which the Developer claims was "taken" when the City denied the Developer's 35-Acre Applications (Ex. BB ¶¶ 10, 12, 31, 44, 83, 207), flies directly in the face of this Court's previous legal conclusions and is entirely unsupported by Nevada law. Nevada law uniformly holds that zoning does not confer a vested right. The City retains discretion to approve or deny any development, even if it is consistent with the zoning. Moreover, although the Developer's motion studiously ignores the City's General Plan land use designation for the property, the PR-OS designation prohibits residential development of the property unless the City approves an amendment to the General Plan, which is squarely within the City's discretion and its statutory powers under NRS 278. The R-PD7 zoning for the property is consistent with this land use designation, but even if it were inconsistent, the PR-OS designation would take precedence over the zoning.

I. This Court previously ruled that a zoning designation does not confer vested rights as a matter of law

The Court's 2018 FFCL directly addresses and rejects the claims the Developer makes in its motion. The Court found that zoning does not grant the Developer a vested right to have its development applications approved. Ex. A at 17 ¶ 35. Instead, the Court noted that Nevada law does not recognize vested rights to development until the project is approved and is not subject to further governmental discretionary action, and the developer has relied considerably on the approvals. *Id.* (citing *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995)). In sum, an owner must rely on a valid *approval* of a permit to have a vested right. Here, the City *denied* the Developer's 35-Acre Applications. Accordingly, the Developer has not changed its position in reliance on a final, valid approval required to obtain a vested right. This Court also

[4] Although the Developer cites only the Nevada Constitution in its motion (*see* Motion at 3), its complaint invokes the federal Constitution as well and asserts both federal and state takings claims. As such, both federal and state law is relevant to these claims.

found that the Developer's 35-Acre Applications were "all subject to the Council's discretionary decision making, no matter the zoning designation." *Id.* at 18, ¶ 37. The Court found that statements from City staff or the City Attorney confirming the Badlands' R-PD7 zoning did not change the conclusion that the Developer did not have a vested right to have its development applications approved. *Id.* ¶ 39.

These findings directly undermine the Developer's request that the Court find that "the Landowners indisputably have a vested property interest in the 35 Acre Property's R-PD7 zoning," and that as such the Developer has the right to use its property for residential development. Motion at 4. The Court has already definitively rejected the theory that the Developer now advances *again*, that it is somehow entitled "by right" (Motion at 6:6) to residential development on the property because of the property's zoning.

II. Zoning does not create a vested right

The Court's ruling in the 2018 FFCL was correct and based on unanimous authority of the Nevada Supreme Court. Without authority, the Developer asserts that it had a vested right under the zoning of the 35-Acre Property to the development of its choice, as long as it proposed no more than seven units per acre, and that the City's denial of the Developer's proposal was a "taking" of its vested property right. The Developer spends the majority of its brief arguing that the zoning for the Property is R-PD7, as if this fact were in dispute. Motion at 5-8. It is not disputed. The City has admitted this fact in its answer and has conceded the fact in every brief it has filed, and the Court previously found that the Property was zoned R-PD7. *See, e.g.*, Ex. A at 18-19 ¶¶ 39, 46. Contrary to the Developer's contention that it "indisputably ha[s] a vested property interest in the 35 Acre Property's R-PD7 zoning," and thus that it has a right "as a matter of law" to use its property for residential development (Motion at 4), this Court found in the 2018 FFCL that as a matter of law, the Developer has no vested right equivalent to a property interest in the R-PD7 zoning. Ex. A at 17 ¶ 35. To the contrary, the Court found that the zoning is a *limitation* on the Developer's use of the property, and the City has discretion whether to allow use of the property up to the numerical limits of the zoning. The Developer has no property interest in any particular exercise of that discretion. That ruling is consistent with long-established law in Nevada that zoning does not grant

a property owner affirmative rights, and the Developer has cited no authority that it does. Insofar as the Court has stated in the 2019 Order that zoning does confer some type of vested right, it was led into error by the Developer.

A. Nevada law consistently holds that zoning does not create a vested right

The Nevada Supreme Court has repeatedly held that zoning does not create a vested right to develop because Nevada cities retain discretion to approve or reject specific uses of property even when those uses are consistent with the zoning for the area. "[F]or 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.*, 111 Nev. at 807, 898 P.2d at 112; *see also Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. at 527-28, 96 P.3d at 759-60 (2004) (project proponent did not have vested right to site development plan despite fact that its proposed development was consistent with the existing zoning); *City of Reno v. Nev. First Thrift*, 100 Nev. 483, 487, 686 P.2d 231, 233 (1984) ("[W]hen a building permit has been issued, vested rights against changes in zoning laws exist after the permittee has incurred considerable expense in reliance thereupon."); *Bd. of Cnty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983) (There are no vested rights against changes in zoning laws "unless zoning or use approvals are not subject to further governmental discretionary actions affecting project commencement."); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992) ("[C]ompatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *Nev. Contractors v. Washoe Cnty.*, 106 Nev. 310, 311, 792 P.2d 31, 31-32 (1990) (affirming county's denial of a special use permit even though property was zoned for the use).

B. The City's regulations provide the City with discretion to deny development

Here, applications the Developer submitted to develop the 35-Acre Property are subject to the City Council's discretion. *See Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112; *Cnty. of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998), *superseded by statute on other grounds*; *Bd. of Cnty. Comm'rs*, 99 Nev. at 747, 670 P.2d at 107. The council members are free to exercise

their discretion to approve, deny, or strike development applications, no matter the zoning designation, so long as their actions are not arbitrary and capricious. *See Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112. As a result, the Developer's assertion that it has a "vested right" to redevelop the 35-Acre Property is legally erroneous.

Stratosphere Gaming Corp. v. City of Las Vegas, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004) is directly on point. In that case, the property owner asserted that it had a vested right to build an amusement ride because existing zoning permitted the ride and the City had previously approved Stratosphere's application to build another ride on the same property. *Id.* The Nevada Supreme Court rejected the developer's argument, finding that because the City must approve the proposed development through its site development plan review process, which requires the City to consider various factors and exercise its discretion, there was "no evidence" that the plaintiff "had a vested right to construct the proposed ride." *Id.* at 528, 96 P.3d at 760. The Nevada Supreme Court affirmed that "'[o]nce it is established that an area permits several uses, it is within the discretion and good judgment of the municipality to determine what specific use should be permitted.'" *Id.* at 527-28, 96 P.3d at 760 (quoting *City of Reno v. Harris*, 111 Nev. 672, 679, 895 P.2d 663, 667 (1995)).

Similarly here, the City was required to review the Developer's proposed 61-lot development for the 35-Acres through its established review process, which required a General Plan Amendment, a Site Development Plan Review application, a Tentative Map application, and a Waiver application. *See* Ex. JJ at 525-52. Further, the City considered the 35-Acre Applications' consistency with the then-pending Development Agreement for the entire Badlands. Ex. LL at 646. The City's review process thus required the City to consider various factors and to exercise its discretion, just as in *Stratosphere*. As a result, the Developer does not have a vested right to residential development on the property. This Court previously rejected the Developer's attempt to distinguish *Stratosphere*, and it must reject the Developer's position now. Ex. A at 18 ¶ 38.

Further, as described below in Section III(C), the residential planned development review process, which applies to areas zoned R-PD, grants the City broad discretion to attach "whatever conditions are deemed necessary to ensure the proper amenities and to assure that the proposed

development will be compatible with surrounding existing and proposed land uses." UDC 19.10.050(D). The City has discretion to impose conditions on R-PD site development plans to ensure proper amenities, including common recreation facilities and open space. *See* UDC 19.10.050; Ex. S at 339-41; Ex. V at 375-76; Ex. PP at 758-60; Ex. QQ at 762. Because the City retains discretion over the design of R-PD developments, no developer has a vested right to construct up to seven units on any specific area of an R-PD development, let alone on the common open space set aside for preexisting development. *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112. Thus, the Developer had no vested right to develop housing in the Badlands.

In view of the City's broad discretion to approve, disapprove, or condition a development project application, the Developer's argument that it had a "vested right" to approval of its 35-Acre Applications is without even the slightest merit. As demonstrated above, to obtain a vested right means that the regulatory agency cannot change the law applicable to a development project after the agency has issued a discretionary approval and the developer then relies on that valid approval. In that case, a change in the law applicable to the project would require the developer to change the project, wasting the developer's construction costs incurred at the time of the change. *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112; *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. at 527-28, 96 P.3d at 759-60. But here, because the City disapproved the Developer's application to develop the 35-Acre Property, the developer cannot claim reliance on a valid approval and it therefore has no vested right as a matter of law.

Ignoring this well-established principle, the Developer asserts that it has a "vested" right to build its proposed project, merely because the zoning allows up to seven housing units per acre on its property. There is no such vested right, nor could there be. The UDC requires that a developer file applications requesting a specific design for a project that complies with the regulations applicable to new residential construction: e.g., number and configuration of units, setbacks from the street and property lines, height and bulk of buildings, open space, etc. The regulations set maximums, such as building heights or density, and minimums, such as setbacks,-within which parameters the City exercises discretion. If the City had approved an application addressing each of these issues, the developer had started construction, and the City had changed the law; e.g., by

reducing the number of allowable units, the developer may have a claim for deprivation of a vested right. But without an approval of a specific application, "vesting" is meaningless. A vested right to do what? Stripped of its rhetoric and obfuscation, the Developer's argument devolves into the claim that the City has no discretion to disapprove or condition the Developer's application—any application for any project of any design—other than to limit construction to no more than seven units per acre. That claim must be rejected as nonsensical.

C. Las Vegas Municipal Code does not limit R-PD7 to residential uses

The Developer misrepresents the Las Vegas Municipal Code when it states that "the '**permitted** land use' on R-PD7 zoned property" is single-family and multi-family residential. Motion at 9 (emphasis in original) (citing UDC 19.10.050(C)). The Developer's insinuation is that the *sole* use of R-PD7 property is single-and multi-family residential. But the Las Vegas Municipal Code is to the contrary. Instead, the City's Code states that permitted land uses for districts zoned R-PD include "[s]ingle-family and multi-family residential *and supporting uses* . . . to the extent they are determined by the Director to be consistent with the density approved for the District and are compatible with surrounding uses." UDC 19.10.050(C)(1) (emphasis added). Thus, residential uses are *not* the sole permitted uses in an R-PD7 zone, but instead supporting uses, including open space and recreation, are permitted in these zones. *See id.* This conclusion is bolstered by the stated purpose of the R-PD District, which is "to provide for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, *efficient utilization of open space*, . . . and homogeneity of land use patterns." UDC 19.10.050(A) (emphasis added). The Code thus contemplates the inclusion of open space as a supporting use within an R-PD7 zoned district.

In an even more blatant misrepresentation of the City Code, the Developer states that the Code permits residential uses in an R-PD7 zone "by right," citing UDC 19.12.010. Motion at 9. However, the Developer is citing a land use table in the City Code that *does not contain* the R-PD zoning district, let alone the R-PD7 district. *See* UDC 19.12.010(B). Even the Developer's own exhibit reveals that the R-PD7 zone is not in the table the Developer cites. *See* Developer's Ex. 6. Instead, the Developer has highlighted the "R-2" district as permitting residential uses "by right." *See id.* The R-2 zoning district is the "Medium-Low Density Residential District," and it is entirely

distinct from the R-PD7 zoning district, UDC 19.06.100; the two are found in entirely different sections of the City Code. *Compare* UDC 19.06 ("Residential Districts"), *with* UDC 19.10 ("Special Area and Overlay Districts"). More important, like any zoning district in the City, the UDC land use tables do not provide that development in an R-2 District is "by right," just as they do not state that development in an R-PD7 district or any other zoning district is "by right." Rather, they limit the density of residential development. Throughout its Motion, the Developer confuses a "permitted" use with a vested right. A permitted use is a use "allowed in a zoning district as a matter of right if it is conducted in accordance with the restrictions applicable to that district." UDC 19.18.020. The City thus retains discretion to ensure that a use complies with all applicable restrictions. Accordingly, such a use is not a vested right.

The sole case cited by the Developer, *Cienega Gardens v. United States*, 331 F.3d 1319, 1330-31 (Fed. Cir. 2003), is inapposite here. In *Cienega Gardens*, the landowners' property interests "were based on the interaction of both real property rights and contractual rights," because the landowners had signed contracts upon purchasing the land that would permit them to prepay their mortgages after twenty years. *Id.* at 1325, 1328. The landowners' real property rights were the rights to "sole and exclusive possession" and to "convey or encumber their properties" after twenty years. *Id.* at 1328. The court held that these fee simple ownership rights had automatically vested upon taking title. *Id.* at 1330. This holding is irrelevant to the instant case because it merely reinforces that the rights attendant with fee simple ownership–including the right to possess land and to convey it—vest upon taking title. Under the regulatory takings doctrine, vesting of title in property also entitles the owner to some use of the property to avoid an economic wipeout, independent of whether the property owner has a vested right to that use. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). However, this case does not support the Developer's contention that the right to develop at a particular density, which is entirely dependent on City discretion and is superseded by a General Plan designation, vests at the time the landowner takes title. *See* Motion at 10.

D. The Nevada Supreme Court did not find that R-PD7 governs the property

Contrary to the Developer's contention, the Nevada Supreme Court did not "specifically

uphold[] permissibility of residential multi-family development as a matter of law finding that this R-PD7 zoning governs the use and development of the property." Motion at 8; *see also id.* at 5-6. Instead, in the decision cited by the Developer, *Seventy Acres, LLC v. Binion,* Case No. 75481 , (Nev. 2020) (unpublished table decision), the Court did not even address what kind of development R-PD7 zoning allows, let alone whether it permits residential development "by right" or confers vested rights to any particular level of development. *See.* Ex. FF.

Instead, the issue before the Court was whether the City should have required the Developer to apply for a Major Modification to the General Plan before granting the Developer's applications to develop the 17-Acre Property, which is part of the 250-Acre Badlands. *See id.* at 514-15. The Supreme Court agreed with the City that because the 17-Acre property "carries a zoning designation of residential planned development district" rather than "planned development district," and the City's UDC requires a Major Modification for a "planned development district" but not a "residential planned development district," no Major Modification was required. *Id.* at 515. Aside from noting the distinction that the property at issue was zoned R-PD rather than PD and applying the plain language of the ordinance, the Court did not make any statement regarding what R-PD zoning permits. Further, the Court did not consider or decide the impact of the PR-OS General Plan designation, which independently limits the use of the Badlands. As a result, contrary to the Developer's misrepresentation, this decision did not hold that residential development is permitted as a matter of law or "right" or that the zoning alone governs the property's use. *See* Motion at 8.

E. Zoning is irrelevant to defining the Developer's property right or interest or whether the City is liable for a taking

Not only does zoning not establish a vested right to develop, but it also is irrelevant to determine the "[u]nderlying '[p]roperty [i]nterest.'" Motion at 4. It is undisputed that for a plaintiff to support a takings claim, it must have a property interest. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006). Courts must therefore determine if the plaintiff possesses a valid interest in the property affected by the government action before proceeding to determine if the governmental action constituted a taking. *Id.* (citing *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000)). "The term 'property' includes all rights inherent in

ownership, including the right to possess, use, and enjoy the property." *Id.* (citing *Property*, *Black's Law Dictionary* (8th ed. 2004)). Once a court finds that the plaintiff has a property interest, the next question in an inverse condemnation case is whether the government took a regulatory action that was the functional equivalent of a classic taking, in the sense that it causes a severe economic deprivation to the plaintiff. *Lingle*, 544 U.S. at 538; *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007). To determine whether a government action has wiped out the use or value of property, courts evaluate the use and value of the property before and after the government regulation is imposed. In this limited context of determining the use or value of the property, which is a distinct inquiry from whether a plaintiff has a property interest to begin with, a property's zoning might be relevant, but it is only one of many factors a court might consider. *See City of Sparks v. Armstrong*, 103 Nev. 619, 622, 748 P.2d 7, 9 (1987).

In this case, the City has never denied that the Developer purchased the Badlands property in 2015, and thus that the Developer's property interest in this case is the fee simple ownership of the 35-Acre property. However, the Developer asks this Court to impermissibly expand the scope of its rights of ownership by declaring that the Developer has a "property interest" in "a residential use of the 35 Acre Property under the hard R-PD7 zoning." Motion at 3. The Court already denied this request in the 2018 FFCL, because, as discussed above (*see supra* Section I), the Court held that zoning does not confer a right to any particular use, and as such it does not create a property interest. Consistent with that fact, the Developer is unable to cite a single case in which a court found that zoning conferred a property interest or was relevant to determine the property interest. Instead, all the cases the Developer cites are either eminent domain cases, in which the property's zoning was relevant to determine the hypothetical fair market value and hence the compensation due, or inverse condemnation cases in which zoning was relevant to compensation rather than liability[5]. *See* Motion at 4 n. 4. Not a single one of these cases relies on the zoning of the property to establish whether the party had a property interest in the first place. *See City of Las Vegas v.*

[5] The determination of liability for inverse condemnation is a mixed question of law and fact for the Court. A jury determines damages only in the rare case where the courts finds the public agency liable for a regulatory taking.

Bustos, 119 Nev. 360, 75 P.3d 351 (2003); *Clark Cnty. v. Alper*, 100 Nev. 382, 685 P.2d 943 (1984); *United States v. Eden Mem'l Park Ass'n*, 350 F.2d 933 (9th Cir. 1965); *Vacation Village, Inc. v. Clark Cnty.*, 497 F.3d 902 (9th Cir. 2007); *Twp. of Manalapan v. Gentile*, A-14 Sept. Term 2019 083137, 2020 WL 2844223 (N.J. June 2, 2020); *Berry & Co., Inc. v. Cnty. of Hennepin*, File Nos. 27-CV-13-07304, 27-CV-14-05896, 27-CV-15-07009, 2017 WL 1148781 (Minn. Tax Regular Div. Mar. 20, 2017). For the same reason, the jury instructions in eminent domain cases are entirely beside the point in this case. *See* Motion at 4-5 n.5.

In relying on eminent domain cases, the Developer confuses the inquiry regarding value in an eminent domain action, where the government's liability for compensation for the taking is conceded by the filing of the action, with the inquiry regarding the uses actually permitted by the government regulation of property challenged in an inverse case, where liability is the primary issue. In an eminent domain case, the appraiser considers the zoning, General Plan, and other restrictions on use and the *potential* application of those regulations in forming an opinion of what a buyer would pay to buy the property if it were put on the market. *See City of Sparks*, 103 Nev. at 622, 748 P.2d at 9 (*citing Clark Cnty. School Dist. v. Mueller*, 76 Nev. 11, 19, 348 P.2d 164, 168 (1960)) (methods used to evaluate the worth of condemned property include "[a]ll elements that might affect the fair market value of the property, including such elements that might influence a reasonably prudent person interested in purchasing it"). In an inverse condemnation case, in contrast, the Court determines whether the government's *actual* application of these regulations wiped out or virtually wiped out the use or value of the property. *State, Dep't of Transp. v. Cowan*, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004).

The Developer cites only two inverse condemnation cases, but neither case involved the court considering the property's zoning to determine the nature of the property interest. *See Alper*, 100 Nev. at 390, 682 P.2d at 948 (parties stipulated that property was taken, and for purposes of valuing the property, court concluded that "due consideration should be given to those zoning ordinances that would be taken into account by a prudent and willing buyer"); *see also Vacation Village, Inc. v. Clark Cnty.*, 497 F.3d at 918 (instructing the district court on remand to consider zoning when determining the amount of compensation). While these cases show that courts might

consider zoning when determining the value of a property, they do not support the contention that zoning is relevant to determine a property interest, or that zoning establishes rights to "use[] property." Motion at 4-5. As this Court held, "[t]he Court rejects the Developer's argument that the RPD-7 zoning designation on the Badlands Property somehow required the Council to approve its Applications. . . . A zoning designation does not give the developer a vested right to have its development applications approved." Ex. A at 17 ¶¶ 34, 35.

Even if the Developer had a vested right to approval of any application it chose to file as long as it is for seven units or less per acre, by arguing that the City is liable for a taking because it has "taken" the Developer's vested right guaranteed by zoning to have its application approved, the Developer engages in a fundamental misunderstanding of the law of regulatory takings. Zoning and other regulations *limit* property rights; the Just Compensation Clause of the Constitution *grants* property rights. But under the Just Compensation Clause, the property owner is granted essentially one right – to make *some* economic use of the property as a whole. Whether a regulation refuses to recognize a vested right – even if the Developer had one – is not relevant for purposes of determining liability for a regulatory taking, unless the refusal results in a wipeout or near wipeout tantamount to a physical ouster from the entire property. *Lingle*, 544 U.S. at 538.

III. The PR-OS General Plan land use designation takes precedence over R-PD7 zoning

A. The City is authorized to adopt a General Plan containing land use designations, with which all zoning regulations must comply

The City's broad power to regulate land use for the public good includes discretion to regulate density and amenities such as open space for master planned developments. Cities in Nevada are authorized to adopt a general plan (also referred to as a "master plan") adopted by a local planning commission to serve as a "pattern and guide for that kind of orderly physical growth and development of the city or county which will cause the least amount of natural resources impairment." NRS 278.150, 278.230(1). Thus, the General Plan is both a record of current land uses by geographic location and the City's plan for future land uses. NRS 278.150(1); 278.160 (describing various elements of a master plan as including an "inventory" of existing conditions). "The master plan shall be a map . . . ." NRS 278.200. A General Plan map can be amended only by

the City Council in the exercise of discretion. *Stratosphere Gaming Corp.*, 120 Nev. at 527-28, 96 P.3d at 759-60.

A city's master plan is a "standard that commands deference and a presumption of applicability." *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989); *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 of an area.") (citing NRS 278.150(1)-(2)).

Zoning is to the City's General Plan as statutes are to constitutions. The General Plan is the City's vision for land uses; zoning implements that vision. Accordingly, local governments are authorized to create zoning districts and to enact zoning regulations, which "must be adopted in accordance with the master plan for land use." NRS 278.250(2). "'[M]unicipal entities must adopt zoning regulations that are in substantial agreement with the master plan.'" *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112 (quoting *Nova Horizon, Inc.*, 105 Nev. at 96, 769 P.2d at 723). Indeed, the City's UDC states that it is the City Council's intent "that all regulatory decisions made pursuant to this Title be consistent with the General Plan." UDC 19.00.040. Consistency with the General Plan includes "consistency with the Plan's land use and density designations," such as the PR-OS land use designation. *Id*. Similarly, zoning ordinances must be consistent with the General Plan. *See* UDC 19.00.050 ("The establishment of zoning districts is intended to be one of the means of implementing the City's General Plan . . . .").

B. The City adopted the PR-OS General Plan designation through duly enacted legislation, and it has the force of law

Since 1992, the City has repeatedly designated the Badlands as PR-OS in its General Plan through duly-enacted ordinances with the force of law, and the designation remains in effect – with the exception of the 17-Acre portion of the Badlands, where the City approved an amendment to the General Plan PR-OS designation to allow medium density residential development. Ex. DD at 484, 489, 491-97. The general area of the Badlands has been set aside as a golf course and drainage area since Phase I of the PRMP was approved in 1989. *See* Ex. F at 111-13; Ex. H at 153-54, 159, 161. The Badlands is uniquely situated for this purpose due to its topography, which makes it a

necessary drainage feature for the surrounding area. To confirm this use of the property as open space and golf course, the City Council designated the majority of the Badlands as PR-OS in the City's General Plan in 1992, and designated the entirety of the property as PR-OS in 1998. *See* Ex. I at 220-27, 242-43, 254, 256 (ordinance approving 1992 General Plan designating 18-hole golf course PR-OS); Ex. M (showing "P" for "Park" designation of Badlands in 1998). The PR-OS land use designation does not permit housing, but instead allows "large public parks and recreation areas such as public and private golf courses, trails and easements, drainage ways and detention basins, and any other large areas of permanent open land." Ex. K at 242-43.

The City has repeatedly confirmed the PR-OS designation of the Badlands by duly adopted legislation since 1992. Ex. N at 268, 275, 279 (Sept. 6, 2000 Ordinance adopting 2020 Master Plan providing that 1992 General Plan "shall continue in effect"); Ex. II at 521-524(General Plan maps showing Badlands as PR-OS); Ex. O at 284-88, 292-93 (2005 Ordinance approving General Plan listing PRMP as "Master Development Plan Area," defined as "comprehensively planned development[]"); *id*. at 297 (2005 General Plan map showing Badlands designated PR-OS); Ex. P at 298-307 (2009 Ordinance and General Plan map showing Badlands designated PR-OS); Ex. Q at 323 (2012 General Plan map showing Badlands designated PR-OS); Ex. R at 324, 337-38 (Ordinance approving 2018 General Plan map showing Badlands designated PR-OS). The City's ordinances approving the PR-OS designation of the Badlands are presumed valid. *Nova Horizon, Inc.*, 105 Nev. at 94, 769 P.2d at 722.

At the time the Developer purchased the Badlands, the Developer was on notice that the 18-hole golf course had been designated PR-OS in the City's General Plan for the previous 23 years and the 9-hole course for 17 years. The Developer also had notice that the City has broad discretion to maintain a General Plan designation and is under no obligation to change the law to allow a more profitable use of property. For example, in *Penn Central Transportation Co. v. City of New York*, the United States Supreme Court held that:

> [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law

> does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.

438 U.S. 104, 136 (1978); *see also Kelly v. Tahoe Reg'l Plan. Agency*, 109 Nev. 638, 651, 855 P.2d 1027, 1035 (1993) (at the time developer purchased property "he had adequate notice that his development plans might be frustrated"); *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 634-35 (9th Cir. 2020) (developer could not have reasonably expected the Commission to not enforce conditions in place when it purchased the property); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1121 (9th Cir. 2010) (takings claimants "bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had"); *Mehaffy v. United States*, 499 F. App'x 18, 22 (Fed. Cir. 2012) (owner is charged with knowledge of regulatory restraint in place at time of acquisition of property and assumes risk of any economic loss of investment based on speculation that discretionary permit will be granted).

The City has never repealed the PR-OS designation, contrary to the Developer's insinuation in its complaint. *See* Ex. BB ¶ 17. In Ordinance No. 5353, adopted in 2001, the City formalized the R-PD7 zoning for the portion of the PRMP that included the Badlands, which had previously been adopted by a resolution of intent in 1990. Ex. U at 348-73; Ex. H at 197-202. While Ordinance No. 5353 stated that all conflicting ordinances contained in the City's Municipal Code "are hereby repealed," this statement did not apply to the PR-OS land use designation in the General Plan. Ex. U at 349. The General Plan is not an ordinance in the Municipal Code, nor are the ordinances adopting General Plan maps codified in the Municipal Code. *See* NRS 278.230. Further, even if the General Plan were codified in the Municipal Code, the PR-OS designation and the R-PD7 zoning of the Badlands are not in conflict.

C. R-PD7 Zoning is consistent with the PR-OS land use designation

The R-PD7 zoning of the Badlands is consistent with the PR-OS General Plan designation. R-PD7 means "Residential Planned Development – 7 units per acre." The R-PD7 zoning is a vehicle for distributing up to seven units per acre across the gross acreage of a site. *See* Ex. PP at 759 (Las Vegas Municipal Code 19.18.030 (1983)). The gross acreage of a site is calculated by measuring

the total land area before deduction of areas to be dedicated or reserved for a public use. UDC 19.18.030(A)(1). A site's density is then calculated by dividing the number of units on a site by the site's gross acreage. UDC 19.18.030(A)(2). As the City Staff has explained, "[a]s a Residential Planned Development, density may be concentrated in some areas while other areas remain less dense, as long as the overall density for this site does not exceed 7.49 dwelling units per acre." Ex. RR at 776.

In a Residential Planned Development, or R-PD zone, the City can require a developer to cluster housing, leaving other areas for recreation and open space to serve the development, according to the City Council's discretion to achieve a land use plan that is in the best interest of the community. *See* UDC 19.10.050, 19.18.010. Indeed, R-PD zoning was intended "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, . . ." Ex. S at 339. The City also has discretion to impose conditions on R-PD site development plans to ensure proper amenities, including common recreation facilities and open space. *See* UDC 19.10.050(D); Ex. S at 339-41; Ex. V at 375-76; Ex. PP at 758-60; Ex. QQ at 762.

Given the fact that R-PD7 does not create a density limit per acre, but instead per gross acreage of a site, and that it allows for clustering of residential development to allow for open space, the PR-OS designation for the Badlands is consistent with this zoning for the second phase of the PRMP. Other areas within the R-PD7 portion of the second phase of the PRMP are designated for different land uses in the City General Plan, allowing for residential and commercial development in those areas. Accordingly, an owner of property within the R-PD7 area designated for residential use in the General Plan could seek an approval to do so without requesting the City to exercise its discretion to amend the General Plan. Here, in the Badlands, an owner would be required to apply for an amendment to the General Plan to construct housing in the Badlands.

The City's actions in approving the PRMP are consistent with these principles of R-PD zoning. In 1990, to obtain tentative zoning for Phase II, which included R-PD7 zoning for 614.24 acres in the PRMP, Peccole had to develop this Phase "in accordance with the [PRMP]," which included plans for open space. NRS 278.250(2); Ex. H at 197-202. Peccole was also required to set aside 211.6 acres for a golf course and drainage. Ex. H at 167, 171-73, 175-76, 179-80, 195-96.

The golf course and drainage area of the R-PD7 zone was then designated PR-OS. In 2001, after much of the PRMP had been built out, the City formalized its adoption of the R-PD7 zoning for the 614.24 acres. Ex. U at 348-73.

Although it now pretends otherwise, the Developer has previously acknowledged that R-PD7 zoning does not grant the Developer the right to build seven houses on each acre of the Badlands. In its Master Development Agreement ("MDA"), which proposed clustering housing along with areas of no construction throughout the Badlands, the Developer acknowledged that "the Property is zoned R-PD7 which allows for the development of the densities provided for herein," implying that no rezoning would be required. Ex. KK at 561. The MDA proposed densities of up to 25 units per acres in some portions of the Badlands, and 34 units per acre in other sections. *See id.* at 608 (Master Land Use Plan for Development Agreement showing 435 units on 17.49 acres, for a density of 24.87 units per acre, and 1684 units per acre on 49.72 acres, which gives a density of 33.87 units per acre). To reach densities exceeding seven units per acre in an R-PD7 zone without a rezoning, as the Developer proposed in its MDA, development of housing and open space would have to be clustered within the Badlands. *See id.* at 575-76 (describing the plan for "12.7 acres of landscape, parks, and recreation areas" in three development areas, and 87 acres of "landscape area" in the fourth development area).

The purpose of R-PD7 zoning is to allow clustering of development, open space, and other amenities to achieve sound land use planning. A PR-OS General Plan designation on the open space component within an R-PD7 planned development is thus fully consistent with the R-PD7 zoning in the second phase of the PRMP. Because the Badlands portion of the R-PD7 zone is designated PR-OS, the Developer has no vested right to build housing in the Badlands.

D. Even if the R-PD7 zoning were inconsistent with the PR-OS land use designation, the PR-OS designation prevails

Even if the R-PD7 zoning were inconsistent with the PR-OS General Plan designation, it is well-established law in Nevada that zoning is subordinate to the master plan, not vice versa. NRS 278.250(2). As noted above, "'municipal entities must adopt zoning regulations that are in substantial agreement with the master plan.'" *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112

(quoting *Nova Horizon, Inc.*, 105 Nev. at 96, 769 P.2d at 723). Moreover, the City's UDC provides:

> [A]ll regulatory decisions made pursuant to this Title [shall] be consistent with the General Plan. . . . "[C]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 . . . .

UDC 19.00.040. "The establishment of zoning districts is intended to be one of the means of implementing the City's General Plan and any amendment thereto . . . ." UDC 19.00.050. Accordingly, even if the R-PD7 zoning were inconsistent with the PR-OS designation, the General Plan designation takes precedence. The zoning for the planned development district as a whole does not confer vested rights to develop any particular parcel in a manner that does not conform with the General Plan. *See Nova Horizon, Inc.*, 105 Nev. at 96, 769 P.2d at 723.

The Developer, like all owners of real property in Las Vegas, is subject to the City's zoning ordinances and General Plan. It has no vested right to develop the Badlands to the maximum density allowed by the zoning ordinance or to use the property in a manner inconsistent with the General Plan.

This Court previously concluded that the Developer purchased the Badlands knowing that the General Plan designation for the property was PR-OS and that the PRMP identified the property for use as open space and drainage. Ex. A at 18 ¶ 40. The Court confirmed the City Council's "discretionary decision making" authority "to decide whether a change in the area or conditions justify the development sought by the Developer." *Id.* at 19, ¶ 44. Further, the Court affirmed that because the Developer's 35-Acre Applications requested a General Plan Amendment and Waiver, the Developer's "assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong." *Id.* ¶ 46. Indeed, "[b]y submitting a General Plan Amendment application, the Developer acknowledged that one was needed to reconcile the differences between the General Plan designation and the zoning." *Id.* at 19-20, ¶ 48.

IV. Vested rights, even if they existed, would not be relevant to the Developer's takings claims

The Developer may contend that the Court's prior ruling that the zoning of the 35-Acre

Property confers no vested right on the Developer is limited to the PJR and does not apply to the Developer's regulatory takings claims. That contention would lack merit. Under Nevada law there is only one vested rights doctrine. As demonstrated above, an owner has a vested right to proceed with a development project if it has obtained all discretionary approvals and the owner has relied on the approvals by starting work on other project. *See supra* at pp. 10-12; *See Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112. There is no separate vested rights doctrine applicable to regulatory takings.

As indicated above in Section II(E), to determine whether the government is liable for a regulatory taking, the first inquiry is whether a party has a property interest, meaning the rights inherent in fee simple ownership, including the right to possess, use, and enjoy the property. *Sisolak*, 122 Nev. at 658, 137 P.3d at 1119 (citing *Property*, *Black's Law Dictionary* (8th ed. 2004)).[6] Ownership of the property means holding "title," as in "title" is "vested in" the owner. *See Vest*, *Black's Law Dictionary* (11th ed. 2019) (defining "vest" as "[t]o confer ownership (of property) on a person" and "[t]o invest (a person) with the full title to property"). If the takings claimant holds title to the property, which is not disputed in this case, the next inquiry is whether the government took regulatory action that caused a severe economic deprivation to the owner equivalent to an eminent domain taking. *Lingle*, 544 U.S. at 538. To find the City liable for a taking, the Developer has the burden to show that the impact of the City's regulatory action is so severe as to wipe out or virtually wipe out any use or value of the property as a whole. Contrary to the Developer's contention, even assuming that the Developer had a vested right, a determination of the City's liability for a taking does not turn on whether the owner had a vested right to a particular development, but whether the City allowed no development. Thus, the Court's ruling in the PJR that the Developer has no vested rights is the beginning and end of the vested rights issue.

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[6] The Nevada Supreme Court in *Sisolak* found that a landowner had a property interest in the airspace above his land based on federal and state airspace law, and that the landowner had the right to be free of a *physical invasion* of its airspace over its property, deciding an issue of physical takings that is not relevant to this case, where the Developer alleges a deprivation of *use* due to regulation. 122 Nev. at 658-60, 137 P.3d at 1119-20.

CONCLUSION

For the reasons stated herein, the City requests that the Court deny the Developer's "Motion to Determine 'Property Interest.'

DATED this 18th day of August, 2020.

By: */s/ Philip R. Byrnes*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 18th day of August, 2020, a true and correct copy of the foregoing **CITY'S OPPOSITION TO "MOTION TO DETERMINE PROPERTY INTEREST"** 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

Exhibit 10

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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 **CITY OF LAS VEGAS' MOTION FOR JUDGMENT ON THE PLEADINGS ON DEVELOPER'S INVERSE CONDEMNATION CLAIMS** Hearing Date: Hearing Time:

Pursuant to Rule 12(c) of the Nevada Rules of Civil Procedure, Defendant City of Las Vegas (the "City"), through its counsel, McDonald Carano LLP, moves for judgment on the pleadings on the First Amended Complaint Pursuant To Court Order Entered On February 1, 2018 For Severed Alternative Verified Claims In Inverse Condemnation ("First Amended Complaint") filed on behalf of Plaintiff 180 Land Company, LLC (the "Developer").

As a matter of law, the Court must dismiss the Developer's inverse condemnation claims on three independent legal grounds. First, the Court already properly determined that the Developer has no vested rights to have its development applications approved. Accordingly, there can be no taking as a matter of law. Therefore, the Developer's constitutional claims be dismissed with prejudice.

Second, the Developer's inverse condemnation claims are time barred because its predecessor-in-interest sought and obtained the PR-OS designation in 1990 in order to have the Peccole Ranch Phase II development approved. As a result, the statute of limitations has run on the Developer's inverse condemnation claims.

Third, because Judge Crockett's Decision held that the Developer must apply for a major modification of the Peccole Ranch Master Development Plan in order to redevelop the golf course property, and this Court determined that Judge Crockett's Decision has preclusive effect here, the inverse condemnation clams are not ripe for review. Ripeness is a jurisdictional prerequisite. Until the Developer gives the Las Vegas City Council the opportunity to hear and decide a major modification application, the Developer has no justiciable inverse condemnation claims.

As demonstrated in detail below, the aforementioned grounds mandate dismissal of the Developer's inverse condemnation claims as a matter of law. Respectfully, therefore, the City requests this Court enter an Order granting the instant motion and dismissing with prejudice all claims in the Developer's First Amended Complaint.

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This motion is made and based upon on the pleadings on file, the following points and authorities and any oral argument the Court may entertain on this matter.

DATED this 13th day of February, 2019.

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NOTICE OF MOTION

TO: ALL PARTIES AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the City of Las Vegas will bring its **CITY OF LAS VEGAS' MOTION FOR JUDGMENT ON THE PLEADINGS ON DEVELOPER'S INVERSE CONDEMNATION CLAIMS** for hearing before Department XVI of the above-entitled Court on the ___ day of March 19, 2019, at the hour of 9:00 am __.m. or as soon thereafter as counsel may be heard.

DATED this 13th day of February, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. Standard for Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is appropriate to obtain dismissal of claims after the pleadings have closed. NRCP 12(c). Just as a motion to dismiss brought under NRCP 12(b) does, a Rule 12(c) motion challenges the sufficiency of the pleadings. The two motions are "functionally identical." *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). As such, in deciding a motion for judgment on the pleadings, the court "is to determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements

of a right to relief." *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792, 858 P.2d 380, 381 (1993).

While the court must accept all factual allegations in the complaint as true, only "fair" inferences must be accepted. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). Bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not defeat a motion to dismiss or, by analogy, a motion for judgment on the pleadings. *See G.K. Las Vegas, Ltd. P'ship v. Simon Prop. Grp., Inc.,* 460 F. Supp. 2d 1246, 1261 (D. Nev. 2006). In addition to the allegations in the complaint, "the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint...." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

As with a Rule 12(b) motion, a motion for judgment on the pleadings can be used to challenge subject matter jurisdiction. Ripeness pertains to the Court's subject matter jurisdiction and, therefore, is properly raised in a Rule 12 motion. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief." *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988), *quoting Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

B. This Court Correctly Concluded That the Developer Lacks Vested Rights to Redevelop the Property

1. Absent Vested Rights, There Can Be No Taking As a Matter of Law

This Court has already determined that the Developer has no vested rights to have its redevelopment applications approved. *See* Findings of Fact and Conclusions of Law entered on November 21, 2018 (the "FFCL") at Conclusions of Law ¶¶35-38, 52. That conclusion requires that the Developer's inverse condemnation claims be dismissed. "The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons ***of vested property rights***…." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994) (emphasis added).

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

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In other words, constitutional guarantees are only triggered by a vested right. *See Landgraf*, 511 U.S. at 266; *Nicholas v. State*, 116 Nev. 40, 44, 992 P.2d 262, 265 (2000); *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949). Because the Court already correctly concluded that the Developer has no vested right to redevelop the golf course, the Developer cannot state a legally cognizable constitutional claim.

2. Denial of the Redevelopment Applications Leaves the Developer With All the Same Rights it Held Previously

The Developer's purchase of the golf course on speculation that the City Council *might* exercise its discretion to allow for redevelopment of the open space/drainage easement into some other use does not alter the conclusion that it has no vested rights that confer a constitutional claim. When evaluating a takings claim, "the question is, [w]hat has the owner lost?" *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). If the landowner retains the same interests it had previously, there is no taking. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1937 (2017). Under Nevada law, a vested property right is something that is "fixed and established." *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (noting a property right must be "established" for a taking to occur). Redevelopment applications do not meet this standard because "[i]n 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."[1] *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110,

[1] This is not just the law in Nevada, but nationwide. *See*, *e.g.*, *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 872 (11th Cir. 2007) (interpreting Florida law);

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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 City Council, the project proponent had no vested right to construct).

Here, the Developer's predecessor sought and obtained the open space designation for the golf course as an amenity to its planned development and to add value to the properties surrounding the gold course. *See* FFCL at Findings of Fact ¶¶13-16, *citing* ROR 10, 32-33; 2658-60; 24073-75; 25968. At the urging of the Developer's predecessor, the City incorporated the open space designation into its master plan. *Id.* Nearly 20 years later, the Developer bought the golf course on speculation that the City might allow another use. The City's denial of the 35-Acre Applications leaves the Developer in the exact position it held when it purchased the property with the ability to continue to use the land in the same manner for which its predecessor-in-interest sought and obtained entitlements.

In other words, the Developer does not identify anything in its First Amended Complaint that has been *taken*. The Developer's unilateral decision to abandon the golf course use does not create a taking. Rather, where the developer still has the same "bundle of sticks" it had previously, there is no taking, as a matter of law, and dismissal of the inverse condemnation claims is proper. *See Murr*, 137 S. Ct. at 1937; *Application of Filippini*, 66 Nev. at 22, 202 P.2d at 537.

C. The Developer's Claims Are Time Barred Because the Parks, Recreation and Open Space Designation Has Existed Since at Least 1990, When it Was Sought and Obtained by the Developer's Predecessor

The statute of limitations has run on the Developer's challenge to the Parks, Recreation and Open Space designation for the Property because that designation has existed since as least 1990 in the Peccole Ranch Master Development Plan, Phase II, and was sought and obtained by the Developer's predecessor. Takings claims are subject to a 15-year statute of limitations. *White Pine Lumber v. City of Reno*, 106 Nev. 778, 779, 801 P.2d 1370, 1371 (1990). A

Ellentuck v. Klein, 570 F.2d 414, 429 (2d Cir. 1978) (interpreting New York law); *Aquino v. Tobriner*, 298 F.2d 674, 677 (D.C. Cir. 1961) (interpreting D.C. law); *City of Ann Arbor, Mich. v. Nw. Park Const. Corp.*, 280 F.2d 212, 221 (6th Cir. 1960) (interpreting Michigan law).

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development restriction created by a predecessor landowner binds successors. *See* NRS 278.0205; *Tompkins v. Buttrum Const. Co. of Nev.*, 99 Nev. 142, 146, 659 P.2d 865, 868 (1983) (noting that successor landowner steps into shoes of predecessor, and "one who creates a restriction is not permitted to violate it"); *Gladstone v. Gregory*, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979) (holding that successor owner could not violate height restriction recorded by predecessor).

For the purpose of a statute of limitations, a landowner claiming inverse condemnation is bound by its predecessor's acceptance of regulatory conditions imposed on the land and from which the predecessor benefitted. *Wilson v. Bd. of Cty. Comm'rs of Cty. of Teton*, 153 P.3d 917, 925 (Wyo. 2007); *Serra Canyon Co. v. California Coastal Comm.*, 16 Cal. Rptr. 3d 110, 113 (Cal. Ct. App. 2004). The limitation period commenced when the regulatory action occurred, even if the predecessor chose not to challenge it. *Serra Canyon*, 16 Cal. Rptr. 3d at 113.

> There must be a limit on when a landowner can bring a takings action, especially when, as here, the landowners did not object to the conditions at the time of approval and actually took advantage of the benefit of increased density offered by the regulations. Without a restriction on the time for contesting property development conditions, the government would be perpetually exposed to unlimited takings challenges.

Wilson, 153 P.3d at 925; *see also Trimen Dev. Co. v. King Cty.*, P.2d 226, 231 (Wash. 1992) (dismissing as time barred developer's challenge to regulation that conditioned development approval on open space dedication or payment of fee in lieu of such dedication).

Here, the Developer's Amended Complaint challenges the General Plan's Parks, Recreation and Open Space designation on the Property and contends it need not seek to change that designation for its proposed residential developments of the golf course property. *See* Am. Compl. ¶¶14-16. However, the open space designation was sought and obtained by the Developer's predecessor in the 1989 Peccole Ranch Master Development Plan, as amended in 1990. *See* FFCL at Findings of Fact ¶¶11-16, *citing* 10, ROR 32, 2658-2660, 2666, 24073-75, 25821, 25968. The Developer's predecessor indicated that the Master Plan "provide[d] for the continuing development of a diverse system of open space." *See* ROR 2665. And the Developer's predecessor assumed responsibility for "open space development and

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landscaping." *See* ROR 2664. As a result of this action sought by the Developer's predecessor, the City then incorporated that open space designation into its General Plan. *See* FFCL at Finding of Fact ¶7, *citing* ROR 25546; *see also* ROR 2823-2831, 2854-2863.

The master plan area is subject to the terms, requirements and commitments made by the Developer's predecessor in the Master Development Plan so that the predecessor could develop the master planned area in the manner it sought. *See* Unified Development Code 19.10.040(F)-(G). In 1990, the Developer's predecessor received approval to develop 4,247 residential units within the master planned area of Peccole Ranch Master Development Plan conditioned upon setting aside 253 acres for golf course, open space and drainage. *See* FFCL at Findings of Fact ¶¶11-16, *citing* 10, ROR 32, 2658-2660, 2666, 24073-75, 25821, 25968. Through the open space designation, the Developer's predecessor was able to satisfy the City's parks set-aside requirement and develop non-open space areas at greater densities and for greater economic benefit. *See* ROR 2660-2667. The Developer's predecessor chose the location of the open space and developed the golf course in furtherance of the development plan it submitted, deriving economic benefit from being able to sell houses that abutted or were in close proximity to an open space amenity. *See* ROR 2658-2667.

Because the Developer's claims are premised on the General Plan's Parks, Recreation and Open Space designation and the 1990 Peccole Ranch Master Development Plan's set aside of the property for open space and drainage (which were invited and accepted by the Developer's predecessor in 1990), they are time barred. *See White Pine Lumber*, 106 Nev. at 779, 801 P.2d at 1371; *Wilson*, 153 P.3d at 925.

D. The Court Lacks Subject Matter Jurisdiction Because the Developer's Claims Are Not Ripe

This Court has determined as a matter of law that Judge Crockett's Decision has preclusive effect. *See* FFCL at Conclusions of Law ¶¶57-62. Pursuant to Judge Crockett's Decision, because the Developer has not provided the City Council with an opportunity to consider and decide an application for a major modification to the Peccole Ranch Master Development Plan, the ripeness doctrine bars the Court from exercising jurisdiction over the

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inverse condemnation claims. If a party's claims are not ripe for review, they are not justiciable, and the Court lacks subject matter jurisdiction to review them. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010); *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988). And where the Court lacks subject matter jurisdiction, dismissal is required. Nev. Const. art. 6, § 6; *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990).

The Nevada Supreme Court has adopted a two-part test for ripeness established by the U.S. Supreme Court, which requires courts to evaluate: "(1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review." *In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

1. The Issues Are Not Fit for Review

Because the Developer has yet to submit a major modification application as required by Judge Crockett's Decision, the issues presented in this case lack the fitness of review needed to satisfy the ripeness doctrine. "In gauging the fitness of the issues in a case for judicial resolution, courts are centrally concerned with whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Resnick*, 104 Nev. at 66, 752 P.2d at 233, *quoting* L. Tribe, *American Constitutional Law* 78 (2nd ed. 1988). "Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be present." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006). Here, the Court has concluded that approval of a major modification is a prerequisite to the City granting the 35-Acre Applications. *See* FFCL at Conclusions of Law ¶¶56-62. Therefore, even if the Developer possessed vested rights to redevelop the golf course (it does not), the Court nevertheless cannot consider whether the Council's denial of those applications constituted a taking.

2. Dismissal Will Not Impose Any Hardship on the Developer

Because the Developer may apply for a major modification to the Master Development Plan at any time (or could have at any time since the City Council's denial of the applications at

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issue), dismissal of the First Amended Complaint for lack of ripeness will impose no hardship. The ripeness doctrine "focuses on the timing of the action rather than on the party bringing the action." *In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003). Dismissal for lack of ripeness until all contingencies and conditions precedent are satisfied does not constitute a hardship. Indeed, the Developer controls whether and when to file a major modification application but has simply chosen not to. No hardship exists here.

3. The Developer Cannot Satisfy the Additional Ripeness Requirements for Inverse Condemnation Claims

Because the Developer has not sought a major modification of the Master Development Plan, it also has not satisfied additional ripeness requirements to assert takings claims. A taking claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). "A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of all economically beneficial use of the property … or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (internal citations and quotations omitted).

To resolve a takings claim, a court must know "the extent of permitted development on the land in question." *Id.*, *quoting MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986)). The decisions of the U.S. Supreme Court regarding ripeness of inverse condemnation claims "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer*, 477 U.S. at 351. If a developer withdraws an application, "the application was not meaningful." *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1199 (N.D. Cal. 1988); *see also Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987), amended, 830 F.2d 968 (9th Cir. 1987) (holding that trial court erred by reaching merits of

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unripe takings claims because "[t]he application made by the developer was not meaningful since it was abandoned at an early stage in the application process."

Here, a major modification application is precisely the type of procedure the Supreme Court recognizes as a threshold requirement before a landowner can assert a takings claim:

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

Palazzolo, 533 U.S. at 620-21.

Judge Crockett has already deemed the City's procedures for a major modification to be reasonable and necessary, and this Court already deemed the major modification requirement to have preclusive effect here. *See* FFCL at Conclusions of Law ¶¶56-62. As the Court already found, the Developer submitted ***and then withdrew*** a major modification application, preventing the City Council from considering it. *Id*. at Finding of Fact 33, *citing* ROR 1; 5; 6262. This is precisely the type of action that precludes the Developer from demonstrating that its inverse condemnation claims are ripe. *See Zilber*, 692 F. Supp. at 1199; *Kinzli*, 818 F.2d at 1455. Absent compliance with the major modification requirement, there has been no final determination of the Developer's rights to develop the Property, and the inverse condemnation claims must be dismissed on jurisdictional grounds. *See Palazzolo*, 533 U.S. at 618; *Kinzli*, 818 F.2d at 1455; *Zilber*, 692 F. Supp. at 1199.

II. CONCLUSION

Because the Court correctly concluded that the Developer lacks vested rights to have redevelopment applications approved, there can be no taking as a matter of law, and the inverse condemnation claims must be dismissed. Moreover, the statute of limitations has run on the Developer's inverse condemnation claims. Finally, as the Court has determined that Judge Crockett's Decision has preclusive effect on this case, the Court lacks subject matter

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jurisdiction to hear the inverse condemnation claims because they are not ripe. For these reasons, the Developer's First Amended Complaint must be dismissed with prejudice.

Respectfully submitted this 13th day of February, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 13th day of February, 2019, a true and correct copy of the foregoing **CITY OF LAS VEGAS' MOTION FOR JUDGMENT ON THE PLEADINGS ON DEVELOPER'S INVERSE CONDEMNATION CLAIMS** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/Jelena Jovanovic
An employee of McDonald Carano LLP

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Exhibit 11

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. _____

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

Petitioner

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and the Honorable Timothy C. Williams, District Judge,

Respondents

and

180 LAND CO, LLC, a Nevada limited-liability company,

Real Party in Interest

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

PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. The City of Las Vegas is a political subdivision of the State of Nevada and has no corporate affiliation.
2. The City is represented in the district court and this Court by the Las Vegas City Attorney's Office and McDonald Carano LLP.

DATED this 17th day of May, 2019.

MCDONALD CARANO LLP

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Petitioner, the City of Las Vegas, seeks a writ of mandamus, or in the alternative, prohibition to prevent the district court from acting outside the bounds of its jurisdiction and to direct the district court to dismiss the inverse condemnation claims of Real Party in Interest, 180 Land Company ("the Developer"). The Developer's inverse condemnation claims challenge the Las Vegas City Council's June 21, 2017 decision (the "June 21, 2017 Decision") to deny four discretionary redevelopment applications that sought to convert a 35-acre portion of the Badlands golf course to houses ("the 35-Acre Applications"). The Developer also filed a petition for judicial review of the June 21, 2017 Decision ("the PJR").

The district court denied the PJR, holding that the City Council properly exercised its discretion to deny the 35-Acre Applications, and substantial evidence supported the June 21, 2017 Decision. In so doing, the district court concluded as a matter of law that: (1) the Developer had no vested rights to have the 35-Acre 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 district court reaffirmed these conclusions of law when denying the Developer's motion to reconsider the PJR.

Based on these dispositive legal conclusions, the City moved for judgment on the pleadings, seeking dismissal of the Developer's inverse condemnation claims. Notwithstanding its earlier conclusions of law that the Developer lacked vested rights to have the 35-Acre Applications approved and that a Major Mod was a prerequisite to redevelopment of the golf course property, and in disregard of its jurisdictional limits and this Court's precedents, the district court denied the City's motion for judgment on the pleadings and ordered that discovery proceed. For two reasons, this was reversible error of such magnitude that a writ is warranted here to direct the district court to dismiss the inverse condemnation claims as a matter of law.

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 cases, because the City Council had discretion to deny the 35-Acre Applications, the Developer has no vested rights to have the 35-Acre Applications approved. And absent vested rights, there can be no regulatory taking, as a matter of law. Even though, when denying the Developer's PJR, the district court concluded that the Developer lacks vested rights to redevelop the golf course, it nevertheless refused to dismiss the inverse condemnation claims. The net result is that the City – and, if the district 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. That is not the law.

Second, the district court lacks jurisdiction over the inverse condemnation claims because they are not ripe for review. Even though, when denying the Developer's PJR, the district court concluded that a Major Mod was a prerequisite to redevelopment of the golf course and found that the Developer had withdrawn the only Major Mod Application it ever submitted, the district court would not dismiss the inverse condemnation claims on ripeness grounds. Yet these are precisely the circumstances in which the ripeness requirements set forth in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City* bar a court from exercising jurisdiction over inverse condemnation claims. 473 U.S. 172, 186 (1985). Notwithstanding its lack of subject matter jurisdiction, the district court has allowed the Developer to engage in extensive discovery to which the City should not be subjected.

These inconsistencies between the district court's denial of the City's motion for judgment on the pleadings and its order denying the Developer's PJR were based on the erroneous premise that, because a petition for judicial review has a different evidentiary standard of proof than inverse condemnation claims, the district court must disregard its earlier legal conclusions. However, 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 law.

To reach its erroneous result, the district court relied on matters outside the pleadings, that post-dated the June 21, 2017 Decision and that the Developer did not plead in the operative complaint. In other words, the district court did not restrict itself to the pleadings, notwithstanding that the City's motion was brought under NRCP 12(c). Compounding this error, the district 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. The district court allowed the Developer 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 the district court's decision has profound consequences for the City Council's discretionary authority over land use decisions, exceeds the district court's subject matter jurisdiction, and could bear on the numerous other pending lawsuits related to the Developer's efforts to redevelop the Badlands golf course,[1] writ relief is warranted here.

---

[1] *See Jack B. Binion, et al. v. Fore Stars, Ltd., City of Las Vegas, et al.*, 8JDC Case No. A-15-729053-C, NSC Case No. 73813; *Jack B. Binion, et al. v. City of Las Vegas, et al.*, 8JDC Case No. A-17-752344-J, NSC Case No. 75481; *180 Land*

ROUTING STATEMENT

The principal issues raised in this writ petition affect government decision makers and land use planners throughout Nevada and are of great statewide public importance. The district court's decision to allow the Developer's inverse condemnation claims to proceed in the absence of vested rights, and where the City Council appropriately exercised its discretion to deny land use applications, creates significant liability exposure to which the City should not be subjected. Under the district court's rationale, the denial of any discretionary land use application alone could constitute a regulatory taking. This would turn longstanding Nevada precedent, including *Stratosphere*, on its head.

Moreover, the district court exercised jurisdiction even though it concluded, as a matter of law, that the City Council could not grant the Developer's redevelopment applications unless and until the Developer allowed the City Council to consider a Major Mod Application. The district court cited to no facts

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Company, LLC v. City of Las Vegas, 8JDC Case No. A-17-758528-J, NSC Case No. 77771; *Frank A. Schreck v. City of Las Vegas and 180 Land Co., LLC*, 8JDC Case No. A-18-768490-J; *180 Land Co LLC v. City of Las Vegas*, 8JDC Case No. A-18-771389-C; *180 Land Co LLC, et al. v. City of Las Vegas, James R. Coffin, Steven G. Seroka*; USDC Case No. 2:18-cv-0547-JCM-CWH; *Fore Stars, Ltd., et al. v. City of Las Vegas, et al.*; 8JDC Case No. A-18-773268-C; *180 Land Company, LLC v. City of Las Vegas*, 8JDC Case No. A-18-775804-J; *180 Land Company, LLC, et al. v. City of Las Vegas*, 8JDC Case No. A-18-780184-C; *Laborers' Int'l Union N. Am., Local 872 v. City of Las Vegas, James Robert Coffin, and Steve Seroka*, USDC Case No. 2:19-cv-00322-GMN-NJK.

alleged in the operative complaint that could support its conclusion that a Major Mod Application would be futile. Under *Williamson*, therefore, the Developer's claims are not ripe, and the district court lacks subject matter jurisdiction.

The district court disregarded these legal impediments based on its misunderstanding of the distinction between an evidentiary burden of proof and a conclusion of law. The evidentiary burden that a litigant must meet does not alter the legal principles that a court must apply to the facts. By conflating these two concepts, the district court allowed the Developer to circumvent the rule of administrative res judicata simply by bringing its petition for judicial review and inverse condemnation claims in one action. Moreover, the district court accepted as true on a Rule 12 motion the Developer's allegations of legal conclusions, which is contrary to law.

Because these are important issues of law that affect municipalities, regional planning agencies and litigants statewide, the matter should be retained by the Supreme Court. NRAP 17(a)(12).

ISSUES PRESENTED

1. Whether this Court should issue a writ that requires the district court to dismiss the Developer's inverse condemnation claims because:
    a. The Developer has no vested rights to have its redevelopment applications approved, and as a matter of law, a regulatory taking cannot occur in the absence of vested rights; and
    b. The district court lacks subject matter jurisdiction over the Developer's unripe inverse condemnation claims until the Developer gives the City Council the opportunity to consider and decide a Major Mod Application.
2. Whether the different standards of proof for a petition for judicial review and inverse condemnation claims render the legal conclusions from the judicial review proceeding inapplicable to the inverse condemnation claims.
3. Whether, on a motion for judgment on the pleadings, the district court could:
    a. Accept the Developer's erroneous assertion that it has vested rights to redevelop the golf course simply because it was pled in the complaint, even though that assertion is (i) a legal conclusion and (ii) directly contrary to the district court's earlier conclusions of law.

b. Consider matters outside the pleadings and that post-dated the City Council's June 21, 2017 Decision that the Developer's operative complaint challenges.

4. Whether the district court should have denied leave to amend as impermissible claim splitting where the Developer sought to add claims that are being litigated in other cases.

PERTINENT FACTS

A. The City Council Denied the Developer's Applications to Redevelop the Golf Course Property Built by its Predecessor

In 1989 and 1990, the Developer's predecessor obtained approval from the Las Vegas City Council for the Peccole Ranch Master Development Plan ("Master Development Plan"). 1(205-206); 6(905-926, 947).[2] Phase II of the Master Development Plan set aside approximately 250 acres for a golf course, drainage and open space. 1(205-206); 6(924). Through the open space designation, the Developer's predecessor was able to satisfy the City's parks set-aside requirement and develop non-open space areas at greater densities and for greater economic benefit. 6(917-924). The Developer's predecessor chose the location of the open space and built the golf course in furtherance of the development plan it submitted.

[2] References to the Petitioner's Appendix consist of the volume number followed by the page number(s) in parentheses.

6(947). The golf course is designated in the City's General Plan as Parks, Recreation and Open Space ("PR-OS"). 1(205); 6(928-946).

The Developer purchased the golf course and seeks to redevelop it into residential uses. 6(947). To that end, the Developer filed four land use applications ("the 35-Acre Applications") related to a 34.07-acre portion of the golf course ("the 35-Acre Property"). 6(948-951). The 35-Acre Applications consisted of requests for a General Plan Amendment to change the open space designation of the golf course to low-density residential, a waiver of the size of private streets, a site development review for 61 lots and a tentative map. 6(948-951). On June 21, 2017, the City Council voted to deny the 35-Acre Applications. 6(952-955).

B. The District Court Denied the Developer's Petition for Judicial Review of the City Council's Decision

The Developer filed a Petition for Judicial Review to challenge the June 21, 2017 Decision. 1(1-8). Thereafter, the Developer filed a First Amended Petition for Judicial Review and Alternative Verified Claims for Inverse Condemnation. 1(9-27). The district court bifurcated the PJR from the inverse condemnation claims pursuant to NRCP 42, after which the Developer filed a Second Amended Petition for Judicial Review (the "PJR") and a First Amended Complaint asserting the inverse condemnation claims ("the FAC"). 1(28-76). The FAC is the operative complaint at issue in this writ petition. 1(28-61).

After briefing and oral argument, on November 21, 2018, the district court entered Findings of Fact and Conclusions of Law on Petition for Judicial Review that denied the PJR and dismissed the alternative claims for inverse condemnation (the "November 21, 2018 Order"). 1(200-227). The district court concluded that the City Council properly exercised its discretion to deny the 35-Acre Applications and that substantial evidence supported the June 21, 2017 Decision. 1(214-219).

Relevant to this writ petition, the November 21, 2018 Order contained the following conclusions of law:

> 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 Nevada Contractors v. Washoe Cty.*, 106 Nev. 310, 311, 792 P.2d 31, 31-32 (1990) (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; *Cty. of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998), *superseded by statute on other grounds.*; *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.
>
> * * *
>
> 52. … NRS 278.349(e) does not confer any vested rights.

1(219-222). As an additional basis to deny the PJR, the district court concluded that an order entered by the Honorable James Crockett in the case of *Jack B. Binion, et al. v. The City of Las Vegas, et al.*, A-17-752344-J ("Judge Crockett's Decision"), had preclusive effect on this case and required the Developer to obtain approval of a major modification of the Master Development Plan before redeveloping the Badlands Property.[3] 1(77-90); 1(223-225). Because of the dispositive effect of these conclusions of law, the November 21, 2018 Order also contained several paragraphs dismissing the inverse condemnation claims. 1(225).

The Developer filed two separate motions for reconsideration of the November 21, 2018 Order, one that challenged denial of the PJR (which the Developer called a "motion for new trial") and one that challenged dismissal of the

[3] The Developer appealed Judge Crockett's Decision, which is pending before the Court as Case No. 75481.

inverse condemnation claims. 2(228-255). The district court granted the latter and entered an Order Nunc Pro Tunc that removed only those portions of the November 21, 2018 Order that dismissed the inverse condemnation claims. 2(256-258). Specifically, the Order Nunc Pro Tunc removed page 23:4-20 and page 24:4-5 of the November 21, 2018 Order. 2(257). All other findings of fact and conclusions of law remained intact. 2(257).

In a separate order, the district court denied the Developer's "motion for new trial" of the denial of its PJR, finding no clear error in its November 21, 2018 Order, as amended by the Order Nunc Pro Tunc. 5(852-867). Importantly, the district court reiterated its earlier conclusions of law:

> 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.

5(863) (referencing 11.30.16 and 1.31.17 orders issued by the Honorable Judge Smith in Case No. A-16-739654-C and Nevada Supreme Court Case No. 72455).

> 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.

5(863) (referencing 1(77-90) and 1(223-224)).

Yet the district court determined that it could ignore these correct conclusions of law when considering 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.

5(865).

C. The District Court Contravened its Earlier Conclusions of Law by Denying the City's Motion for Judgment on the Pleadings and Granting the Developer Leave to Amend its Complaint

While the Developer's motion for reconsideration of the PJR denial was pending, the City moved for judgment on the pleadings on the Developer's inverse condemnation claims, arguing that the legal conclusions in the November 21, 2018 Order required dismissal of the inverse condemnation claims, as a matter of law. 2(259-272). Specifically, the City argued that:

1. Absent vested rights to have the redevelopment Applications approved, the City Council's denial of the 35-Acre Applications could not, as a matter of law, constitute a regulatory taking;
2. The district court lacked subject matter jurisdiction over the Developer's inverse condemnation claims on ripeness grounds because, as directed by Judge Crockett's Decision (which the district court concluded had preclusive effect), the Developer must first obtain the City Council's approval of a Major Mod Application before redeveloping the golf course property.[4]

2(259-272).

The district court denied the City's motion for judgment on the pleadings, erroneously determining that its conclusions of law regarding the PJR did not apply to its consideration of the inverse condemnation claims because the two proceedings had different standards of proof. 5(875-901). As articulated by the district court:

> We have … 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

[4] The City also argued that the Developer's claims are time barred because the Parks, Recreation and Open Space designation in the City's General Plan that the Developer challenges has existed since at least 1990, when it was sought and obtained by the Developer's predecessor. 2(265-267). Although the City does not raise the statute of limitations as a basis for this writ petition, it nevertheless preserves that issue to raise again at the appropriate time and under the appropriate procedural posture.

> 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 [different] standards of proof involved. It's really and truly a different matter.
>
> * * *
>
> Understand this, a petition for judicial review is much different than a complaint for inverse condemnation. There's [*sic*] 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.

4(571:13-25); 4(580:5-581:7). Based upon "the distinction between the evidentiary burdens in a petition for judicial review versus a general civil litigation case," the district court concluded it could and should ignore its earlier conclusions of law

when considering the City's motion for judgment on the pleadings. 4(691:16-20); 4(692:17-20).

The district court's written order denying the City's motion for judgment on the pleadings did exactly that. 5(875-901). The district court determined that the Developer's assertion of a "property interest" in the 35-Acre Property, based on mere ownership and the residential zoning designation, was sufficient to trigger a regulatory taking claim arising from the City Council's denial of the 35-Acre Applications. 5(882-885). This was directly contrary to the district court's earlier conclusions of law that zoning alone does not create a vested right to have discretionary approvals granted. *Compare id.* to 1(219-222).

The district court went further to conclude that where the Developer pled in its complaint that it had a vested right to have the 35-Acre Applications approved, that assertion of a legal conclusion must be accepted as true on a motion for judgment on the pleadings, even where, as here, the district court already reached a contrary legal conclusion. *Compare* 4(691:5-9) *to* 1(219-222); 5(882-885, 893).

As to ripeness, the district court concluded that a Major Mod Application would be futile and, alternatively, that the Developer had satisfied the Major Mod requirements. 5(893-897). To reach this conclusion, the district court relied almost exclusively on documents outside the pleadings, that related to actions that post-date the City Council's June 21, 2017 Decision and regarding which the Developer

did not assert any allegations in the FAC, which was the operative complaint. 5(893-897). Indeed, ***not once*** in its May 15, 2019 Order did the district court cite to a single paragraph of the FAC. 5(878-901).

Finally, the district court allowed the Developer to amend its complaint to add actions that are being litigated in the Developer's other lawsuits against the City. 5(879-880); *compare* 2(363-399) *to* 3(422-482).

Because the law does not change simply because inverse condemnation claims have a different evidentiary standard of proof from a petition for judicial review, and the district court should have prohibited the Developer from engaging in claim splitting, writ relief is warranted here.

ARGUMENT

A. Standard for Issuance of Writ

A writ of prohibition is available to "arrest[ ] the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." NRS 34.320; *see Nevada Power Co. v. Eighth Jud. Dist. Ct.*, 120 Nev. 948, 954,102 P.3d 578, 582-83 (2004). This Court has not hesitated to issue a writ of prohibition when a district court acts without jurisdiction. *See Gaming Control Bd. v. 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).

A writ of mandamus compels the performance of an act that "the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person." NRS 34.160; *Int'l Game Tech. v. Sec. Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ is appropriate when the petitioner does not have a plain, speedy, and adequate remedy at law. *Club Vista Fin. Servs. v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).

The Court has granted writ relief where a district court erroneously denied a motion to dismiss. *See Fulbright & Jaworski LLP v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 5, 342 P.3d 997, 1005-06 (2015) (granting petition for writ of prohibition to vacate district court order denying motion to dismiss); *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1344-45, 1348, 950 P.2d 280, 281, 283 (1997) (issuing writ of mandamus compelling the district court to vacate its order denying a motion to dismiss). The Court will "entertain a writ petition challenging the denial of a motion to dismiss … where … the issue is not fact-bound and

involves an unsettled and potentially significant, recurring question of law." *Buckwalter v. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010).

Particularly when a case is in "the early stages of litigation," "policies of judicial administration" warrant the Court's consideration of a writ petition. *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. Where a petition raises an important legal issue in need of clarification, involving public policy, of which this court's review would promote sound judicial economy and administration, [the Court] will exercise [its] discretion and consider [a writ] petition." *Id.* Such is the case here.

B. The District Court Could Not Disregard Its Correct Conclusions of Law That the Developer Lacks Vested Rights to Redevelop the Golf Course Into Another Use

1. The City Council's Discretion to Deny the Applications Meant the Developer Had No Vested Rights to Have Them Approved

Because the Developer had no vested rights that could give rise to the taking it alleged, the Developer's inverse condemnation claims had to be dismissed, as a matter of law. Constitutional guarantees are only triggered by a vested right. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994); *Nicholas v. State*, 116 Nev. 40, 44, 992 P.2d 262, 265 (2000); *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949). Only a "legitimate claim of entitlement" under state law that derives from "existing rules or understandings" can give rise to a takings claim. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

"To determine whether a property interest has vested for Takings Clause purposes, 'the relevant inquiry is the certainty of one's expectation in the property interest at issue.'" *Bowers v. Whitman*, 671 F.3d 905, 913 (9th Cir. 2012); *quoting Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1002 (9th Cir. 2007), *aff'd.* 553 U.S. 591 (2008); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (noting a property right must be "established" for a taking to occur). If a property interest is "contingent and uncertain," "speculative," "discretionary," "inchoate," or "does not provide a certain expectation," then it cannot be deemed a vested right that gives rise to a taking. *Bowers*, 671 F.3d at 913, *quoting Engquist*, 478 F.3d at 1002-03; *accord Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015).

Contrary to the district court's erroneous conclusion (at 5(884)), therefore, the legal standard for a vested right is no different for eminent domain law than for land use law because applications that are subject to the governmental authority's discretion are not "established" and do not create constitutional guarantees. *See Bowers*, 671 F.3d at 913; *Application of Filippini*, 66 Nev. at 22, 202 P.2d at 537; *Hermosa on Metropole, LLC v. City of Avalon*, 659 F. App'x 409, 411 (9th Cir. 2016); *Charles Wiper, Inc. v. City of Eugene*, 486 F. App'x 630, 631 (9th Cir. 2012). This Court's precedent is clear that for a property interest to vest under Nevada law, it must be "fixed and established." *Application of Filippini*, 66 Nev. at

22, 202 P.2d at 537; *see also Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 824, 313 P.3d 849, 856 (2013) (citing *Filippini* for the proposition that "the sale of the secured property is the event that vests the right to deficiency… [because that is when] the amount of a deficiency is crystalized.…").

Redevelopment applications do not meet the vested rights standard because "[i]n 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.*, 111 Nev. at 807, 898 P.2d at 112 (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 City Council, the project proponent had no vested right to construct). The RPD-7 zoning designation on the golf course does not create a vested right because "compatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest." *Tighe*, 108 Nev. at 443, 833 P.2d at 1137; *see also Nevada Contractors*, 106 Nev. at 311, 792 P.2d at 31-32 (affirming county commission's denial of a special use permit even though property was zoned for the use).

Because the redevelopment of the golf course that the Developer proposed was not "fixed and established," the Developer had no vested right to build pursuant to the Applications it submitted. *See Application of Filippini*, 66 Nev. at 22, 202 P.2d at 537. Similarly, because the Developer's Applications were contingent upon the Council's discretionary decision-making authority, and the City Council had discretion to deny the General Plan Amendment, Waiver, Site Development Plan Review and Tentative Map applications, the Developer had no vested right to have the Applications approved. *See Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60. As a result, dismissal of the inverse condemnation claims was required. *See Roth*, 408 U.S. at 577.

2. The District Court Should Not Have Accepted as True the Legal Conclusions Pled in the Developer's Complaint

The district court failed to follow the proper standard for a motion for judgment on the pleadings by accepting as true the Developer's "allegation" of a vested property right. 4(691:5-9) On a Rule 12 motion, a district court must only accept factual allegations and "fair" inferences as true. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). Bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not defeat a motion to dismiss or, by analogy, a motion for judgment on the pleadings. *See G.K. Las Vegas, Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F. Supp.

2d 1246, 1261 (D. Nev. 2006). Legal conclusions are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

Here, the May 15, 2019 Order stated:

> [A] landowner merely need allege an ownership interest in the land at issue to support a takings claim and defeat a judgment on the pleadings. The Landowners have made such an allegation. The Landowners assert that they have a property interest and vested property rights in the Subject Property …

5(882-885) (describing supposed examples). The district court explained its rationale at the May 15, 2019 hearing:

> 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.

4(691:5-9).

This statement was wrong on multiple fronts. First, the existence of a vested right is a question of law, not a question of fact. *See CMC of Nevada*, 99 Nev. at 747, 670 P.2d at 107. Second, because the existence of a vested right is a question of law, the district court should not have accepted it as true simply because the Developer pled it in the complaint. *See Iqbal*, 556 U.S. at 678-79. Third, the district court had already correctly concluded as a matter of law that the Developer did not have vested rights to have the Applications approved, and as set forth *infra*, should not have jettisoned that conclusion simply because the Developer asserted otherwise in its complaint. 1(219-220). The district court should have followed its

earlier legal conclusion, not blindly accepted the contrary and erroneous legal conclusion baldly asserted by the Developer.

3. Different Evidentiary Standards Between a Petition for Judicial Review and Inverse Condemnation Claims Does Not Alter the Applicable Law

The district court's disregard for the legal principles it espoused in denying the PJR cannot be justified by the different standard of proof for an inverse condemnation claim. In denying the Developer's petition for judicial review, the district court expressly and correctly determined that the Developer has no vested rights to have its redevelopment applications approved because the City had the discretion to deny those applications. *See* 1(219-220, 222), *citing Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112; *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60; *CMC of Nevada*, 99 Nev. at 747, 670 P.2d at 107. Nevertheless, the district court felt untethered to that conclusion because the evidentiary standard differs between a petition for judicial review and inverse condemnation claims. 4(571:13-25); 4(580:5-581:7).

The applicable principles of law do not change, however, simply because a litigant's evidentiary burden to prove facts might be different. That is because an evidentiary burden relates to *evidence* that a party must possess to prove *facts* that meet the elements of a claim. *See Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009); *Nassiri v. Chiropractic Physicians' Bd. of Nev.*, 130

Nev. Adv. Op. 27, 327 P.3d 487, 490 (2014) (The function of a standard of proof "is to instruct the *factfinder* concerning the degree of confidence our society thinks he should have in the correctness of *factual* conclusions for a particular type of adjudication.") (emphases added) (internal quotations omitted). The law stays the same, no matter what the standard of proof is. *See McNabney v. McNabney*, 105 Nev. 652, 659, 782 P.2d 1291, 1295 (1989) (explaining the concept of a "legal rule").

This is clear from the doctrine of administrative res judicata, under which issues decided in an administrative proceeding can have preclusive effect on subsequent legal proceedings. *See Britton v. City of North Las Vegas*, 106 Nev. 690, 693, 799 P.2d 568, 570 (1990). If the district court had entered a final judgment on the PJR, the district court's legal conclusion in the November 21, 2018 Order that the Developer lacks vested rights to have its redevelopment applications approved would have preclusive effect on a subsequent legal action. *See id.* Simply because the Developer brought its inverse condemnation claims and PJR in the same action does not allow the Developer to circumvent the principles of administrative res judicata.[5]

[5] Notably, the Developer argued to this Court in Case No. 77771 that the November 21, 2018 Order *was* a final judgment. *See* App.'s Opp. to Mot. to Dismiss Appeal for Lack of Jurisdiction, Case No. 77771. Although the Court correctly concluded otherwise and dismissed the Developer's appeal for lack of

Because the district court could not stray from its earlier conclusions of law that the Developer lacked vested rights, dismissal of the inverse condemnation claims was required.

C. The District Court Acted Outside the Bounds of its Jurisdiction By Allowing the Developer's Unripe Claims to Proceed

Under the ripeness doctrine, the district court lacked subject matter jurisdiction to hear the Developer's inverse condemnation claims. If a party's claims are not ripe for review, they are not justiciable, and the Court lacks subject matter jurisdiction to review them. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010); *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988). A taking claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty.*, 473 U.S. at 186. "A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of all economically beneficial use of the property … or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (internal citations and quotations omitted).

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jurisdiction, this demonstrates that Developer is advancing conflicting positions as it deems convenient. *See id.*

To resolve a taking claim, a court must know "the extent of permitted development on the land in question." *Id.*, *quoting MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986)). The decisions of the U.S. Supreme Court regarding ripeness of inverse condemnation claims "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer*, 477 U.S. at 351. If a developer withdraws an application, "the application was not meaningful." *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1199 (N.D. Cal. 1988); *see also Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987), *amended*, 830 F.2d 968 (9th Cir. 1987) (holding that trial court erred by reaching merits of unripe takings claims because "[t]he application made by the developer was not meaningful since it was abandoned at an early stage in the application process.").

In its November 21, 2018 Order, the district court concluded, as a matter of law, that Judge Crockett's Decision in the case of *Jack B. Binion, et al. v. The City of Las Vegas, et al.*, A-17-752344-J, had preclusive effect on this case and required the Developer to obtain approval of a Major Mod before redeveloping the Badlands Property. 1(223-226). The district court reiterated this conclusion of law when denying the Developer's motion for retrial of the PJR. 5(863). Furthermore, the district court found that the Developer submitted and then withdrew a Major

Mod Application, preventing the City Council from considering it. 1(208-209). This rendered the inverse condemnation claims unripe. *See Zilber*, 692 F. Supp. at 1199; *Kinzli*, 818 F.2d at 1455.

The City Council's consideration of Major Mod Application is precisely the type of procedure the Supreme Court recognizes as a threshold requirement before a landowner can assert a takings claim:

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

Palazzolo, 533 U.S. at 620-21. Judge Crockett's Decision requires the City Council to modify the Master Development Plan before approving development applications that seek to convert the golf course to residential and commercial uses. 1(89). But the Developer has not allowed the City Council to even consider a Major Mod application, much less approve one. 1(208-209, 225).

Because a district court cannot second guess another court's final judgment, the Developer must comply with Judge Crockett's Decision unless and until it is reversed on appeal. *See Rohlfing v. Second Jud. Dist. Ct.*, 106 Nev. 902, 906, 803

P.2d 659, 662 (1990) (citing Nev. Const. art. 6, § 6; NRS 3.220). Absent compliance with the Major Mod requirement recognized in Judge Crockett's Decision, there has been no final determination of the Developer's rights to redevelop the golf course, and the inverse condemnation claims had to be dismissed on jurisdictional grounds. *See Palazzolo*, 533 U.S. at 618; *Kinzli*, 818 F.2d at 1455; *Zilber*, 692 F. Supp. at 1199.

D. The District Court Could Not Grant Leave to Amend Where the Developer's Proposed Amended Complaint Constituted Impermissible Claim Splitting

The only matter presented in the Developer's original and first amended complaints was whether the City Council's June 21, 2017 Decision to deny the Applications constituted a taking. 1(9-44). In the November 21, 2018 Order, the district court concluded this denial was a proper exercise of the City Council's discretion. 1(216-219). Nevertheless, the district court granted the Developer leave to amend to add allegations related to actions that occurred after June 21, 2017 and that are the subject of the Developer's other lawsuits. *Compare* 2(363-399) *to* 3(422-482) (demonstrating that allegations and claims in the Developer's proposed Second Amended Complaint were already the subject of its Complaints in Case Nos. A-18-775804-J and A-18-780184-C); 5(879-880) (granting motion for leave to amend).

"[L]eave to amend should not be granted if the proposed amendment would be futile.… A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim." *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), as corrected (Aug. 14, 2013) (citations omitted). Other "[s]ufficient reasons to deny a motion to amend a pleading include undue delay, bad faith or dilatory motives on the part of the movant." *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000).

Impermissible claim splitting is grounds to reject an amended complaint. See *Fairway Rest. Equip. Contracting, Inc. v. Makino*, 148 F. Supp. 3d 1126, 1129 (D. Nev. 2015). "As a general proposition, a single cause of action may not be split and separate actions maintained." *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) (citing *Reno Club, Inc. v. Harrah*, 70 Nev. 125, 260 P.2d 304 (1953)). When identical causes of action are pending, involving the same parties and arising from the same incident, a trial court may properly dismiss the second action. *See Fitzharris v. Phillips*, 74 Nev. 371, 376, 333 P.2d 721, 724 (1958), disapproved on other grounds by *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000). "It would be contrary to fundamental judicial procedure to permit two actions to remain pending between the same parties upon the identical cause." *Id.* "To determine whether a plaintiff is claim-splitting, as would support dismissal, the proper question is whether, assuming the first suit was already final, the second

suit would be precluded under res judicata analysis." *Id.* A main purpose behind the rule preventing claim splitting is "to protect the defendant from being harassed by repetitive actions based on the same claim." Restatement (Second) Judgments, § 26 cmt. a; accord 1 Am. Jur. 2d Actions § 99.

The matters that the district court allowed the Developer to add in its proposed new pleading are the subject of other currently pending cases and therefore amount to claim splitting. *Compare* 2(363-399) *to* 3(422-482). Indeed, the Developer effectively conceded as much by broadly describing its litigation before other judges on the same matters it sought to incorporate into this case and arguing that those other cases have preclusive effect here. 2(289-291); 2(318-331). The district court then incorporated these allegations from the Developer's other lawsuits, that post-dated the City Council's June 21, 2017 Decision and that were not in the First Amended Complaint into its May 15, 2019 Order. 5(886-893). This was prohibited. *Hutchins*, 93 Nev. at 432, 566 P.2d at, 1137.

The district court should have prohibited the Developer from splitting its claims among different lawsuits before different judges to shop for the best result. *See id.* This is an improper purpose and in bad faith. Moreover, because the Developer could not prove a taking without the facts alleged in its other litigation, it conceded that its existing claims are not ripe. The district court therefore abused

its discretion by granting leave to amend. *See Halcrow*, 129 Nev. at 398, 302 P.3d at 1152.

E. A Writ is Warranted Here to Protect the City and Other Government Entities From A Flood of Inverse Condemnation Claims Arising From the Denial of Discretionary Land Use Decisions

The fall-out from the district court's order could be catastrophic for the City and other land use authorities. Every month, the City Council or Planning Commission considers and decides as many as 100 discretionary land use applications. Until the district court's order, such discretionary decisions have been protected from inverse condemnation claims under the authority of this Court's *Stratosphere* line of cases, which hold that rights to obtain land use approvals do not vest if they remain subject to governmental discretionary decision-making authority. *See Stratosphere Gaming*, 120 Nev. at 527–28, 96 P.3d at 759–60; *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112. This is consistent with federal takings law. *See Roth*, 408 U.S. at 577; *Landgraf*, 511 U.S. at 266. If the district court's conclusion that the City properly exercised its discretion to deny the 35-Acre Applications provides no assurances that the City will be protected against liability for inverse condemnation, the City's Planning Department and City Council will be chilled from exercising their discretion to deny land use proposals when warranted for fear of the potential impact on the public fisc.

The district court failed to comply with binding precedent, exposing the City and, if adopted as Nevada law, land use authorities throughout the State to claims for inverse condemnation. *See Stratosphere Gaming*, 120 Nev. at 527–28, 96 P.3d at 759–60. The drain on government resources just to defend this case is tremendous, and the defense costs for the potential onslaught of litigation against the City and similarly-situated land use authorities could be disastrous. Much worse, the dollar value of all of the possible claims arising from denials of special use permits, waivers, site development plan reviews, tentative maps, general plan amendments, variances, parcel maps, rezoning, vacations and other discretionary permits is astronomical. Writ relief is warranted under these circumstances.

F. Issuance of the Writ Requested by the City is in the Interest of Judicial Economy

Judicial economy will be advanced by the writ relief sought by the City. "[T]he primary standard" in the Court's determination of whether to entertain a writ petition is "the interests of judicial economy." *Smith*, 113 Nev. at 1345, 1348, 950 P.2d at 281. Particularly when a case is in "the early stages of litigation," "policies of judicial administration" warrant the Court's consideration of a writ petition. *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559.

Here, the case is at the pleadings stage, where it should have ended. 6(956-1050). Urgency exists to halt the district court proceedings because the district court has allowed discovery to proceed. 4(726-760). The Developer has served

extensive written discovery requests on the City. 4(726-749). The City moved the district court for a stay on an order shortening time, which the district court denied on May 15, 2019. 5(761-851, 902). Moreover, because the Court's ruling on this Writ Petition may provide guidance to the district court in not only this case but the other cases involving the Badlands golf course (of which there are many[6]) writ relief here will make the most efficient use of judicial resources. Judicial economy weighs in favor of the Court's consideration of this petition and issuance of the writ requested.

CONCLUSION

Because the district court should have dismissed the Developer's unripe inverse condemnation claims for want of subject matter jurisdiction and because the Developer has no vested rights to trigger the taking it alleges, writ relief is warranted here. The City asks this Court to issue a writ of mandamus, or in the

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[6] *See* footnote 1, *supra*.

alternative prohibition, that directs the district court to dismiss the Developer's claims with prejudice.[7]

DATED this 17th day of May, 2019.

McDONALD CARANO LLP

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Attorneys for Petitioner

[7] The absence of vested rights requires dismissal with prejudice even though dismissal on ripeness grounds is often without prejudice.

VERIFICATION

Debbie Leonard, being first duly sworn, deposes and says:

1. Pursuant to NRS 15.010, NRS 34.030 and NRS 34.170, and under penalty of perjury, I declare that I am counsel for the City of Las Vegas and know the contents of this writ petition.

2. Th facts stated in this writ petition are true and correct to the best of my own knowledge or based on information and belief. I make this verification because the relevant facts are largely procedural and within my knowledge as the City's attorney.

3. On March 22, 2019, the district court held oral argument on the City's motion for judgment on the pleadings and the Developer's countermotions for judicial determination of liability and to amend the pleadings.

4. Ruling from the bench, the district court denied the City's motion for judgment on the pleadings and the Developer's countermotion for judicial determination of liability and granted the Developer's countermotion to amend the pleadings. The district court directed counsel to prepare written orders.

5. Counsel exchanged drafts of the proposed orders, but because they did not reach agreement on language, the parties submitted competing proposed orders.

6. On April 2, 2019, the district court held a 16.1 conference.

7. On April 3, 2019, the City Council voted to authorize the filing of this Writ Petition.

8. On April 15, 2019, the Developer served written discovery requests on the City, true and correct copies of which are included in the concurrently filed appendix. Responding to these requests is hugely time consuming and is diverting the attention of Planning Department staff and the City Clerk from their daily tasks to serve the public. The loss of this time and attention if the City were to be sued for a taking every time it denied a discretionary land use application could cripple the City's resources.

9. On April 23, 2019, the City filed a motion to stay the proceedings in the district court pending the Court's consideration of this writ petition on an order shortening time. The district court did not hold the hearing on the motion to stay until May 15, 2019.

10. At the May 15, 2019 hearing, the district court denied the City's motion to stay and entered a minute order that day. The district court stated at the hearing that the factors specified in *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000), were not satisfied. I have ordered a transcript of the May 15, 2019 hearings, but as of the time of this filing, have not yet received a copy. I will supplement the appendix with the transcript when I receive it.

11. Also on May 15, 2019, the district court entered a written order that denied the City's motion for judgment on the pleadings and granted the Developer leave to amend the complaint. The Developer then filed its Second Amended Complaint. The City has not yet had the opportunity to answer the Second Amended Complaint.

12. The City Council and Planning Commission consider numerous discretionary land use applications, sometimes as many as 100 per month. This information is publicly available on the City's website.

13. The district court's denial of the City's motion for judgment on the pleadings subjects the City to proceedings over which the district court lacks jurisdiction; could chill the City Council and Planning Commission from lawfully exercising their discretion to deny land use applications; and may open the floodgates to inverse condemnation litigation over discretionary denials of land use

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applications, writ relief is appropriate and a stay pending the Court's disposition of this Writ Petition is warranted.

Dated this 17th day of May, 2019.

Debbie Leonard (#8260)

STATE OF NEVADA)
)
COUNTY OF WASHOE)

Subscribed and sworn before me on
this 17th day of May, 2019

NOTARY PUBLIC

PAMELA K. MILLER
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 92-0545-2 - Expires Nov. 01, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 8,103 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of May, 2019.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, LLP, and that on this 17th day of May, 2019, a copy of the foregoing **PETITIONER'S PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system and others not registered will be served via U.S. mail as follows:

The Honorable Timothy C. Williams
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Exhibit 12

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE,
Respondents,
and
180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY,
Real Party in Interest.

No. 78792

FILED
MAY 24 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

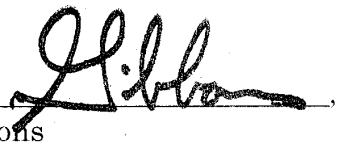
ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This original petition for a writ of mandamus or prohibition challenges a district court order denying a motion for judgment on the pleadings.

Having considered the petition and supporting documents, we conclude that our extraordinary intervention in this matter is not warranted at this time. Generally, this court will not consider writ petitions that challenge a district court order denying a motion for judgment on the pleadings. *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997) (addressing petitions challenging orders denying motions to dismiss or motions for summary judgment). Here, petitioner has not demonstrated that any exception to the general rule exists. The district court explained that it was unable to conclude, as a matter of law and at the

pleading stage, that real party in interest could not prevail on any of its inverse condemnation claims. The court noted that real party in interest asserted both a property interest and that events occurring after the petition for judicial review time frame led to inverse condemnation, and the court also pointed to alleged facts indicating that exhaustion was met or futile. In light of the early procedural stage of this case and the disputed factual and legal conclusions at issue, we decline to exercise our discretion to intervene. Accordingly, we

ORDER the petition DENIED.[1]



_____, C.J.
Gibbons

_____, J.
Stiglich

_____, J.
Silver

cc: McDonald Carano LLP/Las Vegas
Las Vegas City Attorney
McDonald Carano LLP/Reno
Law Offices of Kermitt L. Waters
Kaempfer Crowell/Las Vegas
Hutchison & Steffen, LLC/Las Vegas
Eighth District Court Clerk

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[1]In light of this order, petitioner's emergency motion for a stay is denied as moot.

Exhibit 13

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE,
Respondents,
and
180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY,
Real Party in Interest.

No. 78792

FILED

JUL 24 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Timothy C. Williams, District Judge
McDonald Carano LLP/Las Vegas
Las Vegas City Attorney
Leonard Law, PC
Law Offices of Kermitt L. Waters
Kaempfer Crowell/Las Vegas
Hutchison & Steffen, LLC/Las Vegas
Eighth District Court Clerk

Exhibit 14

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE,
Respondents,
and
180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY,
Real Party in Interest.

No. 78792

FILED

SEP 06 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.[1]

_____, C.J.
Gibbons

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

[1]Kristina Pickering, Justice, and James Hardesty, Justice, voluntarily recused themselves from participation in the decision of this matter.

19-37402

000287

cc: Hon. Timothy C. Williams, District Judge
McDonald Carano LLP/Las Vegas
Las Vegas City Attorney
Leonard Law, PC
Law Offices of Kermitt L. Waters
Kaempfer Crowell/Las Vegas
Hutchison & Steffen, LLC/Las Vegas
Eighth District Court Clerk

Exhibit 15

Electronically Filed
10/23/2020 2:01 PM
Steven D. Grierson
CLERK OF THE COURT

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(Additional Counsel Identified on Signature Page)

Attorneys for Defendant City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT 24 (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entities I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendants.

Case No. A-18-773268-C

MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND IN INVERSE CONDEMNATION

HEARING REQUESTED

Pursuant to NRCP 12(b)(5), Defendant CITY OF LAS VEGAS ("City") moves the Court for an Order dismissing the *Complaint for Declaratory and Injunctive Relief and in Inverse Condemnation* (the "Complaint") filed on behalf of Plaintiffs FORE STARS, LTD. and SEVENTY ACRES, LLC.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this action, the Plaintiffs (collectively, the "Developer") sue the City for a regulatory "taking" of its property and a violation of its due process rights, claiming that the City prevented the Developer from making any use of its property. Because the City approved the Developer's application to build housing on the property, the Developer's takings and due process claims are frivolous and should be dismissed with prejudice.

In 2017, the Las Vegas City Council approved the Developer's application to develop 435 units of luxury housing on 17 acres of golf course property ("17-Acre Property"). The 17-Acre Property is part of a 250-acre golf course and drainage system known as the Badlands, which had been designated for more than 20 years for use limited to parks, recreation, and open space ("PR-OS") in the City's General Plan. The Badlands, in turn, serves as open space and recreation for a roughly 1,569-acre master planned area known as the Peccole Ranch Master Plan ("PRMP").

In approving the 435-unit project, the City upzoned the 17-Acre Property to allow greater density than the zoning in effect when the Developer bought the property, and amended the PR-OS General Plan designation, which prohibited development of housing, to a designation allowing medium density housing. When neighbors brought a lawsuit challenging the City's approval of the 435-unit project, Nevada's Eighth Judicial District Court overturned the City's approval on the ground that the City should have required an application for a major modification ("Major Modification Application") to the PRMP before approving the project. The Developer appealed the court's decision to the Nevada Supreme Court. But rather than allow the appeal to run its course, the Developer filed the instant suit against the City *and* the Nevada District Court, claiming that the City and the court "collectively" had "taken" its property and violated its due process rights by prohibiting all development of the 17-Acre Property, despite the City's *approval* of the Developer's application. The Developer's takings and due process attack on the City here is puzzling, to say the least, because the City changed the law that precluded development of the 17-Acre Property to permit significant development of the property, adding significant value in the process.

The United States Supreme Court and the Nevada Supreme Court have determined that finding a

regulatory taking under the Just Compensation Clause of the Fifth Amendment requires a restriction on use of private property so extreme that it is tantamount to a direct condemnation of the property. Here, in contrast, the City has never taken action to prevent development of the 17-Acre Property, but instead has allowed the Developer to build 435 units of luxury housing. The Nevada Supreme Court reversed the Nevada District Court decision that had invalidated the City's approvals, finding that a Major Modification Application was not required to develop the property. As a result, the City's approval of development of the 17-Acre Property has been reinstated. The City informed the Developer of that fact in March 2020, and again in September 2020, and invited the Developer to seek any required ministerial permits to develop its property. Despite these undisputed facts, the Developer continues to maintain this pointless lawsuit against the City and the District Court. The Court should accordingly dismiss the Developer's complaint with prejudice.

STATEMENT OF FACTS

I. The Badlands has served as open space for Peccole Ranch since its inception

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

In 1988, the Peccole Ranch Partnership ("Peccole") submitted a revised master plan known as the Peccole Ranch Master Plan ("PRMP") and an application to rezone 448.8 acres for the first phase of development ("Phase I"). Ex. E at 52-84. The City approved the PRMP and the Phase I rezoning application in 1989, after Peccole agreed to limit the overall density in Phase I and reserve 207.1 acres for a golf course and drainage in Phase II of the PRMP. *Id*. at 85-96.

[1] City Ordinances, Resolutions, legislative history, transcripts of public hearings, and other documents subject to judicial notice are attached as Exhibits in the Appendix to this Motion. The City requests that the Court take judicial notice of the Exhibits under NRS 47.130, 47.140, and 47.150.

In 1989, the City included Peccole Ranch in a Gaming Enterprise District ("GED"), which allowed Peccole to develop a resort hotel in the PRMP so long as Peccole provided a recreational amenity such as an 18-hole golf course. Ex. F at 97-107, 113, 118-20. Peccole reserved 207 acres for a golf course to satisfy this requirement. *See* Ex. E at 86, 88; Ex. F at 106-07.

In 1990, Peccole applied to amend the PRMP for the second phase of development ("Phase II"). Ex. G at 121-44. The revised PRMP highlighted an "extensive 253-acre golf course and linear open space system winding throughout the community [that] provides a positive focal point while creating a mechanism to handle drainage flows." *Id*. at 128. The City approved the Phase II rezoning application under a resolution of intent subject to all conditions of approval for the revised PRMP. *Id*. at 166-77.

II. The Badlands has been designated PR-OS in the City's General Plans since 1992

Since 1992, the City's General Plan has designated the Badlands for parks, recreation, and open space, a designation that does not permit residential development. On April 1, 1992, the City Council adopted a new Las Vegas General Plan, including revisions approved by the Planning Commission. Ex. H at 178-87, 195-201. The 1992 General Plan included maps showing existing land uses and proposed future land uses. *Id.* at 229. The future land use map for the Southwest Sector designated the area set aside by Peccole for an 18-hole golf course as "Parks/Schools/Recreation/Open Space." *Id.* at 231. That designation allowed "large public parks and recreation areas such as public and private golf courses, trails and easements, drainage ways and detention basins, and any other large areas of permanent open land." *Id.* at 217-18.

Between 1992 and 1998, Peccole developed the 18-hole golf course in the location depicted in the 1992 General Plan, and a 9-hole course to the north of the 18-hole course. *Compare id.* at 231 *with* Ex. I; Exs. J, K. The 9-hole course was also designated "P" for "Parks" in the City's General Plan as early as 1998. *See* Ex. L. The Badlands 18-hole and 9-hole golf courses, totaling 250 acres, remain in the same configuration today. When the City Council adopted a new General Plan in 2000 to project growth over the following 20 years (the "2020 Master Plan"), it retained the "parks, recreation, and open space" [PR-OS] designation. Ex. M at 259-60, 266; *compare id.* at 270 *with* Ex. H at 217-18. Beginning in 2002, the City's General Plan maps show that the entire Badlands was designated PR-OS. Ex. N.

In 2005, the City Council incorporated an updated Land Use Element in the 2020 Master Plan.

Ex. O at 279-83. This 2005 Land Use Element designated all 27 holes of the Badlands golf course as PR-OS for "Park/Recreation/Open Space." *Id.* at 292. Each update to the Land Use Element since 2005 has designated the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged. *See* Ex. P at 293, 301-02; Ex. Q at 303-05, 317-18; Ex. R at 319, 332-33.

III. The City zoned the Badlands R-PD7

In 1972, the City established R-PD7 zoning (Residential-Planned Unit Development, 7 units/acre). Ex. S. "The purpose of a Planned Unit Development [was] to allow a maximum flexibility for imaginative and innovative residential design and land utilization in accordance with the General Plan." *Id.* at 334. R-PD zoning is an example of cluster zoning, which is "[z]oning that permits planned-unit development by allowing a modification in lot size and frontage requirements under the condition that other land in the development be set aside for parks, schools, or other public needs." *Zoning*, *Black's Law Dictionary* (11th ed. 2019). The R-PD district was intended "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns." Ex. S at 334.

During the 1990's, the City approved rezoning requests by a resolution of intent, meaning that a rezoning was provisional until the rezoned property was developed. Once rezoned property was developed, the City would adopt an ordinance amending the Official Zoning Map Atlas to make the rezoning permanent. *See*, *e.g.*, Ex. T at 342. In 1990, the City adopted a resolution of intent to rezone 996.4 acres in Phase II of the PRMP. Ex. G at 172-77. To obtain approval of R-PD7 zoning for 614.24 acres in Phase II, Peccole agreed to set aside 211.6 acres of the 614.24-acre area for a golf course and drainage. *Id*. at 142, 146-48, 150-51, 154-55, 170-71.

In 2001, the City amended the Zoning Map to rezone to R-PD7 the Phase II property previously approved for R-PD7 zoning under the resolution of intent. Ex. U at 343-62. In 2011, the City discontinued the R-PD zoning district for new developments but did not alter the R-PD7 zoning of the Badlands and surrounding residential areas of Phase II. Ex. V at 364.

IV. The Developer acquired and segmented the Badlands

In early 2015, Peccole owned the Badlands under the name Fore Stars Ltd. ("Fore Stars"). Ex. W at 366-78; Ex. X. In March 2015, the Developer acquired Fore Stars, thereby acquiring the 250-acre

Badlands. Ex. Y at 381; Ex. SS. Between 2015 and 2017, the Developer recorded parcel maps subdividing the Badlands into nine parcels. Ex. Z at 384-412; Ex. AA. The Developer transferred 178.27 acres to 180 Land Co. LLC ("180 Land") and 70.52 acres to Seventy Acres LLC ("Seventy Acres"), leaving Fore Stars with 2.13 acres. Ex. Y at 381; *see also* Ex. W at 371-78. Each of these entities is controlled by the Developer's EHB Companies LLC. *See* Ex. W at 372, 376. The Developer segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands. *See* Ex. BB; Ex. CC; Ex. DD; Ex. EE. At issue in this case is 17.49 acres of the Badlands owned by Fore Stars and Seventy Acres (the "17-Acre Property"). *See* Complaint for Declaratory and Injunctive Relief and in Inverse Condemnation ("Compl.") ¶ 7.

V. The City approved development on the 17-Acre Property

In November 2015, the Developer applied for a General Plan Amendment, Re-Zoning, and Site Development Plan Review to redevelop the 17-Acre Property from golf course to luxury condominiums ("17-Acre Applications"). Ex. EE at 545-65. The 17-Acre Applications sought to change the General Plan designation from PR-OS, which did not permit residential development, to H (High Density Residential), and the zoning from R-PD7 to R-4 (High Density Residential). *Id.* at 548-51. The Planning Staff Report for the 17-Acre Applications noted that the proposed development required a Major Modification Application to amend the PRMP. Ex. FF at 569. In 2016, the Developer submitted a Major Modification Application and related applications, but later that year withdrew the applications. Ex. GG at 582-93; Ex. HH.

In February 2017, the City Council approved the 17-Acre Applications for 435 units of luxury housing and approved a rezoning to R-3, along with a General Plan Amendment to change the land use designation from PR-OS to Medium Density Residential, without which the 17-Acre Property could not be developed with housing. Ex. II at 683, 685-88, 690-96.

VI. Neighbors challenged the City's approval of development

After the City approved the 17-Acre Applications, nearby homeowners filed a petition for judicial review of the City's approval, which was assigned to Judge Jim Crockett. *See* Ex. JJ at 698, 709 (the "Crockett Order"). On March 5, 2018, Judge Crockett granted the homeowners' petition, vacating

the City's approval on the grounds that the City Council was required to approve a Major Modification Application to amend the PRMP before approving applications to redevelop the Badlands. *Id.* at 697, 709-10.

The Developer appealed the Crockett Order. *See* Ex. MM (*Seventy Acres, LLC v. Binion*, 458 P.3d 1071 (Nev. 2020) (Order of Reversal)). Although the City did not appeal Judge Crockett's Decision, it did file an amicus brief in support of the Developer's position that a Major Modification Application was not required. Ex. KK.

VII. The Developer sued the City and the District Court

Following Judge Crockett's decision invalidating the City's approval, and despite the City's amending the PR-OS designation to allow significant housing development, the Developer filed the instant suit against the City, the Eighth Judicial District Court, and Judge Crockett. The Developer contends that the Crockett Order was a "judicial taking" under the Fifth Amendment and that the City's designating the property as PR-OS, along with its decision not to appeal the Crockett Order, was a taking under the United States and Nevada Constitutions and violated due process under the 14th Amendment of the United States Constitution. The City and the State filed motions to dismiss, which the court stayed pending resolution of the appeal of the Crockett Order. Ex. LL. After the United States Supreme Court decided *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2019), for the first time conferring federal court jurisdiction over takings claims brought against local governments, the City removed this case to federal district court. The federal district court remanded the case to state court on September 23, 2020.

After the City removed the case to federal district court, the Nevada Supreme Court reversed the Crockett Order, finding that a Major Modification Application was not required to develop the 17-Acre Property. Ex. MM. The Nevada Supreme Court subsequently denied rehearing and en banc reconsideration and issued a remittitur, rendering its determination final. Ex. NN; Ex. OO; Ex. PP. The Supreme Court's decision was consistent with the City's argument in the District Court and in its amicus brief that a Major Modification Application was not required to develop the 17-Acre Property. Ex. KK at 715-18.

. . .

The Nevada Supreme Court's reversal of the Crockett Order validated the City's approval of the Developer's applications to develop the 17-Acre Property. The City provided the Developer with notice of that fact by letter on March 26, 2020. The City's letter explained that once remittitur issued in the Nevada Supreme Court's order of reversal, "the discretionary entitlements the City approved for [the Developer's] 435-unit project on February 15, 2017 . . . will be reinstated." Ex. QQ. On August 24, 2020, the Nevada Supreme Court issued its Remittitur. Ex. PP. On September 1, 2020, the City notified the Developer that the Remittitur has issued, the City's original approval of 435 luxury housing units on the 17-Acre Property has been reinstated, and the Developer is free to proceed with its development project. Ex. RR. Accordingly, the City has not taken any action to limit the Developer's use of the 17-Acre Property.[2]

LEGAL STANDARD

This case must be dismissed under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted. On a motion to dismiss, the court "is to 'determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief.'" *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792, 858 P.2d 380, 381 (1993) (citation omitted). While the court must accept all factual allegations in the complaint as true, only "fair" inferences must be accepted. *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). Bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not defeat a motion to dismiss. *See G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F. Supp. 2d 1246, 1261 (D. Nev. 2006). In addition to the allegations in the complaint, matters of public record and other matters subject

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[2] After the City approved the 17-Acre Applications, it denied the Developer's application to develop the 35-Acre Property on a different part of the Badlands on June 21, 2017. Ex. BB. The Developer filed suit in Nevada District Court. *See 180 Land Co. v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J. In October 2017, the City struck the Developer's applications to develop the 133-Acre Property as incomplete, because, among other things, they did not include a Major Modification application in accord with Judge Crockett's Decision. Ex. CC. The Developer sued in Nevada District Court, and the City removed the case to federal district court. *See 180 Land Co. v. City of Las Vegas*, U.S. District Court for Dist. of Nevada Case No. 2:19-cv-01470-RFB-BNW. The Developer has also sued the City claiming that the City has taken the 65-Acre Property, despite the fact that the Developer did not submit any of the applications required to develop that property. *See 180 Land Co. v. City of Las Vegas*, Eighth Judicial District Court Case No. A-18-780184-C.

to judicial notice may be considered on a motion to dismiss. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

ARGUMENT

I. The Developer's takings claims should be dismissed with prejudice because the City approved the Developer's applications to develop the property (Third – Eighth Causes of Action)

The Developer alleges various takings claims under the United States and Nevada Constitutions. The Developer purports to assert three causes of action for a regulatory taking: a categorical taking, a "per se" taking, and a *Penn Central* taking; along with one cause of action each for a "non-regulatory taking," a judicial taking, and a temporary taking. Compl. ¶¶ 58-117. Because the City did not prevent development of the 17-Acre Property, but instead permitted the Developer to build 435 luxury housing units on the property, each of these causes of action must be dismissed for failure to state a claim.

The Developer's takings claims are based on the combined actions of the City and the Eighth Judicial District Court. *See, e.g.*, Compl. ¶ 59. However, neither the City nor the court is responsible for the other's actions, so their actions cannot be considered collectively for purposes of a takings analysis. The only actions *by the City* that affected the use of the 17-Acre Property were the City's designating the property PR-OS in the General Plan, zoning the property R-PD7, and rezoning the property and amending the General Plan designation to allow the City to approve the development of 435 luxury housing units on the property. Because none of these actions individually or collectively denied the Developer its chosen development of the property for 435 luxury housing units, none are a taking.

A. The Developer cannot state a regulatory taking claim because the City's action did not wipe out all or virtually all economic use of the property (Third- Fifth Causes of Action)

The Developer has stated two regulatory takings claims: a categorical taking (also known as a "per se" taking)[3] and a *Penn Central* taking. Compl. ¶¶ 58-94. A categorical taking occurs either when a

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[3] Although the Developer purports to assert three regulatory takings claims, its "categorical" and "per se" claims are the same thing. The majority in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) classified economic wipeouts and physical takings resulting from government regulation as "categorical" takings, while the dissent characterized the same test as a "per se" standard. *Id*. at 1015, 1052 (Blackmun, J., dissenting). A unanimous Supreme Court in *Lingle* also uses the terms interchangeably. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). Because the terms are
(footnote continued on next page)

regulation results in a permanent physical invasion of property (which is not alleged here), or when a regulation "'den[ies] all economically beneficial or productive use of land.'" *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 648, 855 P.2d 1027, 1033 (1993) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 at — , 112 S.Ct. at 2893 (1992)). The latter type of taking is "confined to the 'extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 626 (9th Cir. 2020) (quoting *Lucas*, 505 U.S. at 1017), *petition for cert. filed* (emphasis original); *see also Kelly*, 109 Nev. at 648, 855 P.2d at 1033 ("'[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.'") (quoting *Lucas*, 505 U.S. at — ,112 S.Ct. at 2895) (emphasis original).

The second taking alleged is a *Penn Central* taking, named for *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and is determined based on consideration of three factors: "(1) 'the economic impact of the regulation on the claimant,' (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations,' and (3) 'the character of the governmental action.'" *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 420, 351 P.3d 736, 742 (2015) (quoting *Penn Cent.*, 438 U.S. at 124). The "primary factors" are the regulation's economic impact and its interference with distinct investment-backed expectations. *Bridge Aina Le'a, LLC*, 950 F.3d at 630. Under both the categorical and *Penn Central* tests, however, the regulation must be so extreme as to be tantamount to a physical ouster from the property. In harmony with the United States Supreme Court, the Nevada Supreme Court limits regulatory takings to only those cases where the regulation "'completely deprive[s] an owner of all economically beneficial use of her property,'" akin to a direct condemnation by eminent domain. *See State*, 131 Nev. at 419, P.3d at 741 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (alteration original)); *see also Kelly*, 109 Nev. at 648, 649-50, 855 P.2d at 1033-34 (under both the categorical and the multi-factor tests, courts consider whether the regulation denies "'all economically beneficial or productive use of land'" or "all economically viable use of [] property")

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synonymous and do not stand for different regulatory takings tests, the Developer's two causes of action for categorical and per se regulatory takings, based on the same factual allegations, are redundant. *See id.*

(quoting *Lucas*, 505 U.S. at —, 112 S.Ct. at 2895); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-25 (1994) (denial of a building permit was not an unconstitutional taking because it "did not destroy all viable economic value of the prospective development property"); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient economic loss to constitute *Penn Central* taking). Accordingly, to be the functional equivalent of eminent domain, the challenged regulatory action must cause a truly "severe economic deprivation" to the plaintiff. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007).

1. The City's approval of the Developer's requested development enhanced the property's value

The Developer's claim here is meritless because not only did the City's regulation not impose an extreme adverse economic impact on the property, but in approving substantial development of the 17-Acre Property—indeed, the very development the Developer requested—the City *increased* the use and value of the property. In the course of approving 435 units of luxury housing on the 17-Acre Property, the City granted the Developer's application to upzone the property from R-PD7 to a zoning that allowed *greater density* than that allowed when the Developer bought the property, and amended the City's General Plan designation from PR-OS, which *prohibited* housing construction on the property, to a designation that *allowed* construction of housing. The City accordingly changed the law in a way that significantly enhanced the property's use and value. Because the City approved the Developer's requested development applications on the 17-Acre Property, the Developer cannot show any reduction in the value of its property, let alone the total wipeout necessary to establish a taking. Its regulatory takings claims therefore fail.[4]

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[4] The Developer purchased the entire 250-acre Badlands and segmented it into four properties for which it pursued individual development applications and is now pursuing separate takings claims. Courts routinely reject this type of segmentation of property in analyzing taking claims, instead identifying the "parcel as a whole" and assessing whether the regulatory action in question has taken that parcel. *See Penn Cent.*, 438 U.S. at 130-31; *Murr v. Wis.*, 137 S. Ct. 1933, 1943-44 (2017); *see also Kelly*, 109 Nev. at 651, 855 P.2d at 1035 ("Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of *all* economic use."). In this case it is unnecessary for the Court to reach the question of the relevant parcel as a whole because even if the 17-Acre Property were the parcel as a whole, the City's approval of development on the property precludes any taking
(footnote continued on next page)

2. The Developer did not have a reasonable investment-backed expectation to develop the property

Even if the City had denied the Developer's requested development, the Developer's *Penn Central* taking claim must fail because the long-standing PR-OS designation precludes any claim that the Developer had reasonable investment-backed expectations to build housing on the property. *See* Compl. ¶¶ 75-77. "[T]he regulatory regime in place at the time the claimant acquires the property at issues helps shape the reasonableness of those expectations." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring); *see also Kelly*, 109 Nev. at 651, 855 P.2d at 1035 (finding the property owner's reasonable investment-backed expectations had been satisfied where he "had adequate notice that his development plans might be frustrated" at the time he purchased the property). "'Distinct investment-backed expectations' implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes.'" *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). A landowner cannot assert a taking based on "the government's failure to repeal a long existing law." *Id.* at 1118.

Here, most of the Badlands has been designated PR-OS since 1992 (including the 17-Acre Property), and all of it has been designated PR-OS since at least 2002, long before the Developer purchased the Badlands in 2015. *See* Ex. H at 178-87, 195-201, 229, 231; Ex. N at 276; Ex. W at 366-78. Residential use is not permitted on property designated PR-OS. Accordingly, residential use of the property would require an amendment to the General Plan designation. The City had complete discretion to amend, or not amend, the PR-OS designation. Las Vegas Unified Dev. Code ("UDC") 19.16.030(B) ("Whenever the public health, safety and general welfare requires, the City Council may, . . . change the General Plan land use designation for any parcel or area of land"); *see also Nova Horizon v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989) (local agencies have discretion to apply and amend their master plan). Further, contrary to the Developer's assertion, the R-PD7 zoning on the 17-Acre Property did not supersede or invalidate the PR-OS land use designation, nor did it provide the

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claim. Nevertheless, the City does not waive the argument that the parcel as a whole is either the PRMP or, at a minimum, the Badlands. *See Murr*, 137 S. Ct. at 1945.

Developer with a vested right to develop the property. *See* Section III, infra; *see also* Compl. ¶¶ 14, 24. Because the law prohibited residential development on the 17-Acre Property when the Developer bought it, the Developer cannot have had an objective expectation to develop the property with housing. *See Guggenheim*, 638 F.3d at 1121. However, even if the Developer had an objective expectation that the City would change the law to allow development of housing on its property, the City did so by approving a 435-unit luxury housing development. Accordingly, the City did not interfere with the Developer's investment-backed expectations as a matter of law.

3. The City's decision not to appeal the Crockett Order did not cause a regulatory taking

The Developer also asserts that the City's decision not to appeal the Crockett Order constituted a regulatory taking, but such a claim is untenable. The City is not obligated to expend taxpayer funds to defend its development approvals in court, and there is no authority that its decision not to do so can form the basis of a regulatory taking claim. *See, e.g.*, *The Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. 304, 305, 419 P.3d 140, 141 (2018) (recognizing that the City Council has discretion concerning whether to appeal). Nonetheless, the City filed an amicus brief in the Nevada Supreme Court supporting the Developer's position (and the City's position throughout this litigation) that a Major Modification Application was not required under the City's UDC. Ex. KK. Most important, the City did not need to appeal Judge Crockett's Order because the Developer appealed it, and the Nevada Supreme Court reversed the Crockett Order and reinstated the City's approvals. Accordingly, the Developer cannot claim any harm from the City's declining to appeal Judge Crockett's Order, and its claim is moot. *See* Ex. MM; Ex. NN; Ex. OO; Ex. PP; Ex. QQ; Ex. RR.

B. The Developer cannot state a non-regulatory taking because the City allowed substantial development of the property (Sixth Cause of Action)

The Developer also asserts a "non-regulatory taking" under Nevada caselaw, claiming that the City's actions and the Crockett Order were "oppressive," "unreasonable," and aimed at precluding any use of the 17-Acre Property. Comp. ¶¶ 97- 99. The claim has no basis in law or fact because the City approved the Developer's application to construct 435 housing units on the property, thereby permitting substantial use of the property.

. . .

Even if the City had disapproved the Developer's application to develop housing on the property, the Developer cannot state facts to establish a non-regulatory taking. A non-regulatory taking can occur "if the government has 'taken steps that substantially interfere[] with [an] owner's property rights to the extent of rendering the property unusable or valueless to the owner.'" *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 421, 351 P.3d 736, 743 (2015) (alteration in original) (quoting *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed. Cir. 2013)). A non-regulatory taking occurs only in "extreme cases" involving either a physical taking or unreasonable precondemnation activities. *Id.*

The Developer has not asserted that the City engaged in a physical taking or in precondemnation activities. Indeed, far from the "extreme cases" of government actions taken before condemning property, which may amount to a non-regulatory taking, in this case the City approved the Developer's application to develop the 17-Acre Property. The Developer does not, and cannot, allege that the City physically appropriated, condemned, or declared an intent to condemn the 17-Acre Property. Even if it had declared an intent to condemn the property, the City approved substantial development of the property. It cannot be deemed to have interfered with the Developer's rights, let alone caused a "substantial[]" interference that rendered the property "unusable or valueless" prior to the alleged condemnation. *Id.* The government actions alleged in this case do not fit within the narrow class of actions that could constitute a non-regulatory taking. Accordingly, this claim should be dismissed.

C. The City cannot be held responsible for a judicial taking (Seventh Cause of Action)

The Complaint asserts that the Crockett Order constituted a "judicial taking." Compl. ¶¶ 104-11. To the extent that the Developer's claim of a judicial taking implicates the City, this claim must be dismissed. The City cannot be held liable for the Crockett Order, which the City opposed. *See id.* ¶ 32. The judicial branch of the State is independent of the City, and vice versa. Nev. Const. art. 3, § 1 (the state government's powers are divided into three separate departments); *see also State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 421, 351 P.3d at 743 (rejecting the property owner's "efforts to portray [the Nevada Department of Transportation] as a grand puppet master dictating the City's actions"). The fact that the Crockett Order temporarily invalidated the City's approval of the 17-Acre Applications over the City's objection further underscores the futility of holding the City responsible for the Court's decision.

. . .

D. The Developer cannot state a temporary taking because the City has not effected a permanent taking (Eighth Cause of Action)

The Developer's "temporary taking" claim does not state a separate cause of action. A temporary taking describes the scenario in which a court finds that a regulation effects a permanent taking under *Lucas* or *Penn Central*, and the public agency thereafter rescinds the regulation to avoid paying compensation for a permanent taking, but must pay compensation for the period where the regulation temporarily prevented all use of the property. *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 318-19, 321 (1987). A temporary taking, therefore, does not arise unless and until the court finds that a permanent regulatory taking has occurred, and the agency rescinds the regulation causing the taking. *See id.* In this case, there cannot have been a regulatory taking in the first place because the City approved the 17-Acre Applications, so the temporary takings claim should be dismissed.

II. The Developer cannot state a claim for declaratory relief (First Cause of Action)

The Developer seeks a declaratory judgment under Nevada law that the City's PR-OS land use designation is invalid, thereby precluding the City from applying this designation to the 17-Acre Property. Compl. ¶¶ 17-24, 45-59. However, the Developer cannot show that there is a justiciable controversy between the parties regarding the PR-OS designation or that the designation caused any damage because the City amended the designation at the Developer's request to allow the Developer's 435-unit housing project. As a result, the Developer cannot state a valid claim for declaratory relief.

"Declaratory relief is available only if: (1) a justiciable controversy exists between persons with adverse interests, (2) the party seeking declaratory relief has a legally protectable interest in the controversy, and (3) the issue is ripe for judicial determination." *Cnty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998) (citing *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996)). "Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem." *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). Declaratory relief is also "unavailable when the damage is merely apprehended or feared." *Id.* (citing *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948)). "The court may refuse to . . . enter a declaratory judgment" when such a judgment "would not terminate the . . . controversy giving rise to the

proceeding." Nev. Rev. Stat. Ann. ("NRS") § 30.080 (West 2020).

Here, the PR-OS designation did not preclude development of the 17-Acre Property because the City approved the Developer's application to amend the PR-OS designation to one that permits the construction project the Developer proposed. Ex. II at 683, 688, 690-92. Accordingly, determining whether the PR-OS designation is valid would not resolve any conflict between the parties or remedy any harm to the Developer. The Nevada Supreme Court reversed the Crockett Order, and the City has informed the Developer that its development approvals have been reinstated. Exs. MM, QQ, RR. Thus, the validity of the former PR-OS designation of the 17-Acre Property is irrelevant to the Developer's ability to develop that property, and the Developer is not entitled to declaratory relief regarding the validity of this designation.

Even if the validity of the PR-OS designation were still in controversy, there can be no genuine dispute as to its validity. The City imposed the PR-OS designation on the Badlands property by ordinance of the City Council approving the City's 1992 General Plan, and it has reinstated that designation in every ordinance amending the General Plan since then. Ex. H at 231; Ex. M at 259, 266, 270; Ex. N at 275-278; Ex. O at 279-83, 292; Ex. P at 293, 301-02; Ex. Q at 303-05; Ex. R at 319, 332-33. The City's ordinances approving the PR-OS designation of the Badlands are presumed valid. *See Nova Horizon*, 105 Nev. at 94, 769 P.2d at 722 (noting that a county board's action was presumed valid where supported by substantial evidence).

Moreover, it is too late for the Developer to challenge the PR-OS designation. A lawsuit challenging a final action of the City Council filed later than 25 days after notice of the action is barred. NRS 278.0235; *see also League to Save Lake Tahoe v. Tahoe Reg'l Plan. Agency*, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977), overruled on other grounds by *Cnty. of Clark v. Doumani*, 114 Nev. 46, 9 52 P.2d 13 (1998). The City Council adopted the PR-OS designation for the 18-hole portion of the Badlands golf course (including the 17-Acre Property) in Ordinance No. 3636 adopted on April 1, 1992. Ex. H at 197-201, 231. The 9-hole course was also designated for PR-OS as early as 1998, and the entire Badlands was shown as PR-OS in General Plan maps beginning in 2002. *See* Ex. L; Ex. N at 276. The Developer has not alleged and cannot allege that it or its predecessor sought judicial review of that legislation within 25 days after its enactment. Even if the Court applied a 15-year statute of limitations

for takings claims (*White Pine Lumber v. City of Reno*, 106 Nev. 778, 779 (1990)), the claim would still be time-barred because the Developer filed this action in September 2018, 26 years after the designation was adopted in 1992.

Because the Developer has not raised a justiciable controversy regarding the PR-OS designation, the PR-OS designation is a valid legislative enactment of the City Council, and the declaratory relief claim is time-barred, the Developer's first cause of action for declaratory relief should be dismissed with prejudice.

III. The Developer cannot state a due process violation claim (Ninth Cause of Action)

The Developer asserts that the City's actions and the Crockett Order "retroactively and without due process transformed" the Developer's "vested property right to a property without any value," violating the Developer's substantive and procedural due process rights under the Fourteenth Amendment of the United States Constitution and Article 1, section 8 of the Nevada Constitution. Compl. ¶¶ 10, 119, 123. Like the Developer's takings and declaratory relief claims, this claim is frivolous and must be dismissed.

A person may not be deprived of "life, liberty, or property, without due process of law." Nev. Const. art. 1, § 8(2); U.S. Const. amend. XIV, § 1. Accordingly, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (quoting U.S. Const. amend. XIV); *see also Pressler v. City of Reno*, 118 Nev. 506, 510, 50 P.3d 1096, 1098 (2002) ("The protections of due process only attach when there is a deprivation of a protected property or liberty interest.") (citing Nev. Const. art. 1, § 8); *Allen v. State*, 100 Nev. 130, 134, 676 P.2d 792, 794 (1984) ("Substantive due process guarantees that no person shall be deprived of life, liberty or property for arbitrary reasons.") (citing *Truax v. Corrigan*, 257 U.S. 312, 332 (1921)). Here, the Developer's due process claims are predicated on its erroneous assertion that the City denied the Developer's "vested right" to approval of a housing project with a density of seven units per acre under the R-PD7 zoning, and thereby deprived the Developer of its "property rights." Compl. ¶¶ 9, 10, 119-23. Not only did the City *allow* the Developer to build seven units per acre, but it upzoned the property to allow 25 units per acre (435/17 = 25). Accordingly, the City cannot have deprived the Developer of a vested property right, even if the

Developer had one, and the due process claim must be dismissed.

IV. The Developer cannot state a claim for injunctive relief (Second Cause of Action)

The Developer's cause of action for a preliminary injunction should be dismissed because injunctive relief is a remedy, not a cause of action. *See State Farm Mut. Auto Ins. Co. v. Jafbros, Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993). An injunction is available "to restrain a wrongful act that gives rise to a cause of action." *Chateau Vegas Wine, Inc. v. S. Wine & Spirits of Am., Inc.*, 127 Nev. 818, 824, 265 P.3d 680, 684 (2011). Even if a request for injunctive relief could be treated as a separate cause of action, the Developer's cause of action should still be dismissed because the Developer has not alleged irreparable harm. "Irreparable harm is an injury for which compensatory damage is an inadequate remedy." *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 353, 351 P.3d 720, 723 (2015) (internal quotation marks and citation omitted). Here, the City has not caused the Developer any harm—let alone irreparable harm—but instead has enhanced the use and value of the 17-Acre Property by changing the law to allow development of 435 units on the property.

CONCLUSION

The City respectfully requests that the Court grant its Motion to Dismiss.

DATED this 23rd day of October, 2020.

By: */s/Philip R. Byrnes*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 23rd day of October, 2020, a true and correct copy of the foregoing **CITY'S MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS IN SUPPORT THEREOF** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

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Exhibit 16

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT 24 (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entities I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendants.

Case No. A-18-773268-C

CITY'S SUR REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND IN INVERSE CONDEMNATION

Hearing Date: December 7, 2020
Hearing Time: 9:00 AM

INTRODUCTION

The Developer's Sur-Reply is a last ditch effort to avoid dismissal. The Developer has the burden to show that the City's regulations prevented all or virtually all use of the 17-Acre Property or interfered with the Developer's reasonable investment-backed expectations. The Developer's Sur-Reply arguments and exhibits, which generally rehash the arguments it made in its Opposition, continue to ignore the fact that the City *approved* the Developer's application to develop 435 luxury housing units on the 17-Acre Property. The Developer simply cannot show that the City denied the Developer any use of the 17-Acre Property or interfered with its investment-backed expectations when it purchased the 17-Acre Property. Accordingly, the Developer cannot possibly meet any relevant test for a regulatory taking.

This case is the equivalent of a trial where an eye witness to the crime identified the defendant as the perpetrator and the defendant signed a confession, but the defendant denies culpability. Try as it might, the Developer cannot make the City's approval of its project disappear. As a result, the Developer cannot avoid dismissal, no matter how many sur-reply briefs it files, no matter what events transpired with regard to the City's approval of the 17-Acre Property before the Nevada Supreme Court reinstated the City's approval, and no matter what anyone did or said with regard to other properties owned by the Developer. All that matters in this case is that the City approved the Developer's application in full. The Developer cannot possibly show that the 17-Acre Property suffered an injury from the City's actions. All the discovery in the world cannot change this result.

Based on unrefutable and judicially noticeable evidence that the City approved the Developer's project, there is no triable issue of fact, there can be no taking or due process violation as a matter of law, and the case should be dismissed. Undercutting its own argument that the Court should deny this motion because this case is "fact intensive," the Developer has conceded that:

> [L]iability for a taking in inverse condemnation is always a judicial determination. *McCarran v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006) ("[w]hether the government has inversely condemned private property is a question of law that we review de novo." *Id*. at 1121.) The question of whether a taking has occurred is based on Government action and can frequently be determined solely based on government documents (the truth and authenticity of the same are rarely in question). Therefore, this Court can review the facts as presented in the City's

> own documents and apply the law to those facts to make the judicial determination of a taking.

Landowners' Reply In Support of Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims Etc. filed 3/21/19 in *180 Land Company, LLC v. City of Las Vegas*, Clark County District Court No. A-17-758528-J, at 2.

I. While not legally relevant to this motion (because the City approved the Developer's project), the amount of damages the Developer seeks in this case explains why it does not want to use its entitlements to develop the 17-Acre Project and would rather extort money from the taxpayers

Although not at issue in this motion, the extreme contrast between what the Developer paid for the 17-Acre Property and the amount the Developer is seeking in damages, even though the Developer suffered no injury whatsoever, puts this case in the proper context.[1] Ignoring the law, and plain logic, that a property owner cannot show a constitutional violation when the government agency it is suing did everything the owner asked the agency to do, the Developer soldiers on with this suit. Why? In its opposition to this motion, the Developer contended that the City rescinded its approval of the 17-Acre Property. In its Sur-Reply, the Developer continues with this flagrant misrepresentation, even when confronted with letters from the City informing the Developer that *the City's approvals of the 435 unit project are valid and the City is ready to process building permits*. *See* Sur-Reply at 3-4. It is hard to imagine a more bizarre scenario. There is certainly no precedent for this perverse position in any land use litigation in this Universe.

The obvious answer to "Why?" is that the Developer does not actually intend to develop the 17-Acre Property. Instead, it believes that it can make more money by using this suit as a weapon to soak the taxpayers, based on some manufactured injury. The Purchase and Sale Agreement for the Badlands, signed by the Developer, shows that the Developer bought the entire 250-acre Badlands real estate for less than $7.5 million in 2015. *See* Appendix of Exhibits in Support of City's Motion to Dismiss ("MPA App.") Ex. SS at 752 (stating that Developer paid $7.5 million for the Badlands real estate and personal property). That the Developer now asks this Court to award $26,228,571 in damages, to be paid by the

[1] There is no triable issue of fact as to how much the Developer paid for the Badlands. Here, the City's approval of the Developer's project is fatal to the Developer's takings claims regardless of how much it paid to buy the property.

taxpayers of Las Vegas, for the 17-Acre Property *alone*, proves the point that this case is nothing more than an attempted shakedown of the taxpayers. Indeed, in this 17-Acre lawsuit and the other three lawsuits the Developer filed against the City, the Developer claims damages of 250 acres x $1,542,857/acre for a total of $386 million (rounded), or 50 times what it paid for the property. *See* MPA App. Ex. B at 19, MPA App. Ex. C at 29-30. 5,000 percent is not a bad profit margin for creating no new development and simply suing the City. The Court should end this case here and now and dismiss this naked attempt at extortion of the public treasury.[2]

II. The Developer's contention that the City nullified the 17-Acre approval is obviously false

The Developer's claim that it has been injured by the City's conduct is premised entirely on its misrepresentation that the City has nullified its approval of the Developer's 17-Acre project. There is simply no evidence to support this claim. Even if the evidence cited in the bullets of the Sur-Reply at pages 3-4 were true or affected the 17-Acre approvals (they don't), the Developer has no explanation as to how any of this evidence would matter in light of the City's letters of March 26, 2020 and September 1, 2020 stating that *the 17-Acre approvals are valid and inviting the Developer to proceed with the project*. MPA App. Exs. QQ, RR.

III. None of the Developer's arguments in its Sur-Reply could make the slightest difference in the outcome of this case because the City approved the Developer's project for the 17-Acre Property

The Developer bought the 250-acre Badlands in 2015 in a single transaction and later chopped the property into four parts. The Developer, not the City, filed applications to develop the 17-Acre Property standing alone. The City approved those applications, and those approvals are now final. The Developer filed four separate lawsuits against the City – one for each property. In the 17-Acre lawsuit before this Court, the Developer treats the 17-Acre Property as a separate property from the rest of the

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[2] The Developer misrepresents that it paid $45 million for the Badlands. When asked for documentation of that purchase price, the Developer initially denied that it had any documents supporting that price, then alleged that it has documents that support that price, but ultimately admitted that the documents do not actually mention the Badlands. *See* **attached Ex. A** (excerpts of Reporter's Transcript) at 31, 47, 49-50, 52-53. The Purchase and Sale Agreement the Developer signed to purchase the Badlands, stating that the Developer bought the entire Badlands plus personal property for $7.5 million, speaks for itself. MPA Ex. SS. Even if the Developer paid $45 million for the Badlands, it would still be demanding damages of 8.5 times what it paid for the Badlands from the taxpayers in the four lawsuits.

Badlands and claims that the City has taken the 17-Acre Property only. The Developer has not asked for any relief with respect to the other three properties in this lawsuit. Because the City approved the Developer's application to construct 435 units of luxury housing on the 17-Acre Property at the Developer's request and the City has taken no action affecting those approvals other than to confirm to the Developer that they are valid, the following facts and arguments the Developer repeats in its Sur-Reply at pages 4-10 are irrelevant and moot or based on obvious misrepresentations. The Court does not need to reach these arguments because they constitute statements of individual City employees, City Councilmembers, and third parties, because they involved other parcels of property, or did not preclude the City Council's approval of the Developer's project for the 17-Acre Property. As a result, these alleged statements and actions had *no effect* on the City Council's approval of the 17-Acre development and therefore could not affect the outcome of this case. For example:

- A Councilmember complemented the Developer;
- A Councilmember stated that the Developer has a right to build in the Badlands;
- A Councilmember expressed opposition to development of the Badlands, proposed that the City acquire the Badlands for a park or golf course for $15 million, and proposed legislation to require the Badlands, other than the 17-Acre Property, to remain open space, none of which ever occurred;
- A Councilmembers expressed opposition to development of the Badlands and criticized the Developer;
- A City employee asked other City employees to notify him if they see grading, clearing, or grub of the Badlands;
- The County Tax Assessor (a *County*, not a City, agency) assessed the Badlands at below market value;
- The City denied the 35-Acre applications;
- The City denied a Master Development Agreement;
- After approving the 17-Acre Property, the City changed the application procedure to develop the remainder of the Badlands;
- The City Attorney advised the City Council that the Judge Crockett Order is wrong;

- The Badlands has always been zoned R-PD7;
- Golf course is not allowed in an R-PD7 zone;
- The original developer of the PRMP did not intend the Badlands to be used forever for a golf course; the property was always intended for development consistent with its R-PD7 zoning;
- The golf course was an interim use;
- Neither the original developer nor the City imposed a condition on the PRMP that the Badlands remain a golf course; and
- The Developer shuttered the golf course four years ago.

Again, the Developer is challenged to explain why any of the above statements or actions, even if true, would have any effect on this case, where the City approved the Developer's application, that approval is valid, and the City is merely waiting for the Developer to pull building permits.

IV. The Developer has not and cannot plead a physical taking

In asserting that its complaint validly alleges a physical taking, the Developer cites no authority and completely ignores the law. The Developer's allegations *in support of its regulatory taking claims* that "[t]he Government Action *has the effect of* preserving the 17 Acres as open space for a public use and the public is actively using the 17 Acres" and "[t]he Government Action excludes the Landowners from using the 17 Acres and, instead, permanently reserves the 17 Acres for a public use and the public is using the 17 Acres" is not nearly enough to overcome a motion to dismiss. *See* Sur-Reply at 8 (emphasis added). A physical taking requires that the public agency either *physically occupy* private property or *restrict the owner's ability to exclude others from the property*, which the Developer has not alleged here. *See Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 426, 436, 102 S.Ct. 3164, 3171, 3176 (1982) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-22, 122 S.Ct. 1465, 1478-79 (2002) ("When the government physically takes possession of an interest in property for some public purpose," it may be liable for a physical taking.); *id*. at 322 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private

uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa."); *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662, 137 P.3d 1110, 1122 (2006) ("In determining whether a property owner has suffered a per se taking by physical invasion, a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space.") (internal citations omitted).

The Developer failed to "set forth the facts which support [a] legal theory" of a physical taking, as is required under notice pleading. *Liston v. Las Vegas Metro. Police Dept.*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (citing NRCP 8a). Where a plaintiff does not set forth facts that would entitle it to relief, the Court should dismiss the plaintiff's claim. *Slade v. Caesars Entertainment Corp.*, 132 Nev. 34, 373 P.3d 74, 78 (2016) (finding it beyond a doubt that plaintiff could prove no set of facts that would entitle him to relief for breach of the duty of public access to a casino where the plaintiff failed to demonstrate that his exclusion was for unlawful reasons); *see also Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (the allegations in a complaint "must be legally sufficient to constitute the elements of the claim asserted").

The Developer has not and cannot assert that the City has physically occupied the 17-Acre Property or restricted the Developer's ability to exclude others from the property. *See Loretto*, 458 U.S. at 426, 436. The Developer has not alleged that the City has taken any official action authorizing the public to physically occupy the 17-Acre Property. To the contrary, the Developer cannot genuinely dispute that the City has *approved* the Developer's application to use the 17-Acre Property for construction of 435 housing units.

Although courts should accept a complaint's material allegations as true, the court "need not accept conclusory allegations of law or unwarranted inferences." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007). The Court may also consider matters subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003) (citations omitted). The Court need not accept as true allegations contradicted by facts subject to judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted). *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (when ruling on a motion to dismiss for failure to state a

claim, "the court may take into account matters of public record, orders, [and] items present in the record of the case.") (citation omitted). Here, the Court can take judicial notice of the City's approval of the 17-Acre project, the Nevada Supreme Court's reinstatement of the approval, and the City's letter to the Developer confirming that the approvals are valid and the Developer may proceed to build its project. *See* MPA App. Ex. II at 683, 685-88, 690-96; MPA App. Ex. QQ; MPA App. Ex. PP; MPA App. Ex. RR; Ex. A to City's Reply in Support of Motion to Dismiss ("Reply"). These documents negate any physical takings claim.

If the City had taken formal action to require the Developer to submit to physical occupation of the 17-Acre Property by members of the public, such formal action, such as a resolution or ordinance, would be in the public record and the Developer should have included evidence of that action in its 30-page brief or ten volumes of exhibits. In fact, the Developer has no evidence that the City has taken any action to occupy the Developer's property or grant permission to the public to enter the property. Bald contentions and unsupported characterizations are not well-pleaded allegations, and cannot defeat a motion to dismiss. *See G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F. Supp.2d 1246, 1261 (D. Nev. 2006). If members of the public are trespassing on the 17-Acre Property, the Developer may have legal remedies against the trespassers, but not against the City, which has no responsibility for keeping trespassers off private property.

The Developer cites NRS 37.039, which is wholly irrelevant to its taking claims. This statutory provision sets out requirements for agencies exercising eminent domain to acquire property for open space use. Because the City did not condemn the 17-Acre Property or any other portion of the Badlands, this section does not apply here. Further, even if this section were relevant, it would not save the Developer's physical takings claim because the City changed the PR-OS designation of the 17-Acre Property to a designation allowing housing.

The Developer stretches the truth once again in alleging that legislation regarding repurposing of golf courses required the Developer to allow the public to occupy its land. Sur-Reply at 8-10. The legislation in question was enacted in June 2018 (Pltf. Ex. 39), *after* the Developer had voluntarily shut down the golf course on the Badlands (2016 – Sur-Reply at 8), *after* the Developer had already sued the City for a taking of three of the four properties carved out of the Badlands, and *more than one year after*

the City approved the 435 luxury housing unit project on the 17-Acre Property, in February 2017 (Reply Ex. A). The legislation is obviously not applicable to the 17-Acre Property, where the City has already approved the repurposing of the golf course, and has no effect on the Developer's ability to exclude the public from the 17-Acre Property. In sum, demonstrably false allegations cannot be the basis for a valid physical takings claim.

V. The Developer has not and cannot state a claim for an invalid exaction

In yet another breathtaking and deliberate misrepresentation, the Developer contends that the City argues in briefs in other cases that the City's approval of the 17-Acre project was conditioned on the Developer maintaining the other 233 acres of the Badlands permanently in open space. Sur-Reply at 11-12. This contention reaches new heights of mendacity. The City does not remotely argue in other cases or anywhere that the City's approval of the 17-Acre project was conditioned on the Developer maintaining the remaining 233 acres of the Badlands remain in open space. To so grossly misrepresent the City's briefs, the Developer clearly is counting on the Court not reading them.

In the briefs in question, the City relies on the applicable law, which is that the Badlands has been designated PR-OS in the City's General Plan since 1992 and up to the present, except for the 17-Acre Property, where the City changed the PR-OS designation at the Developer's request to a designation allowing medium density housing. It is correct that the Badlands other than the 17-Acre Property are by law limited to uses allowed under the PR-OS designation. But that requirement was imposed in 1992 and reaffirmed repeatedly in ordinances of the City Council, long before the City approved development of 435 housing units on the 17-Acre Property. The City has never contended that the approval of the 17-Acre applications was in any way contingent on the City's never changing the PR-OS designation, and the Developer has no evidence that it was. *See* MPA App. Ex. II at 683, 685-88, 690-96; Reply Ex. A.

The Developer did not plead this claim because it does not have the slightest merit. The claim is contradicted by the City's written approvals of the Developer's applications and by all other documentary evidence. The Developer should not be given leave to amend its complaint to add this nonexistent and specious claim.

. . .

CONCLUSION

The City respectfully requests that the Court grant its Motion to Dismiss with no leave to amend.

DATED this 4th day of December 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of City of Las Vegas, and that on the 4th day of December, 2020, I caused a true and correct copy of the foregoing **CITY'S SUR-REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS IN SUPPORT THEREOF** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

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Exhibit 17

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT 24 (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entitles I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entitles I through X,

Defendants.

Case No. A-18-773268-C

CITY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING CITY'S MOTION TO DISMISS COMPLAINT

Hearing Date: December 7, 2020
Hearing Time: 9:00 AM

Defendant City of Las Vegas filed its Motion to Dismiss Complaint on September 1, 2020 ("Motion"). At the hearing on the Motion on December 7, 2020, James Jack Leavitt and Elizabeth Ghanem Ham appeared for the Plaintiffs ("Developer") and George F. Ogilvie III and Andrew Schwartz appeared for the Defendant City of Las Vegas ("City"). The Court having reviewed the briefs submitted in support of and in opposition to the motion and having considered the written and oral arguments presented, makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

1. In 1980, the City approved William Peccole's petition to annex 2,243 acres of undeveloped land to the City. Ex. A at 1-11. After the annexation, the City approved an integrated plan to develop the land with a variety of uses, called the "Peccole Property Land Use Plan." In 1986, Mr. Peccole requested approval of an amended master plan featuring two 18-hole golf courses, one of which was in the area where the Badlands golf course was later developed.

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

3. In 1989, the City included Peccole Ranch in a Gaming Enterprise District ("GED"), which allowed Peccole to develop a resort hotel in the PRMP so long as Peccole provided a recreational amenity such as an 18-hole golf course. Peccole's reservation of 207 acres for a golf course satisfied this requirement.

4. In 1990, Peccole applied to amend the PRMP for the second phase of development ("Phase II"). The revised PRMP highlighted an "extensive 253-acre golf course and linear open space system winding throughout the community [that] provides a positive focal point while creating a mechanism to handle drainage flows." The City approved the Phase II rezoning application under a resolution of intent subject to all conditions of approval for the revised PRMP.

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

6. Between 1992 and 1998, Peccole developed the 18-hole golf course in the location depicted in the 1992 General Plan, and a 9-hole course to the north of the 18-hole course. The 9-hole course was also designated "P" for "Parks" in the City's General Plan as early as 1998. The Badlands 18-hole and 9-hole golf courses, totaling 250 acres, remain in the same configuration today. When the City adopted a new General Plan in 2000 to project growth over the following 20 years (the "2020 Master Plan"), it retained the "parks, recreation, and open space" [PR-OS] designation. Beginning in 2002, the City's General Plan maps show that the entire Badlands was designated PR-OS.

7. In 2005, the City Council incorporated an updated Land Use Element in the 2020 Master Plan. This 2005 Land Use Element designated all 27 holes of the Badlands golf course as PR-OS for "Park/Recreation/Open Space." Each update to the Land Use Element since 2005 has designated the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged.

8. In 1972, the City established R-PD7 zoning (Residential-Planned Unit Development, 7 units/acre). "The purpose of a Planned Unit Development [was] to allow a maximum flexibility for imaginative and innovative residential design and land utilization in accordance with the General Plan." R-PD zoning is an example of cluster zoning, which is "[z]oning that permits planned-unit development by allowing a modification in lot size and frontage requirements under the condition that other land in the development be set aside for parks, schools, or other public

needs." The R-PD district was intended "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns."

9. During the 1990's, the City approved rezoning requests by a resolution of intent, meaning that a rezoning was provisional until rezoned property was developed. Once rezoned property was developed, the City would adopt an ordinance amending the Official Zoning Map Atlas to make the rezoning permanent. In 1990, the City adopted a resolution of intent to rezone 996.4 acres in Phase II of the PRMP. To obtain approval of R-PD7 zoning for 614.24 acres in Phase II, Peccole agreed to set aside 211.6 acres of the 614.24-acre area for a golf course and drainage.

10. In 2001, the City amended the Zoning Map to formally rezone to R-PD7 the Phase II property previously approved for R-PD7 zoning under the resolution of intent. In 2011, the City discontinued the R-PD zoning district for new developments but did not alter the R-PD7 zoning of the Badlands and surrounding residential areas of Phase II.

11. As of 2015, when the Developer bought the Badlands, Peccole owned the Badlands under the name Fore Stars Ltd. In March 2015, the Developer acquired Fore Stars, thereby acquiring the 250-acre Badlands. Between 2015 and 2017, the Developer recorded parcel maps subdividing the Badlands into nine parcels. The Developer transferred 178.27 acres to 180 Land Co. LLC ("180 Land") and 70.52 acres to Seventy Acres LLC, leaving Fore Stars with 2.13 acres. Each of these entities is controlled by the Developer's EHB Companies LLC. The Developer segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands. At issue in this case is 17.49 acres of the Badlands owned by Fore Stars and Seventy Acres.

12. In November 2015, the Developer applied for a General Plan Amendment, Re-Zoning, and Site Development Plan Review to redevelop the 17-Acre Property from golf course to condominiums ("17-Acre Applications"). The 17-Acre Applications sought to change the

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General Plan designation from PR-OS, which did not permit residential development, to H (High Density Residential), and the zoning from R-PD7 to R-4 (High Density Residential).

13. In February 2017, the City Council approved the 17-Acre Applications for 435 units of luxury housing and approved a rezoning to R-3, along with a General Plan Amendment to change the land use designation from PR-OS to Medium Density, without which the 17-Acre Property could not be developed with housing. The City Council did not require that the Developer file a Major Modification Application to develop the 17-Acre Property.

14. After the City approved the 17-Acre Applications, nearby homeowners filed a petition for judicial review of the City's approval in Nevada's Eighth Judicial District Court, which was assigned to Judge Jim Crockett (the "Crockett Order"). On March 5, 2018, Judge Crockett granted the homeowners' petition, vacating the City's approval on the grounds that the City Council was required to approve a Major Modification Application to amend the PRMP before approving applications to redevelop the Badlands.

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

16. Following Judge Crockett's decision invalidating the City's approval, the Developer filed the instant suit against the City, the Eighth Judicial District Court, and Judge Crockett. The Developer contends that the Crockett Order was a "judicial taking" under the Fifth Amendment and that the City's designating the property as PR-OS, along with its decision not to appeal the Crockett Order, was a taking under the United States and Nevada Constitutions and violated due process under the 14th Amendment of the United States Constitution. The City and the State filed motions to dismiss, which the court stayed pending resolution of the appeal of the Crockett Order.

17. In its March 5, 2020 Order of Reversal, the Nevada Supreme Court reversed the Crockett Order, finding, consistent with the City's position, that a Major Modification Application was not required to develop the 17-Acre Property and reinstating the City's approvals of the 17-Acre Applications. The Supreme Court held: "The City correctly interpreted

its land use ordinances and substantial evidence supports its decision to approve Seventy Acres's three applications." The Nevada Supreme Court subsequently denied rehearing and en banc reconsideration and issued a remittitur, rendering its determination final.

18. On March 26, 2020, the City notified the Developer that the Nevada Supreme Court's reversal of the Crockett Order validated and reinstated the City's approval of the Developer's applications to develop the 17-Acre Property and explained that once remittitur issued in the Nevada Supreme Court's Order of Reversal, "the discretionary entitlements the City approved for [the Developer's] 435-unit project on February 15, 2017 . . . will be reinstated." On August 24, 2020, the Nevada Supreme Court issued its Remittitur. On September 1, 2020, the City notified the Developer that the Remittitur had issued, the City's original approval of 435 luxury housing units on the 17-Acre Property had been reinstated, and the Developer is free to proceed with its development project.

19. The Developer contends that the City "clawed back," "nullified," and "negated" its approval of the 17-Acre Applications. This contention is contradicted by all evidence, including, but not limited to, the Nevada Supreme Court Order of Reversal reinstating the City's approvals of the 17-Acre Applications and the City's March 26, 2020 and September 1, 2020 letters notifying the Developer that its approvals of the 17-Acre Applications were reinstated and valid and the Developer could proceed with its project to construct 435 luxury housing units on the 17-Acre Property.

CONCLUSIONS OF LAW

1. This case must be dismissed for failure to state a claim upon which relief can be granted under NRCP Rule 12(b)(5) if the court determines that the plaintiff has not set forth allegations sufficient to make out the elements of a right to relief. *Pemberton Farmers ins. Exch.*, 109 Nev. 789, 792, 858 P.2d 380, 381 (1993) (citations omitted). Only "fair" inferences must be accepted. *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

2. Courts accept the complaint's material allegations as true, but the court "need not accept conclusory allegations of law or unwarranted inferences." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007). The court may also consider matters of public

record and other matters subject to judicial notice. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). The Court need not accept as true allegations contradicted by facts subject to judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted).

3. Liability for a taking in inverse condemnation is always a judicial determination. *McCarran v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006) ("Whether the government has inversely condemned private property is a question of law that we review de novo.") The question of whether a taking has occurred is based on government action and can frequently be determined solely based on government documents (the truth and authenticity of the same are rarely in question). Therefore, this Court can review the facts as presented in the City's own documents and apply the law to those facts to make the judicial determination of a taking.

4. The Developer purports to assert three causes of action for a regulatory taking: a categorical taking, a "per se" taking, and a *Penn Central* taking; along with one cause of action each for a "non-regulatory taking," a judicial taking, and a temporary taking. Compl. ¶¶ 58-117. Because the City did not prevent development of the 17-Acre Property, but instead permitted the Developer to build 435 luxury housing units on the property, each of these causes of action must be dismissed with prejudice for failure to state a claim.

5. The Developer's takings claims are based on the combined actions of the City and the Eighth Judicial District Court. *See, e.g.*, Compl. ¶ 59. However, neither the City nor the court is responsible for the other's actions, so their actions cannot be considered collectively for purposes of a takings analysis. The only actions by the City that affected the 17-Acre Property were the City's designating the property PR-OS in the General Plan, zoning the property R-PD7, and rezoning the property and amending the General Plan designation to allow the City to approve the development of 435 luxury housing units on the property. Because none of these actions individually or collectively denied the Developer its chosen development of the property for 435 luxury housing units, none can be deemed a taking.

6. The Developer has stated two regulatory takings claims: a categorical taking (also known as a "per se" taking) and a *Penn Central* taking. Compl. ¶¶ 58-94. Although the

Developer purports to assert three regulatory takings claims, its "categorical" and "per se" claims are the same thing. The majority in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) classified economic wipeouts and physical takings resulting from government regulation as "categorical" takings, while the dissent characterized the same test as a "per se" standard. *Id*. at 1015, 1052 (Blackmun, J., dissenting). A unanimous Supreme Court in *Lingle* also uses the terms interchangeably. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). Because the terms are synonymous and do not stand for different regulatory takings tests, the Developer's two causes of action for categorical and per se regulatory takings are redundant. *See id.*

7. A categorical taking occurs either when a regulation results in a permanent physical invasion of property (which is not alleged here), or when a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)); *see also Sisolak* ("Categorical rules apply when a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property.") The latter type of taking "is a 'relatively narrow' and relatively rare taking category . . . confined to the 'extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 626 (9th Cir. 2020) (quoting *Lingle*, 544 U.S. at 538; *Lucas*, 505 U.S. at 1017), *petition for cert. filed*.

8. A *Penn Central* taking, named for *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), is determined based on review of three factors: "(1) [t]he economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action." *Bridge Aina Le'a,* LLC, 905 F.3d at 625 (quoting *Penn Cent.*, 438 U.S. at 124) (internal quotation marks omitted). The "primary factors" are the regulation's economic impact and its interference with distinct investment-backed expectations. *Id.* at 630.

9. A regulatory taking under either the categorical or *Penn Central* test occurs only when a regulatory action is "functionally equivalent to the classic taking in which government directly

appropriates private property." *Lingle*, 544 U.S. at 539. The "determinative factor" for a categorical taking is "the complete elimination of a property's value," while the *Penn Central* inquiry turns "upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 539-40 (citing *Lucas*, 505 U.S. at 1017). To be the functional equivalent of eminent domain, the challenged regulatory action must cause a truly "severe economic deprivation" to the plaintiff. *Cienega Gardens v. United States*, 503 F.3d 1266, 1282 (Fed. Cir. 2007). Courts routinely require a nearly total economic wipeout to find a taking under either the categorical or the *Penn Central* test. *See, e.g.*, *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient economic loss to constitute *Penn Central* taking).

10. In this case, because the City approved substantial development of the 17-Acre Property—indeed, the very development the Developer requested—the Developer cannot show that the City's regulatory actions diminished the value of its property under either the categorical or the *Penn Central* test. To the contrary, in approving 435 units of luxury housing on the 17-Acre Property, the City granted the Developer's application to upzone the property from R-PD7 to a zoning that allowed greater density, and amended the City's General Plan designation from PR-OS, which prohibited development of the property, to a designation that allowed construction of housing. The City accordingly changed the law in a way that significantly enhanced the property's value. Because the City approved the Developer's requested development applications on the 17-Acre Property, the Developer cannot show any reduction in the value of its property, let alone a total wipeout necessary to establish a taking. Its categorical regulatory taking claim therefore fails and is dismissed with prejudice.

11. Even if the City had denied the Developer's requested development, the Developer's *Penn Central* taking claim must fail because the long-standing PR-OS designation precludes any claim that the Developer had reasonable investment-backed expectations to build housing on the property. "[T]he regulatory regime in place at the time the claimant acquires the property at issues helps shape the reasonableness of those expectations." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring). "'Distinct investment-backed expectations'

implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes.'" *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). A landowner cannot assert a taking based on "the government's failure to repeal a long existing law." *Id.* at 1118.

12. Here, most of the Badlands has been designated PR-OS since 1992 (including the 17-Acre Property), and all of it has been designated PR-OS since at least 2002, long before the Developer purchased the Badlands in 2015. Residential use is not permitted on property designated PR-OS. Accordingly, residential use of the property would require an amendment to the General Plan designation. The City had complete discretion to amend, or not amend, the PR-OS designation. Las Vegas Unified Dev. Code ("UDC") 19.16.030(B) ("Whenever the public health, safety and general welfare requires, the City Council may, . . . change the General Plan land use designation for any parcel or area of land"); *see also Nova Horizon v. City Council of Reno*, 105 Nev. 92, 96 (1989) (local agencies have discretion to apply and amend their master plan).

13. Contrary to the Developer's assertion, the R-PD7 zoning on the 17-Acre Property did not supersede or invalidate the PR-OS land use designation, nor did it provide the Developer with a vested right to develop the property. Because the law prohibited residential development on the 17-Acre Property when the Developer bought it, the Developer cannot have had an objective expectation to develop the property with housing. *See Guggenheim*, 638 F.3d at 1121. However, even if the Developer had an objective expectation that the City would change the law to allow development of housing on its property, the City did so. Accordingly, the City did not interfere with the Developer's investment-backed expectations as a matter of law. The Developer's *Penn Central* taking claim is dismissed with prejudice.

14. The Developer asserts that the City's decision not to appeal the Crockett Order constituted a regulatory taking, but such a claim is untenable. The City is not obligated to expend taxpayer funds to defend its development approvals in court, and there is no authority that its decision not to do so can form the basis of a regulatory taking claim. Nonetheless, the City filed an amicus brief in the Nevada Supreme Court supporting the Developer's position (and the

City's position throughout this litigation) that a major modification application was not required under the City's UDC. Moreover, the City did not need to appeal Judge Crockett's Order because the Developer appealed it, and the Nevada Supreme Court reversed the Crockett Order and reinstated the City's approvals. Accordingly, the Developer cannot claim any harm from the City's declining to appeal Judge Crockett's Order, its claim for a regulatory taking on this basis is moot, and the claim is dismissed with prejudice.

15. The Developer also asserts a "non-regulatory taking" under Nevada caselaw, claiming that the City's actions and the Crockett Order were "oppressive," "unreasonable," and aimed at precluding any use of the 17-Acre Property. Comp. ¶¶ 97- 99. The claim has no basis in law or fact because the City approved the construction of 435 housing units on the property, thereby permitting substantial use of the property.

16. Even if the City had disapproved the Developer's application to develop housing on the property, the Developer cannot state facts to establish a non-regulatory taking. A non-regulatory taking can occur "if the government has 'taken steps that substantially interfere[] with [an] owner's property rights to the extent of rendering the property unusable or valueless to the owner.'" *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 421 (2015) (alteration in original) (quoting *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed. Cir. 2013)). A non-regulatory taking occurs only in "extreme cases" involving either a physical taking or unreasonable precondemnation activities. *Id.*

17. The Developer has not alleged that the City occupied the 17-Acre Property or authorized a physical invasion of the property through any regulatory action as required for a physical taking. Nor has the Developer alleged that the City made an official announcement to condemn the 17-Acre Property or that the City actually condemned the property, as required for a non-regulatory taking. Instead, the City approved the Developer's application to develop the 17-Acre Property. Accordingly, the Developer's non-regulatory takings claim is dismissed with prejudice.

18. The Complaint asserts that the Crockett Order constituted a "judicial taking." Compl. ¶¶ 104-11. The Developer claims that the Order overreached by holding that the PR-OS

designation does not allow residential development. *Id.* ¶ 39. To the extent that the Developer's claim of a judicial taking implicates the City, this claim is dismissed with prejudice. The City cannot be held liable for the Crockett Order, which the City opposed. *See id.* ¶ 32. The judicial branch of the State is independent of the City, and vice versa. Nev. Const. art. 3, § 1 (the state government's powers are divided into three separate departments); *see also State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 421 (rejecting the property owner's "efforts to portray [the Nevada Department of Transportation] as a grand puppet master dictating the City's actions").

19. The Developer's "temporary taking" claim does not state a separate cause of action. A temporary taking describes the scenario in which a court finds that a regulation effects a permanent taking under *Lucas* or *Penn Central*, and the public agency thereafter rescinds the regulation to avoid paying compensation for a permanent taking, but must pay compensation for the period where the regulation temporarily prevented all use of the property. *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 318-19, 321 (1987). A temporary taking, therefore, does not arise unless and until the court finds that a permanent regulatory taking has occurred, and the agency rescinds the regulation causing the taking. *See id.* In this case, there cannot have been a regulatory taking in the first place because the City approved the 17-Acre Applications. Therefore, the temporary taking claim is dismissed with prejudice.

20. Although it did not plead a physical taking in its Complaint, the Developer contends that the City has engaged in a physical taking because "[t]he Government Action *has the effect of* preserving the 17 Acres as open space for a public use and the public is actively using the 17 Acres" and "[t]he Government Action excludes the Landowners from using the 17 Acres and, instead, permanently reserves the 17 Acres for a public use and the public is using the 17 Acres." A physical taking requires that the public agency either physically occupy private property or restrict the owner's ability to exclude others from the property. *See Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 426, 436, 102 S.Ct. 3164, 3171, 3176 (1982) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program

adjusting the benefits and burdens of economic life to promote the common good."); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-22, 122 S.Ct. 1465, 1478-79 (2002) ("When the government physically takes possession of an interest in property for some public purpose," it may be liable for a physical taking.); *id*. at 322 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa."); *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662, 137 P.3d 1110, 1122 (2006) ("In determining whether a property owner has suffered a per se taking by physical invasion, a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space.") (internal citations omitted).

21. The Developer failed to "set forth the facts which support [a] legal theory" of a physical taking, as is required under notice pleading. *Liston v. Las Vegas Metro. Police Dept.*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) (citing NRCP 8a). Where a plaintiff does not set forth facts that would entitle it to relief, the Court should dismiss the plaintiff's claim. *Slade v. Caesars Entertainment Corp.*, 132 Nev. 34, 373 P.3d 74, 78 (2016) (finding it beyond a doubt that plaintiff could prove no set of facts that would entitle him to relief for breach of the duty of public access to a casino where the plaintiff failed to demonstrate that his exclusion was for unlawful reasons); *see also Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (the allegations in a complaint "must be legally sufficient to constitute the elements of the claim asserted"). The Developer has not alleged that the City has physically occupied the 17-Acre Property or restricted the Developer's ability to exclude others from the property. *See Loretto*, 458 U.S. at 426, 436. The Developer has not alleged that the City has taken any official action authorizing the public to physically occupy the 17-Acre Property. To the contrary, the only action taken by the City with regard to the 17-Acre Property was to approve the Developer's 17-Acre Applications, allowing the Developer to use the 17-Acre Property for construction of 435 housing units.

22. The Developer cites NRS 37.039 in support of its physical takings claim. This statute sets out requirements for agencies exercising eminent domain to acquire property for open space use. Because the City did not condemn the 17-Acre Property or any other portion of the Badlands, this section does not apply. Further, even if this section were relevant, it would not save the Developer's physical takings claim because the City changed the PR-OS designation of the 17-Acre Property to a designation allowing housing.

23. The Developer alleges that City legislation regarding repurposing of golf courses required the Developer to allow the public to occupy its land. The legislation in question was enacted in June 2018, after the Developer had voluntarily shut down the golf course on the Badlands, after the Developer had already sued the City for a taking of three of the four properties carved out of the Badlands, and more than one year after the City approved the 435 luxury housing unit project on the 17-Acre Property, in February 2017. The legislation is not applicable to the 17-Acre Property, where the City had already approved the repurposing of the golf course, and has no effect on the Developer's ability to exclude the public from the 17-Acre Property. Also, the legislation was repealed in 2020. Accordingly, the Developer's physical taking claim is dismissed with prejudice.

24. The Developer contends that the City's approval of the 17-Acre Applications was conditioned on the Developer maintaining the other 233 acres of the Badlands permanently in open space. The Developer contends that that condition is an unconstitutional exaction taking under *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). This claim is contradicted by the transcript of the City Council's approval of the 17-Acre Applications, the City's February 2017 letters approving the 17-Acre Applications, and the City's March and September 2020 letters to the Developer notifying the Developer that its approval for the 17-Acre Applications had been reinstated by the Nevada Supreme Court and the Developer was free to proceed with its project. None of these documents contains a condition affecting the other 233 acres of the Badlands. Accordingly, this claim of an unconstitutional exaction is dismissed with prejudice.

25. The Developer seeks a declaratory judgment under Nevada law that the City's PR-OS land use designation is invalid, thereby precluding the City from applying this designation to the 17-Acre Property. Compl. ¶¶ 17-24, 45-59. "Declaratory relief is available only if: (1) a justiciable controversy exists between persons with adverse interests, (2) the party seeking declaratory relief has a legally protectable interest in the controversy, and (3) the issue is ripe for judicial determination." *Cnty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 752 (1998) (citing *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10 (1996)). "Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem." *Doe v. Bryan*, 102 Nev. 523, 525 (1986). Declaratory relief is also "unavailable when the damage is merely apprehended or feared." *Id.* (citing *Kress v. Corey*, 65 Nev. 1 (1948)). "The court may refuse to . . . enter a declaratory judgment" when such a judgment "would not terminate the . . . controversy giving rise to the proceeding." Nev. Rev. Stat. Ann. ("NRS") § 30.080 (West 2020).

26. Here, the PR-OS designation did not preclude development of the 17-Acre Property because the City approved the Developer's application to amend the PR-OS designation to one that permits the development the Developer proposed. Accordingly, determining whether the PR-OS designation is valid would not resolve any conflict between the parties or remedy any harm to the Developer. The Nevada Supreme Court reversed the Crockett Order, and the City has informed the Developer that its development approvals have been reinstated. Thus, the validity of the former PR-OS designation of the 17-Acre Property is irrelevant to the Developer's ability to develop that property, and the Developer is not entitled to declaratory relief regarding the validity of this designation.

27. Even if the validity of the PR-OS designation were still in controversy, there can be no genuine dispute as to its validity. The City imposed the PR-OS designation on the Badlands property by ordinance of the City Council approving the City's 1992 General Plan, and it has reinstated that designation in every ordinance amending the General Plan since then. The City's ordinances approving the PR-OS designation of the Badlands are presumed valid. *See Nova Horizon*, 105 Nev. at 94 (noting that a county board's action was presumed valid where supported by substantial evidence).

28. It is also too late for the Developer to challenge the PR-OS designation. A lawsuit challenging a final action of the City Council filed later than 25 days after notice of the action is barred. NRS 278.0235; *see also League to Save Lake Tahoe v. Tahoe Reg'l Plan. Agency*, 93 Nev. 270, 275 (1977), overruled on other grounds by *Cnty. of Clark v. Doumani*, 114 Nev. 46 (1998). The City Council adopted the PR-OS designation for the 18-hole portion of the Badlands golf course (including the 17-Acre Property) in Ordinance No. 3636, adopted on April 1, 1992. Ex. H at 197-201, 231. The 9-hole course was also designated for PR-OS as early as 1998, and the entire Badlands was shown as PR-OS in General Plan maps beginning in 2002. *See* Ex. L; Ex. N at 276. The Developer has not alleged that it or its predecessor sought judicial review of that legislation within 25 days after its enactment. Even if the Court applied a 15-year statute of limitations for takings claims (*White Pine Lumber v. City of Reno*, 106 Nev. 778, 779 (1990)), the claim would still be time-barred because the Developer filed this action in September 2018, 26 years after the designation was adopted in 1992.

29. Because the Developer has not raised a justiciable controversy regarding the PR-OS designation, the PR-OS designation is a valid legislative enactment of the City Council, and the declaratory relief claim is time-barred, the Developer's claim for declaratory relief is dismissed with prejudice.

30. The Developer asserts that the City's actions and the Crockett Order "retroactively and without due process transformed" the Developer's "vested property right to a property without any value," violating the Developer's due process rights under the Fourteenth Amendment of the United States Constitution and Article 1, section 8 of the Nevada Constitution. Compl. ¶¶ 10, 119. Like the Developer's takings and declaratory relief claims, this claim is dismissed with prejudice. A person may not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(2). Accordingly, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (quoting U.S. Const. amend. XIV); *see also Pressler v. City of Reno*, 118 Nev. 506, 510 (2002) ("The protections of due process only attach when there is a deprivation of

a protected property or liberty interest.") (citing Nev. Const. art. 1, § 8). Here, the Developer's due process claim is predicated on its erroneous assertion that the City denied the Developer's "vested right" to approval of a housing project with a density of seven units per acre under the R-PD7 zoning. Compl. ¶¶ 9, 10, 119-23. Not only did the City allow the Developer to build seven units per acre, but it upzoned the property to allow 25 units per acre (435/17 = 25). Accordingly, the City cannot have deprived the Developer of a vested right, even if the Developer had one, and the due process claim must be dismissed with prejudice.

31. The Developer's due process claim is also meritless because zoning does not grant rights to property owners. Rather, zoning limits the use of property, setting maximums such as seven units per gross acre, or minimums, such as setbacks. *See, e.g.*, UDC 19.10.050(A) (explaining numerical limit of R-PD zoning); *id.* 19.06.070 (providing minimum lot size and setbacks for R-1 zoning district). Nevada cities retain discretion to approve or reject uses of property even if they are consistent with the zoning. "[F]or 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 (1995) (emphasis added); *see also Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527-28 (2004) (because City's site development review involved discretionary action, developer had no vested right to construct); *Tighe v. Von Goerken*, 108 Nev. 440, 443 (1992) ("[C]ompatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *Nev. Contractors v. Washoe Cnty.*, 106 Nev. 310, 311 (1990) (affirming county's denial of a special use permit even though property was zoned for the use). A "vested right" in the land use context means that a developer has earned the right to proceed with an approved project free of further discretionary actions by the regulatory agency limiting the use of the property. A vested right, therefore, requires a valid *approval* of a project and the start of construction or other reliance on the approval. Contrary to the Developer's claim, zoning alone does not confer any vested rights as a matter of well-established law.

32. Under these principles, R-PD7 zoning prevents the City from approving more than seven units per acre over the gross acreage of the property zoned R-PD7, unless it rezones the property. The City Council retains discretion to approve, deny, or strike development applications no matter the zoning designation, as long as its actions are not arbitrary and capricious. *See Am. W. Dev.*, 111 Nev. at 807; *see also Stratosphere Gaming Corp.*, 120 Nev. at 527-28. Further, the PR-OS land use designation, which prohibited use of the 17-Acre Property for housing, takes precedence over the R-PD7 zoning designation.

33. The Court further finds that the Developer's claim that the R-PD7 zoning of the 17-Acre Property confers a property right or vested right to develop the property with housing was actually and necessarily litigated between the same parties in *180 Land Co. LLC v. City of Las Vegas*, United States District Court for the District of Nevada Case No. 18-cv-0547-JCMand Ninth Circuit Court of Appeals Case No. 19-16114 In the Ninth Circuit's Memorandum Decision filed October 19, 2020 in that case, the Court issued a final decision rejecting the Developer's claim that it had a property or vested right conferred by the R-PD7 zoning to build housing in the Badlands. The decision of the Ninth Circuit is binding on the parties to the instant case under issue preclusion. Issue preclusion applies to an issue of law or fact where: "(1) the issue decided in the prior litigation [is] identical to the issue presented in the current action; (2) the initial ruling [was] on the merits and [] became final; . . . (3) the party against whom the judgment is asserted [was] a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (internal quotation omitted). Each of these elements is present in the instant case and thus the decision in *180 Land Co.* binds the Developer here.

34. The Developer's reliance on NRS 278.349(3)(e) as a basis for its claim of a vested right to develop seven houses per acre on the 17-Acre Property is also misplaced. *See* Compl. ¶¶ 14, 24. NRS 278.349 relates only to tentative maps, and the Developer has not alleged that it filed a tentative map application for the 17-Acre Property. *See* Compl. ¶ 25. As a result, this section is irrelevant to the Developer's rights. Even if it the Developer had filed a tentative map application, NRS 278.349(3) merely provides that the governing body "shall consider" various

factors when considering whether to approve a tentative map; it does not compel a municipality to approve a tentative map based only on the area's zoning.

35. The Developer's cause of action for a preliminary injunction is dismissed with prejudice because injunctive relief is a remedy, not a cause of action. *See State Farm Mut. Auto Ins. Co. v. Jafbros, Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993). An injunction is available "to restrain a wrongful act that gives rise to a cause of action." *Chateau Vegas Wine, Inc. v. S. Wine & Spirits of Am., Inc.*, 127 Nev. 818, 824, 265 P.3d 680, 683 (2011). Here, the Developer has not alleged and cannot show irreparable harm. "Irreparable harm is an injury for which compensatory damage is an inadequate remedy." *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 353 (2015) (internal quotation marks and citation omitted). The City has not caused the Developer any harm—let alone irreparable harm—but instead has enhanced the value of the 17-Acre Property by allowing development of 435 units on the property.

ORDER

IT IS HEREBY ORDERED THAT Defendant City' Motion to Dismiss Complaint is **GRANTED WITH NO LEAVE TO AMEND.**

Dated this ___ day of December 2020.

_____
JAMES BIXLER, District Court Judge

Submitted By:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 7th day of December, 2020, I caused a true and correct copy of the foregoing **CITY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING CITY'S MOTION TO DISMISS COMPLAINT** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

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Exhibit 18

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DISTRICT COURT
CLARK COUNTY, NEVADA

FORE STARS, LTD; SEVENTY ACRES, LLC, a Nevada liability company; et al.,

Plaintiffs,

vs.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT 24 (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), et al.,

Defendants.

Case No.: A-18-773268-C
Dept. No.: Honorable Jim Bixler

ORDER DENYING CITY OF LAS VEGAS MOTION TO DISMISS

Hearing date: December 7, 2020
Hearing time: 9:00 am

The City of Las Vegas' Motion to Dismiss Complaint for Declaratory and Injunctive Relief and Inverse Condemnation having come for hearing on December 7, 2020 at 9:00 a.m. before the Honorable Senior Judge Jim Bixler of the Eighth Judicial District Court, James Jack Leavitt, Esq., and Autumns Waters, Esq. of the Law Office of Kermitt L. Waters along with Elizabeth Ghanem Ham, Esq., appearing for an on behalf of the Plaintiffs Fore Stars, Ltd. and Seventy Acres, LLC (hereinafter the Landowners), and Geroge F. Oglive III Esq., Andrew

Schwartz, Esq., Lauren Tarpey, Esq., and Phil Byrnes, Esq., appearing for an on behalf of the Defendant, City of Las Vegas (hereinafter the City). Having reviewed all pleadings and attached exhibits filed in this matter and having heard extensive oral arguments on December 7, 2020, in regards to the City's motion to dismiss, the court hereby finds and orders as follows:

1. The Landowners brought claims against the City of Las Vegas and the Eighth Judicial District Court, Department 24, for declaratory relief, preliminary injunction, Categorical Taking, Penn Central Regulatory Taking, Regulatory Per Se Taking, Nonregulatory / De Facto Taking, Judicial Taking, Temporary Taking, and Due Process violations, alleging, in part, that the City engaged in actions that resulted in the taking by inverse condemnation of their 17.49 acre property (hereinafter 17 Acre Property). *See* Complaint for Declaratory and Injunctive Relief and Inverse Condemnation, filed April 20, 2018 (hereinafter Complaint or Compl.).

2. The City brought a motion to dismiss seeking dismissal of all Landowners' claims against the City of Las Vegas.

3. In considering the City's Motion to Dismiss, the Court must presume and recognize all factual allegations as true and draw all inferences in favor of the Plaintiff. Buzz Stew, LLC v. City of North Las Vegas, 181 P.3d 670 (2008). Also, the Nevada Supreme Court has adopted a "policy of this state that cases be heard on the merits, whenever possible." Schulman v. Bongberg-Whitney Elec., Inc., 98 Nev. 226, 228 (1982).

4. The United States and Nevada Supreme Court have further held that there is "no magic formula [that] enables a court to judge, in every case, whether a given government interference with property is a taking;" there is "nearly infinite variety of ways in which government actions or regulations can effect property interests;" "the Court has recognized few invariable rules in this area;" and, therefore, "most takings claims turn on situation-specific factual inquiries."

Arkansas Game & Fish Comm's v. U.S., 133 S.Ct. 511, 518 (2012); State v. Eighth Jud. Dist. Ct., 131 Nev. 411 (2015).

5. Nevada law requires an analysis of all government actions cumulatively (or in the aggregate) when determining a taking. State v. Eighth Judicial District Court, 131 Nev. 411, 421 (2015) (court must consider if the government has "taken steps" to take property).

6. Nevada is a notice pleading state (NRCP Rule 8) and when ruling on a motion to dismiss the Court may take into account matters of public record, orders, and items present in the record of the case. Liston v. Las Vegas Metropolitan Police Dep't, 111 Nev. 1575 (1995); Breliant v. Preferred Equities Corp., 109 Nev. 842 (1993).

7. The Landowners allege in their Complaint that they are the owners of the 17.49 Acre Property, generally located south of Alta drive, east of Hualapai Way and north of Charleston Blvd within the City of Las Vegas, Nevada (17 Acre Property); that this 17 Acre Property has been zoned for a residential use at all relevant times; that the Landowners had the vested right to use and develop the 17 Acre Property; zoning takes precedence over master plan designations; and, that this vested right to use and develop the property was confirmed in writing by the City of Las Vegas, prior to the Landowners' acquiring the property. Compl. ¶¶ 7-16.

8. During the hearing on this matter and in the briefs submitted, it was disclosed to the Court that the 17 Acre Property is one of four lawsuits, with the other three being the 35, 65, and 133 acre cases – consisting of the "250 Acre Residential Zoned Land."

9. The Landowners **allege** that the City engaged in the following actions to take, by inverse condemnation, their 17 Acre Property:

a. that the City identified an illegal PR-OS (parks, recreation, open space) land use designation on the 17 Acre Property on the City maps, without notice and without following the

City's own procedures and, therefore, the PR-OS has no effect on the 17 Acre Property. Compl. ¶¶ 17-22.

b. that the City maps showed the illegal PR-OS on the 17 Acre Property in error. Compl. ¶ 23.

c. that the Landowners made repeated requests that the City remove the illegal and erroneous PR-OS land use designation from the City maps and the City refused, even though, as alleged by the Landowners, the City's own City Attorney's Office and the City's own Planning Department determined the PR-OS was not properly designated on the 17 Acre Property. Exhibit 16 to the Opposition.

d. that, as a result of the City refusing to remove the PR-OS designation from the 17 Acre Property, Department 24, the Honorable Judge Jim Crockett, relied upon and applied the PR-OS to nullify the Landowners' applications to develop the 17 Acre Property that were previously approved by the City of Las Vegas (hereinafter "Crockett Order"). Compl. ¶¶ 31-39. The Crockett Order held, in part, that "on the maps of the City's General Plan, the land for the golf course/open space/drainage is expressly designated as PR-OS, meaning Parks/Recreation/Open Space. There are no residential units permitted in an area designated as PR-OS." Compl. ¶¶ 31-39

e. that, the impact of the Crockett Order, that relied on the City's illegal PR-OS, is to overturn the underlying residential zoning and materially impairs the property rights of the Landowners.

f. that the City then changed its position on the initial approvals for the 17 Acre Property and adopted the Crockett Order and argued at the City Council and in the district courts of Nevada that the Crockett Order should be applied to deny all use of the entire 250 Acre

Residential Zoned Land owned by the Landowners, which includes the 17 Acre Property. Compl. ¶¶ 43, 59, 97, 119, 121. Exhibit 26 to the Opposition.

g. that the City also changed its position on the initial approvals for the 17 Acre Property and forcefully argued that the Landowners had no underlying property interest to begin with, meaning the initial approvals were erroneous, because the PR-OS designation applied in the Crockett Order nullified the underlying residential zoning and limited the use of the 17 Acre Property to a park or open space. Compl. ¶¶ 59, 63, 71, 73, 74, 77, 89, 97, 119, 121, prayer for relief.

h. that the City put in writing its adoption of the Crockett Order when it refused to extend the initial applications based on the Crockett Order and stated "there is nothing to extend at this time and we cannot process any applications for such an extension," causing the initial applications to expire. Compl. ¶ 43, Exhibit 7.

i. in-house counsel for the Landowners, Elizabeth Ghanem Ham, confirmed during oral argument that evidence would be presented that, even though the City initially approved the applications to develop the 17 Acre Property, the City officials confirmed there were other permits / applications the Landowners needed to obtain to build and the City would take actions to interfere with these permits / applications so that the Landowners could not build. Compl. ¶ 43

j. that the City clearly showed it would not allow development on the 17 Acre Property when, after the initial approvals, the City adopted two City Bills, Bills 2018-5 and 2018-24, which:

- were adopted to target solely the Landowners' 250 Acre Residential Zoned Land (which includes the 17 Acre Property);

- made it impossible to develop any part of the 250 Acre Residential Zoned Land (which includes the 17 Acre Property); and,

- forced the Landowners to permit "ongoing public access" to the 250 Acre Residential Zoned Land. Compl. ¶ 43; Exhibits 36-43.

k. that City Councilwoman Fiori stated that Bills 2018-5 and 2018-24 were adopted to solely target the Landowners' 250 Acre Residential Zoned Land. Exhibits 37 and 38.

l. that the City denied the Landowners over-the-counter access request to the adjoining roadways (after the initial approvals), even though the Nevada Supreme Court has held all Nevada landowners have a property right of access to their property from the adjoining roadways. *See* Schwartz v. State, 111 Nev. 998 (1995) (landowner had property right to access roadway even though the access had never been built). Compl. ¶ 43; Exhibit 44.

m. that the City denied the Landowners over-the-counter request to put up fences on the 250 Acre Residential Zoned Land (after the initial approvals). Compl. ¶ 43; Exhibit 45.

n. that the City denied a Master Development Agreement (after the initial approvals) that was drafted almost entirely by the City and which the City stated was the only vehicle for developing any part of the 250 Acre Residential Zoned Land (which includes the 17 Acre Property). Compl. ¶ 43; Exhibit 29-35.

o. that the City denied or struck applications to develop on the adjoining 35 and 133-acre properties that are owned by the Landowners (after the initial approvals), further demonstrating the intent to preclude any and all use of the entire 250 Acre Residential Zoned Land. Compl. ¶ 43; Exhibits 29-35.

p. that the City was denying the use of the entire 250 Acre Residential Zoned Land (which includes the 17 Acre Property) so the public can use the property for ongoing public access and as a viewshed for the adjoining neighbors. Compl. ¶ 43; Exhibits 58-80.

10. The Landowners further **allege** that the City's actions have had the following impact on their 17 Acre Property:

a. the City's decision to not allow development is final, demonstrating that the City will not allow development of the 17 Acre Property and that the City will preclude all use of the 17 Acre Property. Compl. ¶ 59, 71.

b. the City's actions have resulted in a direct appropriation of the 17 Acre Property by entirely prohibiting use of the property for any purpose and reserving the 17 Acre Property as undeveloped for the benefit of the surrounding public. Compl. ¶ 61, 78, 89.

c. as a result of the City actions, the Landowners are unable to develop the 17 Acre Property and any and all value of the property has been eliminated. Compl. ¶ 62.

d. the City's actions have resulted in a direct and substantial economic impact on the Landowners and the 17 Acre Property. Compl. ¶ 64, 73.

e. any further requests to the City to allow development would be futile. Compl. ¶ 72.

f. the City's actions exclude the Landowners from using the 17 Acre Property and permanently preserves the 17 Acre Property as open space for a public use and the public is actively using the property. Compl. ¶ 78, 89.

g. the City's actions directly and substantially interfere with the Landowners' vested property rights rendering the 17 Acres unusable and / or valueless. Compl. ¶ 96.

h. the City has engaged in a bad faith effort to preclude any use of the 17 Acre Property and the City actions are arbitrary, capricious, and fail to advance any legitimate government interest and is more akin to a physical acquisition. Compl. ¶ 80.

11. The Landowners inverse condemnation claims are based in the following inverse

condemnation law, which finds a taking where government action:

a. involves a direct interference with or disturbance of property rights. State v. Eighth Jud. Dist. Ct., 131 Nev. 411 (2015), citing Richmond Elks Hall Assoc. v. Richmond Red. Agency, 561 F.2d 1327, 1330 (9th Cir. Ct. App. 1977). Compl. pp. 15-16.

b. damages or substantially impairs the property. Nev. Const. Art. 1 § 22(3); NRS 37.110(3); Sloat v. Turner, 93 Nev. 263, 269 (1977). Compl. pp. 11-14.

c. preserves the property for a public use. Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006). Compl. pp. 14-15.

d. renders the property unusable or valueless to the owner. State v. Eighth Jud. Dist. Ct., 131 Nev. 411 (2015). Compl. pp. 15-16.

e. completely deprives the property owner of all economical use of their property. Sisolak, supra, at 662. Compl. pp. 11-12

f. results in or authorizes a physical invasion of property. Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162, 2170, 2172 (2019). Sisolak, supra, at 662. Compl. ¶¶ 78 and 89.

g. imposes an "unconstitutional condition" on the property. Dolan v. City of Tigard, 512 U.S. 374 (1994).

OR

h. has gone too far, considering: (1) the economic impact on the owner, (2) the interference with the owners investment-backed expectations, and (3) the character of the City action. Sisolak, supra, at 663-664. Compl. pp. 12-14.

12. Moreover, once the City's actions have worked a taking of property, no subsequent action by the government can relieve it of the duty to provide just compensation for the period during which the taking was in effect. Arkansas Game and Fish Com'n v. U.S., 133 S.Ct. 511, 519 (2012); Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162 (2019) (post taking actions by the government cannot nullify the taking, "[a] bank robber might give the loot back, but he still robbed the bank." Id., at 2172).

13. Based on the foregoing, the Landowners have alleged facts and provided documents sufficient to show that their property has been taken by inverse condemnation, which is sufficient to defeat the City's Motion to Dismiss the inverse condemnation claims.

14. The Landowners have also alleged that the City violated their substantive and procedural due process rights under the United States and Nevada Constitutions as follows:

a. that the City engaged in the above taking actions. Compl. ¶ 118.

b. that the City's taking actions transformed the Landowners' vested property right to a property without any value without due process. Compl. ¶ 119.

c. that the City's actions resulted in a taking of their property without notice. Compl. ¶ 120.

d. that the City's actions to eliminate or substantially change the Landowners' vested and established property rights, had the effect of depriving the Landowners of their legitimate constitutionally protected property rights. Compl. ¶ 121.

e. that the City's actions were arbitrary and/or irrational and unrelated to any legitimate government objective. Compl. ¶ 122.

15. The United States and Nevada due process clauses provide that no person shall be deprived of life, liberty, or property, without due process of law. U.S. Const. Amend., XIV; Nev. Const. Art. 1, sec. 8 (2).

16. Based on the foregoing, the Landowners have alleged facts and provided documents sufficient to support their due process violation claims, which is sufficient to defeat the City's Motion to Dismiss the due process claims.

17. The Landowners have also properly pled declaratory and injunctive relief, incorporating all of the allegations in the Landowners' Complaint and alleging that the City's PR-OS was illegally identified on the City's maps and the City should be prohibited from further applying

this PR-OS to the 17 Acre Property. Compl. ¶¶ 45-57. The City advanced the PR-OS argument at the December 7, 2020, hearing.

18. Based on the foregoing, the Landowners have alleged facts and provided documents sufficient to support their declaratory and injunctive relief claims, which is sufficient to defeat the City's Motion to Dismiss the declaratory and injunctive relief claims.

Therefore, **IT IS HEREBY ORDERED** that the City's Motion to Dismiss is **DENIED** in its entirety.

Dated this _____ day of December, 2020.

DISTRICT COURT JUDGE

Respectfully Submitted By:
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Exhibit 19

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiff, vs. CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entitles I through X, Defendants.	Case No.: A-18-775804-J Dept. No. 26 **CITY OF LAS VEGAS' MOTION TO DISMISS**