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. 55

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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 **REPLY IN SUPPORT OF CITY OF LAS VEGAS' RULE 56(d) MOTION ON ORDER SHORTENING TIME** **(HEARING REQUESTED ON ORDER SHORTENING TIME)** **OST Hearing Date:** April 21, 2021 **OST Hearing Time:** 9:30 a.m.

I. INTRODUCTION

The Developer's Opposition to the City's Rule 56(d) Motion ("Opposition") presents no valid justification for putting the cart before the horse and refusing to allow the City to complete discovery before ruling on the Developer's Motion to Determine Take and for Summary Judgement on the First, Third, and Fourth Claims for Relief (the "MSJ"). The reason for the Developer's rush to summary judgment is transparent: to prevent the City from completing its discovery of evidence refuting the Developer's taking claims. The Developer provides no reason why it cannot wait to

file its motion until the City has completed its discovery. Nor can the Developer show no prejudice is allowing the City to properly prepare its case. Remarkably, the Opposition's main argument is that the discovery the City seeks is only relevant to the Developer's *Penn Central* regulatory taking claim and none of the claims at issue in the MSJ. This argument flies in the face of the Developer's steadfast refusal to comply with the City's discovery requests based on boilerplate relevance objections. The Developer has not dismissed the *Penn Central* claim. Accordingly, the City is entitled to discovery regarding that claim, regardless of whether the Developer chooses to move for summary judgment on the *Penn Central* claim.

The Opposition makes no serious effort to respond to the arguments in the City's Motion explaining why the discovery sought is relevant to the claims at issue in the MSJ. The Developer simply repeats the same arguments it makes in every filing, namely, that the standard for each of its takings claims focuses "entirely on the government's actions." That is not the law, no matter how many times the Developer claims that it is. The only thing that each of the Developer's claims have in common is the alleged *impact* of governmental action. The Developer's actions are also relevant to show the value of the Badlands before and after the City's alleged actions and the Developer's investment-backed expectations.

For a governmental regulation to result in a categorical taking, the regulation must deprive property of "all economically beneficially or productive use of land." *See Lucas v. S.C. Coastal Council*, 112 S. Ct. 2886, 2893 (1992). For a per se taking, the impact of the government's actions must be permanent. *See McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662–63, 137 P.3d 1110, 1122 (2006). And, for a nonregulatory taking to occur, government action must "directly and substantially interfere with an owner's property rights to the extent of rendering the property unusable or valueless." *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 421, 351 P.3d 736, 743 (2015).

The Developer ignores its own allegations in accusing the City of rewriting its Complaint. Its categorical taking claim expressly alleges, "[t]he City's actions have completely deprived the Landowner of all economically beneficial use of the 35 Acres." *See* Second Amendment Complaint ("SAC") at ¶ 167. The per se takings claim alleges "[t]he City's actions have shown an unconditional and permanent taking of the 35 Acres." *Id.* at 201. Finally, the nonregulatory claim alleges that

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the "City has taken steps that directly and substantially interfere with the Landowner's property rights to the extent of rendering the 35 Acre Property valueless or unusable." *Id.* at 209. Accordingly, the value of the property before and after the City's alleged actions is a key issue in all of these claims.

The City's Motion explains how each of its discovery requests are intended to rebut the Developer's allegations regarding value or use of the Badlands, while the Developer attempts to justify its failure to comply with excuses that verge on the absurd. Like the novel claim that operating a golf course on the Badlands property would be "illegal" or that failing to disclose witnesses is acceptable because an unpublished decision suggests that whether planes actually invaded someone's airspace is inconsequential to a takings claim. Not to mention the fact that the Developer is still claiming it paid $45 million to acquire the Badlands property despite also claiming that no documents exist to support that figure.

These unreasonable excuses for refusing to comply with the City's discovery requests exemplify the same obstinance that has prevented the City from completing discovery and obtaining evidence essential to the City's defense, which is precisely why a continuance is warranted under NRCP 56(d). The Developer cannot complain about delays when the Developer moves for summary judgment claiming the facts are undisputed after refusing to comply with discovery requests related to the same set of facts. The timing of the Developer's motion clearly demonstrates the Developer's intent: to obtain the Court's ruling on the merits before the City can properly prepare its case to refute the Developer's claims.

II. ARGUMENT

A. No Legal Authority Supports the Developer's Argument that Inverse Condemnation Claims Focus Solely on Government Action and that Everything Else is Irrelevant

The Developer argues that a continuance is not warranted because the City's discovery requests are only relevant to the Developer's *Penn Central* claim. In an attempt to distinguish its *Penn Central* claim, the Developer argues that the claims at issue in the MSJ "focus entirely on the City's actions." *See* Opposition at 4:12. The Developer cites no legal authority in its Opposition to support its argument that the inverse condemnation claims at issues in the MSJ focus entirely on

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government action. There simply is none. It is an attempt to deflect from the Developer's failure to formulate a legitimate explanation as to why the City's discovery is not relevant.

The Developer is apparently now conceding that the City's discovery requests *are* relevant, just not to the claims at issue in the MSJ. Now that it is convenient to do so, the Developer has completely reversed its position and finally acknowledged that requests regarding the price paid for the property, communications with prior owners, communications with land use consultants, and communications with lenders are in fact relevant to the Developer's *Penn Central* claim. *See* Opposition at 4:10-12. However, the Developer never made this distinction when it opposed the City's Motion to Compel:

> The City asserts that discovery on a Nevada landowner in an inverse condemnation case is wide open, because there is "no magic formula" to determine a taking and that most cases "turn on situation-specific factual inquiries." The City leaves out that that the "situation-specific factual inquiry" is focused entirely on "government action," not "landowner action."

See Opposition to Motion to Compel attached as **Exhibit A**, at 7:3-8.

In fact, the Developer made the exact opposite argument it is making now in its opposition to the City's motion for reconsideration, claiming that as of now *all* of its inverse condemnation claims "focus entirely" on the actions of the government. *See* Opposition to Motion for Reconsideration attached as **Exhibit B**, at 8:1-4. It is not the Developer's claims that are focused entirely on the government's action, but rather the Developer itself who chooses to focus entirely on the City's actions, ignoring the law.

Aside from having no legal basis whatsoever, the Developer's argument that the claims in the MSJ focus entirely on government makes no sense. The City approved the Developer's applications to build a 435-unit condominium complex on the Badlands property and even sent him a personal invitation to come in and apply for ministerial building permits. The Developer is claiming that the Badlands is useless and at the same time refusing to use it. Accordingly, the Developer's actions are directly relevant to the value of the 35-Acre Property.

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B. The Developer Fails to Explain Why The City Is Not Entitled to Discovery Regarding the Developer's Claim that the Property Has No Economically Beneficial Use

As the Developer correctly points out, a categorical taking occurs where the government denies all economically beneficial use of land. However, the fact that the Developer is required to pay property taxes does not mean the property has "negative value." It actually means that the property has value, but that is beside the point. The City requested documents and correspondence relevant to the claim that the property has no value. The Developer offers no explanation as to why the requested information is not relevant to value. Instead, the Developer simply argues that the denial of its applications means the property has no value. The Developer again ignores the fact that the City has increased the value of the Badlands Property by approving development of a 435-unit condominium complex, which the Developer now refuses to build. As explained in the City's motion, the consideration paid for the property, communications with the Developer's lender, and cost estimates are all clearly related to value and the Developer's investment-backed expectations.

C. The Developer's Illegal Golf Course Use Argument is Frivolous

As for the Developer's failure to produce evidence regarding the feasibility of operating a golf course on the property, the Developer makes a novel argument that it would be illegal to use the property as a golf course. The Developer is essentially claiming, by way of syllogism, that because R-PD zoning permits residential, therefore any non-residential use is illegal. This is easily disproved. The Developer ignores the fact that R-PD developments were always intended to have common open space. *See, e.g.*, LVMC 19.10.050.A ("The R-PD District has been to provide for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space, ...").

The City approved the golf course as common open space at the same time it approved the R-PD zoning. *See* April 4, 1990 City Council Minutes attached as **Exhibit C.** There is nothing inconsistent about R-PD zoning and open space uses such as golf courses. In fact, nearly half of all golf courses in the City of Las Vegas have R-PD zoning and a PR-OS general plan designation. Canyon Gate, Los Prados, Painted Desert, and Silverstone all have R-PD zoning and PR-OS general plan designations. Similarly, in communities with manmade lakes such as Lake Sahara and Desert

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Shores, the lakes areas themselves are zoned R-PD and have general plan designations of PR-OS. There is nothing unique about the Badlands Property having R-PD zoning with the common open space designated PR-OS. That is precisely what R-PD zoning was intended to achieve. The Developer's phony claim that a golf course use is illegal is not an acceptable reason for refusing to produce documents available to the Developer.

The City requested all documents related to the operation of the Badlands Property as a golf course. It did not request all documents related to the *Developer's* operation of the golf course. The Developer has consistently misconstrued the City's request in order to avoid producing relevant documents available to the Developer. *See* 180 Land's Responses to City's First Set of Document Requests attached as **Exhibit D**, at 10. The Developer is clearly withholding documents responsive to this request.

In August of 2014, more than three months before the Developer acquired the Badlands Property, it had communications with OB Sports Golf Management, which operates over 50 golf courses. On August 24, 2014, the president of OB Sports Golf Management emailed Frank Pankratz, one of the principals of the Developer, stating:

> Hi Frank – I did speak with Phil Green today and we would be very interested in updating our proposal to manage the Badlands to include a guarantee by OB Sports to cover any operational loss in exchange for a slightly larger piece of the upside. As we briefly discussed, it would greatly help our analysis if we could obtain some historical information on the course. Attached is the information checklist we requested from Billy Bayne (and thus Par 4). **Let's discuss what options may be available to still try and obtain the financials**. I'll give you a call tomorrow if that's okay. Thank you!

August 28, 2014 Email from CA Roberts III attached as **Exhibit E**.

The Developer has never provided the financial information and analyses for the golf course, which the Developer was clearly exploring before it acquired the Badlands property.

D. Failure to Disclose Witnesses Justifies Relief Under NRCP 56(d)

The Developer makes a roundabout argument that it had no obligation to disclose Mr. Richards before submitting his affidavit in support of the MSJ. Disclosures under Rule 16.1 are mandatory. The Developer failed to disclose Mr. Richards until after filing its MSJ. The City has the right to question Mr. Richards' about his alleged encounters with trespassers who told him "its

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our open space." There is no excuse for failing to make proper disclosures pursuant to Rule 16.1. The Developer nevertheless attempts to craft on argument based on an unpublished decision that found that evidence of airplanes flying through restricted airspace is inconsequential to a takings determination. This incoherent argument does not warrant a response.

After proffering this absurd explanation, the Developer's Opposition continues to make the same arguments the Developer made in its MSJ. The purpose of the City's Motion is to obtain discovery *before* being forced to respond to the MSJ. Therefore, these arguments do not warrant a response either. Suffice it to say, nothing in the Developer's opposition excuses its failure to comply with basic mandatory discovery obligations.

E. The City Should Be Permitted to Conduct A Site Visit Before Responding to the MSJ

As explained in the Motion, the City had to cancel a scheduled site visit to the Badlands property at the outset of the COVID-19 pandemic. The Developer acknowledges the City's counsel did not want to travel during the pandemic and that this is understandable, but nevertheless argues that the City should have sent its other attorneys to do a site visit and that the City had 4 years to conduct a site visit. It is now safer for the City's counsel to travel to Las Vegas than it has been for the past 13 months. The City did not waive its right to a site visit because counsel did not incur the risk of unsafe travel. The Developer also forgets that it did not raise the access issue until it filed its second amended complaint in 2019. Moreover, it was not until recently that the Developer has attempted to argue that there are neighbors trespassing on the property at the behest of a former member of the City Council.

In arguing that a site inspection is not necessary, the Developer completely misses the point of Rule 56(d), which allows the Court to defer consideration of a dispositive motion where the opposing party lacks "facts essential to justify its opposition." If Mr. Richards' affidavit is so "inconsequential" and gathering evidence to rebut it is not essential, the court should deny the MSJ because the Developer has no other evidence to support its physical taking theory.

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F. The Developer's Non-Regulatory Taking Claim

The Developer's opposition does not address any of the arguments in the City's Motion. It merely repeats the same arguments in the MSJ. The extended discussion of non-regulatory takings claims in the abstract is apparently intended to demonstrate that a non-regulatory taking is focused entirely on government action. The Developer is overcomplicating the issues raised by the Motion. Simply put, the City is entitled to discovery regarding the allegations in the complaint. The Developer alleges that the property has no value. The City has requested documents relevant to the value of the property. The Developer refuses to produce them. As noted above, in order for a nonregulatory taking to occur, government action must "directly and substantially interfere with an owner's property rights ***to the extent of rendering the property unusable or valueless***." *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 421, 351 P.3d 736, 743 (2015) (emphasis added). Accordingly, whether the property has any value is central to the nonregulatory taking claim.

G. The Developer's Discovery Abuses

The Developer again attempts to misrepresent the extent of its compliance with its discovery obligations in claiming that it produced over 38,000 documents. At least half of those documents are duplicates. When the Developer initially produced documents in this case, it produced emails separately from the attachments. Then it produced emails with attachments, but without bates numbering on the attachments. The Developer later produced different documents with the same bates numbers. The City had to fight with the Developer on all of these issues in order to get the Developer to re-produce the same documents it had already produced but in proper format, which the Developer eventually did with new bates numbers. The City still lacks key documents and cannot take depositions until it receives the documents. The Developer is aware that the City requires all relevant documents and has delayed depositions until those documents are produced. That explains why the Developer has rushed this motion – to attempt to secure a ruling on the merits before the City can gather evidence that may support its opposition to the motion.

A regulatory taking requires regulation that has an extreme economic effect on the property. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir.

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2018). The Developer's claim that it paid $45 million to purchase the Badlands goes to the very heart of this case. The Developer asserts that it paid $45 million to purchase the Badlands from the Peccoles in several transactions occurring over a 20-year period prior to 2015, even though the Developer entered a Purchase and Sale Agreement to purchase the Badlands in 2015 for only $7,500,000. Yet, the Developer denies that the City has a right to any documents related to these transactions. The Developer still cannot piece together a coherent explanation as to where the $45 million figure came from and what evidence supports it. *See* April 6, 2021 Email from Elizabeth Ghanem Ham attached as **Exhibit F**. As explained in the Motion, the Developer submitted a declaration from Mr. Lowie in support of the MSJ that repeats the $45 million claim. The City is not only entitled to request documents that support that claim, but also evidence that refutes it. Once the City has these documents, it can depose the Developer's principal, Yohan Lowie. A continuance is warranted so that the City can obtain these documents.

III. CONCLUSION

To reiterate the relief the City is seeking, the City is requesting that the Court deny the MSJ without prejudice until: (i) the Developer fully complies with the February 24 Order and produces the documents related to all relevant transactions between the Developer and the Peccole family; (ii) the City has had the opportunity to depose Yohan Lowie; (iii) the City has had the opportunity to inspect the Badlands property to gather evidence necessary to oppose the MSJ; (iv) the Court reconsiders the February 24 Order to the extent that it denies the City's request for discovery of matters at issue in the MSJ; and (v) the City has had the opportunity to complete all other discovery necessary to prepare its case.

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Respectfully submitted this 20th day of April, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 20th day of April, 2021, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF CITY OF LAS VEGAS' RULE 56(d) MOTION ON ORDER SHORTENING TIME** 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, and as referenced below to the following:

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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; 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 **PLAINTIFFS' OPPOSITION TO DEFENDANT CITY OF LAS VEGAS' MOTION TO COMPEL DISCOVERY RESPONSES AND DAMAGE CALCULATIONS** **Hearing Date: November 17, 2020** **Hearing Time: 9:00 A.M.**

Plaintiffs 180 Land Co LLC (hereinafter "180 Land Company") and Fore Stars, LTD. (hereinafter "Fore Stars") (collectively "Landowners," "Plaintiffs," or "Plaintiff Landowners") hereby oppose Defendant City of Las Vegas' (hereinafter "City") Motion to Compel and For an Order to Show Cause (the "Motion"). This Opposition is made and based on the following

Memorandum of Points and Authorities, the papers and pleadings on file herein, and the oral argument this Honorable Court entertains at the hearing on the matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As the Court is aware, this case seeks to remedy the City's systematic, aggressive and outrageous actions[1] to prevent the Landowners from using approximately 35 acres of land (APN 138-31-201-005, hereinafter "35 Acre Property" or "Property") they own in Las Vegas, Nevada.

Specifically, the Landowners have brought claims against the City for the uncompensated taking by inverse condemnation of the 35 Acre Property. The Landowners were forced to initiate this lawsuit because the City's intentional and outrageous conduct has caused substantial harm to the Landowners and their livelihood and deprived them of all use of their land rendering the Property useless and valueless.

The City has continued its intentional harmful conduct by engaging in illicit litigation practices and predatory discovery only some of which this Court is aware.[2] It is the Landowners who are incurring exorbitant, unnecessary legal fees in opposing the numerous, virtually identical, and meritless motions filed by the City costing the tax payers millions of dollars in their attempt to keep the facts of the City's outrageous conduct of government abuse from being fully considered. This latest motion filed by the City is nothing more than a facade with the real intent of continued disparagement of the Landowners and more importantly it is a rearguing of legal positions already decided by this Court and others. The City has been using procedure to lay out its legal positions in every single court hearing regardless of what the issue is before the Court.

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[1] These City actions include everything from calling the principal landowners a "motherf----er" to seeking "intel" via a private investigator on individual principals because "dirt may be handy if I need to get rough" to enacting a law aimed at the entire 250 acres in the middle of attempted development to prevent development of this property all together. *See* Exhibit 1, 2, 3.

[2] This Court may recall that the City submitted an order after the PJR hearing dismissing the claims for inverse condemnation for lack of ripeness causing this Court to issue an order *nunc pro tunc* and exclaim "This issue was never vetted. It was never raised. It was never discussed; right? Exhibit 4, pg 6 (January 17, 2019)

Here the City devoted 30 pages of self-serving conjectures and a manufactured story as to what took place in relation to the purchase of Fore Stars, using words like "apparently", "appears to be", "this suggests" and "it is likely" ultimately concluding "its taking claims fail" and requesting "an order dismissing the Developer's takings claims" in a motion to compel discovery.[3] Moreover any statements the City believes "apparently" took place in the transaction between other parties and the sellers of Fore Stars must be completely ignored by this Court as they are wholly false and based on the City's manufactured story. Thus, the only thing that is apparent is that the City cannot grasp (or is intentionally fabricating) what took place in this matter.[4]

Eventually, the City complains of the following items[5]:

1. Documents related to its damage calculations.
2. Documents related to the maintenance and/or operation of the Badlands golf course.
3. All communications between the Landowners and their attorneys Chris Kaempfer and Stephanie Allen and non-attorney Greg Borgel.

On page 22 of the City's brief the City requests the following items be produced.

"All agreement between the Developer and the Peccole family (and their respective affiliates) related or connected to the acquisition of the Badlands Property;

All documents pertinent to consideration paid by the Developer in connection with the acquisition of the Badlands Property;

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[3] The City made no less than 11 assumptions throughout its brief to support their manufactured factual background. Clearly the City does not want this Court to consider all of its egregious actions in taking the land and would rather have the Court dismiss the case in a motion to compel documents.

[4] The City provides an example of a complaint in 2007 between BGC Holdings and Fore Stars claiming that "the Developer sued the Peccole family in an attempt to takeover of the golf course and unwind those commitments" further evidencing their lack of understanding of any transaction related to this property let alone the relationship between the seller and Landowner.

[5] The City also largely complains that it took *15 months* and/or *over a year* to get these items. These statements are also false as the City either agreed to allow an extension (while taking 90 days itself to produce documents) of time and/or actually received responsive document but insisted "there must be more" as they continue to do in their briefs to this Court. Additionally, the City seems to ignore the fact that there during the discovery phase, there was a pandemic necessitating multiple administrative orders from the Court which suspended all deadlines for discovery responses. Regardless, the Landowners continued to work to the best of their ability to produce documents.

All documents related to the restrictive covenant recorded against the Badlands Property for the benefit of BGC Holdings LLC and Queensridge Towers LLC, and

All documents related to the 2013 Settlement Agreement, including but not limited to Queensridge Towers LLC's election to transfer 2.37 acres to Fore Stars.

In relation to these requests, all documents have been produced that are in the possession of the Landowner. As explained multiple times during the 2.34 conferences, there simply are no more documents whether they believe it or not or whether "in their experience" there are usually more documents. Specifically, over 4,600 documents have been produced in relation to these requests and are as follows:

- Consultants: 1,707 documents produced LO 0029412-0033180; 7 withheld for privilege LO0033181-0033196

- Communications with previous owners of Fore Stars: 413 documents Produced LO0018536 – LO0022694; LO00186020- 0022315; LO0018448 – 0022319; LO0018557-0022320; LO0018030-0018270; 2 withheld LO0022695 – 0022696.

- Prior owners president, Walters: 70 documents produced LO 0018442-0022326; 0018445-0022327.

- Appraisals, opinion letters and communications related to financing for the acquisition of Badlands RFP 1 1,129 Documents Produced LO0018442-0022327; 112 Documents Withheld LO0022328 – 0022899; LO00036807-00037064.

- Documents related to the acquisition of water rights, a water rights lease, and the acquisition of WRL LLC - 1,104 Documents Produced 45 withheld for Privilege

To date, the Landowner has produced over 38,000 pages and as is more fully discussed below, documents have been produced for nearly each and every item outlined above. Thus, Court should summarily deny the City's motion because, as admitted by the City itself in its brief, documents and/or answers have been provided for each and every one of these items, but the City refuses to believe these are the extent of the documents claiming "it is apparent there is more."

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II. ARGUMENT

A. Computation of Damages

The City's assertion that the Landowners' computation of damages is deficient is also without merit. City Motion, 14. The Landowners initially objected to the computation of damages prior to disclosure of expert reports, because the courts have recognized that eminent domain cases are "a field dominated by expert opinion,"[6] meaning all valuation data must be compiled, properly analyzed, and then a conclusion of value reached and produced as part of the expert exchange.[7] The City, however, insisted on receiving an estimate of the value of the property prior to the time the Landowners had the opportunity to fully analyze the data and the expert reports. The Landowners complied, providing a "preliminary estimate," without the benefit of their expert reports(s), as follows, and stated that this damages calculation will be updated at the time of expert exchange:

> Without waiving said objections, and assuming the date of value is on or about September 7, 2017 (the date the inverse condemnation claims were filed and served on the City) the Landowners' preliminary estimate of damages (just compensation) for the total taking of the 35 Acre Property (APN 138-31-201-005) is approximately $54 Million. This is an average of the per acre value assigned by the following: 1) an appraisal report prepared by Lubawy and Associates of seventy acres of property formerly known as APN 138-32-301-004 at ± $700,510/acre as of July 2015; 2) an offer to purchase 16-18 acres of the seventy acre property formerly known as APN 138-32-301-004 for ± $1,525,000/acre as of December 2015; and, 3) the sale of APN 138-32-314-001 for ± $2,478,000/acre as of August 2019. This computation will be supplemented upon the completion of expert reports, if needed, or as otherwise deemed necessary in this matter.

The City's accusation that the Landowners are withholding documents related to this preliminary estimate is without merit as the documents referenced in the above preliminary estimate have already been produced to the City. And, as this Court will recall, at the most recent Status Conference undersigned counsel explained that the Landowners are facing significant difficulties obtaining all of the data necessary to completely and fully value the 35 Acre Property in light of the recent lock downs and individuals trying to catch up with the backlog and, for that

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[6] Sparks v. Armstrong, 103 Nev. 619, 622 (1987).

[7] Landowners are also permitted to provide their opinion of value at trial, which will be produced to the City with the exchange of expert reports. *See* City of Elko v. Zillich, 100 Nev. 366 (1984).

purpose, the expert exchange date was moved to December 1, 2020. Once all of this valuation data is obtained and fully analyzed by the Landowners and their expert(s), opinions of value and expert reports will be produced and this damage calculation will be finalized. Again, the City is trying to create a mirage of non-compliance that does not exist.

Finally, the complaint about the computation of damages is not only disingenuous it is contrary to counsel's own statements to this Court. During a hearing before this Court on May 14, 2020, attorney George Ogilvie stated "**I will say that the developer did supplement yesterday its initial disclosures with an estimate of its damages related to the 35 acres. So, the developer has addressed that.**" *See* Exhibit 5, page 43, lines 2-5 (emphasis added.) If the disclosure was not sufficient then City's counsel should have addressed it at the May hearing, which he did not.

B. The City's Allegation of "Fraud" is Unwarranted

The City asserts that "the City understands from documents" that "the developer paid less than $7.5 million for the entire Badlands" and that this "demonstrates that the Developer's claim that it paid $45 million to buy the Badlands and its claims for $54 million in damages are both obvious **frauds**." City Motion 3:2-5. Emphasis supplied. The City's "understanding" and accusations of "fraud" are patently wrong. These numbers the City refers to as the amount "paid" for the 250 Acre Residential Zoned Land (Badlands) was not indicative of, nor tied to, the "value" of the 250 Acre Residential Zoned Land. In fact, immediately after closing on the 250 Acre Residential Zoned Land, an appraisal of just 70 acres of the 250 Acre Residential Zoned Land was issued by a bank (which are typically low to assure the underlying collateral is protected), and this bank appraisal valued just 70 acres of the entire 250 Acre Residential Zoned Land at $700,510 per acre or $49,400,000 for just the 70 acres of land. Exhibit 6, (cover sheet for appraisal and value conclusion). And, the City was given this appraisal report during discovery – although the City chooses to ignore its significance in relation to the City's "understanding" of the facts and "fraud" allegation. The City clearly is ignoring facts to create a mirage of non-compliance that does not exist and the City's mis-"understanding" does not impute fraud on the Landowners.

C. The City Misinterprets Well Established Inverse Condemnation Law

Although not directly relevant to the City's pending motion, the City entirely misinterprets and misapplies Nevada inverse condemnation law. The City asserts that discovery on a Nevada landowner in an inverse condemnation case is wide open, because there is "no magic formula" to determine a taking and that most cases "turn on situation-specific factual inquiries." City Motion pp. 19-20. The City leaves out that that the "situation-specific factual inquiry" is focused entirely on "government action," not "landowner action." In fact, this very issue has already been litigated in this case, with this Court entering the following order:

> 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, yet again, 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**. Exhibit 7, pp. 8-9 (May 15, 2019, Order Denying City's Motion to

Dismiss (35 Acre Opinion)). The basis for this rule is only the "government action" can rise to the level of a taking. A landowner cannot engage in actions that either defeat or cause the taking of his or her property. Therefore, this law is not an excuse for the City to blow discovery wide open in this case.

D. The City Leaps to Conclusions and Makes Baseless Accusations Against the Landowners that Contradict the City's Own Past Actions

The City claims that the Landowners "could not have possibly believed" that the 250 Acre Residential Zoned Land had the vested right to be developed residentially and that the Landowners must have known there was a PR-OS designation precluding development, because they only paid $30,000 per acre for the property and, therefore, there must be other information and documents showing that the Landowners knew they could not develop the 250 Acre Residential Zoned Land that is discoverable. City Motion 24:17-22. First, the City's underlying premise of $30,000 per acre is false, as explained above. Second, it is unconscionable that the City is advancing this blatantly false narrative. The City, itself, issued the Landowners a Zoning Verification Letter prior to the Landowners purchasing the property and as part of the Landowners due diligence, which expressly states the entire 250 Acre Residential Zoned Land is hard zoned for residential development. Exhibit 8. The Landowners could also provide here the unequivocal and extensive evidence rejecting the City's PR-OS argument and confirming the right to develop the 35 Acre Property residentially **by the City's own Planning Director and City Attorney**, but that evidence has already been presented to this Court through extensive briefing and oral argument, resulting in this Court issuing an order which rejects the City's argument of non-developability. Therefore, not only did the Landowners know the 35 Acre Property had the vested right to be developed residentially prior to purchasing the property, but the City, itself, also knew this, as it issued the Landowners a Zoning Verification Letter stating as much. Again, it is simply unconscionable that the City is not only ignoring this Court's order, but also ignoring the opinion of its own high ranking employees and the very Zoning Verification Letter the City issued to the Landowners as part of their due diligence.

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III. THE REMAINING REQUESTS FOR PRODUCTION OF ITEMS

A. Documents related to the maintenance and operation of the Badlands Golf Course.

RFP 10:

Produce all documents related to the maintenance and operation of the Badlands Property as a golf course by Plaintiff and its predecessors, including but not limited to financial statement, financial projections, business plans, budgets, statements of operating expenses, gross revenues and capital expenditures, leases, insurance documents, advertising and promotional expenses, costs of purchasing operating inventory, compensation and expenses of management staff and other employees, and any similar documents pertaining to any amenities or other activities customarily associated with or incidental to the operation of a golf course (e.g., sale or rental of golf related merchandise at a golf professional's shop, furnishing of lessons by a golf professional, operation of a driving range, and sales of food and beverages, including liquor sales.)

RESPONSE TO RFP 10

None, the Landowner never operated a Golf Course.

See Exhibit 9.

As the City is well aware, the Landowners did not operate the Badlands golf course and as such, do not have any documents related to the maintenance and operation beyond what has been produced which includes, a water lease for additional water rights, various lease agreements between the Landowner and the golf course operators, equipment and asset lists, communications between the operator and the Landowner, etc. In total there were over 600 pages of documents produced in relation to this request.

B. All communications between attorneys Chris Kaempfer and Stephanie Allen.

As the City has admitted itself, 57 documents were produced in relation to this request and the privilege log was updated. The City complains that most were a production of emails exchanged with the City and other consultants, but this is exactly what the City requested *after*

the Landowners objected based on seeking clearly privileged communications and that it seeks documents already in the possession of the City. *See* Exhibit 9.[8] It is accurate that the attorney client privilege communications were not produced to the City as they are privileged.[9] They City attempts to boot strap a legal argument of investment backed expectations to a distorted statement that Mr. Kaempfer and Stephanie Allen "likely advised the Developer that it had no vested right to develop the Badlands Property." This they say is the "linchpin" of our entire case and therefore, attorney client communications must be produced, or the inverse condemnation claims must be dismissed. Not only does this fail to rise to the level of requiring production of attorney client privileged documents, it is baseless as no opinions of any "advisors" were necessary since **the City itself informed prior to the purchase of Fore Stars that the property was zoned RPD 7 and continued to state during City Council hearings that the property was hard zoned RPD 7**.

IV. The Landowners – Not The City – Are Entitled To Attorney Fees Associated With Opposing Yet Another Frivolous Motion.

The City seeks attorneys' fees claiming that the Landowners have failed to produce documents. As provided above, the Landowners have not failed to produce documents. Rather, the City has filed a frivolous motion and has not been forthcoming with this Court as to what has been provided. For example, the City claims on page 9 of its motion that "180 Land omitted those Bates-stamped documents. *Id.* It was unclear to the City whether this omission was intentional. *Id.*" In support of this position the City provides Exhibit O – an email from attorney Chris Molina of McDonald Carrano and Ms. Waters of the Waters Law Firm. What the City fail to do is provide Ms. Waters response wherein she states "There should not have been any changes

[8] Interestingly, the City did not produce as evidence of the Landowners "failures" the actual responses, rather they produced their own self serving letters claiming production was insufficient.

[9] The City is claiming that the Landowners are required to provide a privilege log of all attorney client privileged documents. However, given over 2 ½ years of attempts to develop the property with the City, there are thousands of emails with counsel. If the City is insisting on a privilege log, then the City must be required to pay for this overly burdensome request.

to the "Amended Responses." An errata will be sent out shortly." *See* Exhibit 10. The City then feigns ignorance claiming they were unsure as to what was being supplemented "Due to this confusion, on July 15, 2020, 180 Land served an Errata . . ." City's Motion page 10 lines 1-2. This is just one example of the misleading statements the City has provided to this Court to support its frivolous motion. For these reasons, the City's request for attorney fees and costs should be denied, and the Landowners should be awarded reasonable expenses incurred in filing this opposition.

V. CONCLUSION.

For the foregoing reasons, the City's motion should be denied in its entirety.

Dated this 6th day of November, 2020.

LAW OFFICES OF KERMITT L. WATERS

/s/ Kermitt L. Waters

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EXHIBIT “B”

OPPS
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendant.

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

OPPOSITION TO THE CITY OF LAS VEGAS' MOTION FOR RECONSIDERATION OF ORDER GRANTING IN PART AND DENYING IN PART THE CITY'S MOTION TO COMPEL DISCOVERY RESPONSES, DOCUMENTS AND DAMAGES CALCULATION AND RELATED DOCUMENTS; REQUEST FOR SANCTIONS FOR INTENTIONAL VIOLATION OF THE PROTECTIVE ORDER

HEARING DATE: April 15, 2021

I. INTRODUCTION

Only two weeks after signing a Protective Order and nine days after receiving the Confidential Documents covered by the Protective Order, the City violated the Protective Order by filing this motion and publicly filing the covered Confidential Documents.[1] As with much of the City's behavior since the inception of this matter,[2] the City continues to disregard orders. The City should be sanctioned and held accountable for its intentional violation.[3]

Moreover, the City's motion for reconsideration of the Court's prior discovery decision is yet another example of the City's aggressive and systematic actions to substantially harm the Landowners to avoid paying just compensation for taking the 35 Acres Property. The real intent of the City's motion is to reargue positions that have already been rejected.

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[1] "**Any document to be filed with the Court by the City, including** status reports, **motions and their exhibits** and attachments, which includes any reference to Confidential Information, **shall be filed publicly without the Confidential Information** until such time as the Plaintiffs have the opportunity to seek a sealing order. The copies of the document(s) submitted to the Court and to Plaintiffs may contain the Confidential Information. **Upon notice by the City that Confidential Information is intended for public filing**, Plaintiffs shall bring the issue of whether the Confidential Information will be sealed to the Court's attention in an appropriate and timely manner, and the ultimate determination of what to do with the Confidential Information submitted to the Court will rest with the Court." *See* Protective Order Re Documents Produced in Response to City of Las Vegas; First Set of Requests for Production of Documents to Plaintiffs, filed February 24, 2021. Emphasis added.

[2] This Court will recall the City's act of adding language to the PJR order dismissing the inverse condemnation case causing this Court to issue an order *nunc pro tunc* and exclaim "This issue was never vetted. It was never raised. It was never discussed; right?" See Exhibit 1, Transcript, Pg. 6 January 17, 2019.

[3] This Court may recall that the Landowner's counsel has vehemently argued for confidentiality for over a year expressing to this Court that the City was ill intended and would disclose these documents. "And through the City's actions which have been so egregious and outrageous, everything stemming from intending to destroy the company . . . seeking intel though a private investigator on some of our principals. . . .So we are highly guarded over here, more than usual, because of what's gone on for the past five years. So, again if you're inclined to order it I would ask that it be 100 percent protected." *See Exhibit 2, Transcript* Pg 48 & 49 lines 20-25 and 1-5.

To date, the Landowners have produced over 38,000 pages of documents in response to the City's discovery requests in this case. Notwithstanding this substantial production, the City is attempting to create a narrative of the Landowners' course of dealings, as well as the existence of additional documents, without any basis for doing so. The City's aim appears to be, not discovery of facts, but rather to use improper discovery[4] tactics to harass, cause delay and substantially increase the cost to the Landowners. The City's incorrect narrative of events they claim transpired giving rise to the purchase of the Land are not only of no consequence, but there is also no nexus to the documents they seek. With this motion, the City is attempting to build a defense "on the gossamer threads of whimsy, speculation and conjecture" in an attempt to conduct a fishing expedition to acquire confidential documents that it will then release publicly as it has done in its pending motion.

Thus, the Court should summarily deny the City's motion because it indisputably raises no new issues of law or fact and the Court's discovery rulings were reasonable and well within the scope of its broad discretion. Moreover, this Court should impose sanctions against the City for filing another frivolous motion and violating the parties' stipulated protective order.

II. ARGUMENT

A. The Court Has Already Considered And Rejected The City's Arguments

Reconsideration is only warranted "in very *rare* instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (emphasis added); *see also Powell v. Liberty Mut. Fire Ins. Co.,* 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3. A party seeking reconsideration of a ruling

[4] Improper discovery is "sought not to gather evidence that will help the party seeking discovery to prevail on the merits of his case but to coerce his opposition to settle regardless of the merits . . . " *Marese v. Amer. Academy of Orthopedic Surgeons,* 726, F. 2d 1150, 1162 (7th Cir. 1984).

of the district court must do so pursuant to EDCR 2.24(b). Because the City raises no new issues of law or fact, the motion for reconsideration should be summarily denied.

In fact, the City doesn't even address the reconsideration standard, concluding instead that prejudice and manifest injustice will result if the Court does not reconsider its prior discovery decision.[5] The City then simply reiterates the arguments raised in its motion to compel, which arguments the Court has already considered and rejected several times. *See* Mot. to Compel at pp. 2-27; 11/17/2021 Hearing Tran. at pp. 6-16; *cf.* Mot. for Recon. at pp. 10-12. Even a cursory comparison of the City's initial motion papers to those for reconsideration reveals no new issues of law or fact. *See id.* For example, the Court already considered and rejected the City's arguments regarding attorney-client communications and the Landowner's privilege log. *See* 02/24/2021 Order at p. 3. Similarly, the Court considered and rejected the City's unsubstantiated claims that the Landowners have withheld other communications between its principals and/or with lenders and others as well as additional documents related to the Badlands Property. *See id.; cf.* Mot. to Compel at pp. 2-27; 11/17/2021 Hearing Tran. at pp. 6-16; Mot. for Recon. at pp. 10-12. With respect to old cost estimates, documents related to Greg Borgel and/or other transactions related to the Peccole family, the Court likewise already considered and rejected the same City arguments

[5] Likewise, the cases cited by the City are inapposite. In *Harvey's Wagon Wheel v. MacSween,* 96 Nev. 215, 606 P.2d 1095 (1980), rehearing was appropriate because the district judge to whom the first motion was made consented to the rehearing. No such circumstances exist here. In *Masonry & Tile Contrs. v. Jolley, Urga & Wirth Ass'n,* 113 Nev. 737, 941 P.2d 486 (1997), the district court reconsidered an arbitrability issue based on new clarifying case law, which fell squarely within the rigorous reconsideration standard. *Masonry & Tile Contrs.*, 113 Nev. 737 (1977), is easily distinguishable given that the City's motion in this case is not based on any new issues of law or fact. Finally, *Trail v. Faretto,* 91 Nev. 401, 536 P.2d 1026 (1975), involved a renewed dispositive motion rather than a motion for reconsideration. Importantly, the district court granted the renewed motion to dismiss in that case based on a new issue of fact, namely, that there had been a change of circumstances (i.e., an additional lapse of time) which warranted dismissal under NRCP 41(e).

made here. *See id.*[6] Accordingly, the City's motion falls short of the rigorous standard for reconsideration and should be denied.

B. The Court Properly Exercised Its Discretion To Reasonably Limit Discovery

The district court has wide discretion in controlling pretrial discovery. *See MGM Grand, Inc. v. District Court*, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991) (*citing Hahn v. Yackley*, 84 Nev. 49, 54, 436 P.2d 215, 218 (1968)). Furthermore, decisions limiting discovery are generally upheld so long as they are reasonable. *See MGM Grand,* 107 Nev. at 69-70, 436 P.2d at 204 (trial court's decision to limit discovery was reasonable and therefore within scope of wide discretion).

Here, the Court's rulings on the discovery issues are reasonable. The Court ordered the Landowner to produce documents related to computation of damages in conjunction with the parties' expert witness disclosures. *See* 02/24/2021 Order at p. 3. As such, the City will get those documents, including any cost estimates and expert communications/reports at that time. *See id.* With respect to old cost estimates, none exist, so it was reasonable for the Court to reject that aspect of the City's discovery motion. *See* 11/17/2021 Hearing Tran. at pp. 37-38. Likewise, no additional communications exist between the Landowner's principals, so it was reasonable for the Court to reject the City's baseless assertion otherwise. *See id.*

Moreover, the Court determined that the City was entitled to receive all documents related to the Landowner's "contention that it paid $45 million for the Badlands Property" prior to taking Yohan Lowie's deposition. *See* 02/24/2021 Order at p. 3-4. In other words, the City prevailed on some of the discovery issues. *See id.* Finally, the Court ordered the parties to enter into a stipulated protective order, following which the Landowners produced additional documents, including those related to multiple transactions involving the Peccole family that occurred during development and

[6] For each item the City reargues with no new evidence or position, the Landowners hereby incorporate the opposition to the Motion to Compel filed on 11/6/2020.

construction of the Queensridge Towers and which led to the letter of intent for the purchase of the Badlands Property. *See id.* at 4. Despite the City's contention otherwise, this supplemental production is responsive to the requests for production. *See* 02/24/2021 Protective Order at pp. 2-3; *cf.* Mot. for Recon. at pp. 10-12. And, it is not a "selective production" as the City erroneously claims simply because counsel is dissatisfied with the documents received.

Rather than just depose Mr. Lowie to learn the historical facts surrounding the purchase of the Badlands Property, the City once again makes assumptions about the Landowners' course of dealings, and the existence of additional documents, without any good faith, evidentiary basis for doing so.[7] In sum, the Court's rulings are not unreasonable. To the contrary, the Court's decision to limit discovery was well within the scope of its wide discretion. Reconsideration should be denied accordingly.

C. **The City's "Relevant Factual Background" is Incorrect and Does Not Provide a Basis for Reconsideration.**

Initially, the City argues that the Court's Order was wrong and then moves on to argue the merits of the case concluding the Landowners have no case because they could not have expected to develop anything and, even if they did, the Land is not worth much. On this basis, the City claims if only the Court would allow the City to conduct a fishing expedition and get documents from the Landowners' consultants, principals and lawyers, it could prove that the Landowners did not believe they could ever develop.

[7] The City's overemphasis, in particular, on the purchase price for the Badlands Property is a red herring. *See* Mot. for Recon. at pp. 10-12; Mot. to Compel at pp. 21-24. Parties are only entitled to obtain discovery relevant to the subject matter of the case. *See* NRCP 26(b)(1). This is an inverse condemnation action, and just compensation must be paid under Nevada law for valuable property whenever government action substantially impairs that value. *See State v. Eighth Judicial Dist. Ct.*, 131 Nev. 411, 351 P.3d 736 (2015). The purchase price of the property is irrelevant under such circumstances. Even under *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978), ***purchase price is not determinative of a landowner's investment backed expectations*** as the City incorrectly asserts.

This argument that the Landowners did not believe they could develop defies the facts already presented to the Court. First, facts have been presented that the Landowners conducted 20 years of due diligence prior to acquiring the 250 Acre Land and ***repeatedly*** confirmed the developability of the entire 250 Acre Land with the City itself. During this due diligence the City even provided to the Landowners a Zoning Verification Letter confirming the R-PD7 zoning and that the "intent" for this zoning was "residential" development. *See e.g.* Exhibit 3, City of Las Vegas Zoning Verification Letter submitted by the City to the Landowners prior to acquisition of the 250 Acre Land. Third, as this Court will recall, the Landowners presented evidence in this case that they spent millions of dollars to develop the property and the City has denied all attempts at development, including denying the individual applications to develop the 35 Acre Property as a stand-alone property and the Master Development Agreement (MDA) to develop the entire 250 Acre Property under one plan. Fourth, the Landowners worked with the City for over 2.5 years on the MDA, spending over $1 million on this MDA, alone, only to have the City deny the MDA. And, during that MDA process, City Councilwoman Tarkanian acknowledged "I don't know if I've ever seen anybody who's done as much as far as, you know, filling in gullies and giving you football field lengths behind you and stuff like that . . . **I've never seen that much given before**." *Exhibit 4,* Transcript of June 21, 2017, City Council Meeting, see pages 104-105. Emphasis added. Fifth, this Court already granted the Landowners' motion to determine property interest, holding that, before the City began interfering with the use of the 35 Acre Property, the 35 Acre Property was hard zoned R-PD7 and "the permitted uses ***by right*** of the 35 Are Property are single-family and multi-family residential." *See* Findings of Fact and Conclusions of Law Regarding Plaintiff Landowners' Motion to Determine 'Property Interest,'" filed October 12, 2020, p. 5:4-8. These are just some of the facts that entirely rebut the City's incorrect narrative that the Landowners could not have expected to develop the 35 Acre Property.

This incorrect narrative that the Landowners did not believe they could develop is also entirely irrelevant to the Landowners' inverse condemnation claims as all of these inverse condemnation claims focus entirely on the actions the government engaged in to take the property. The standard to find a Per Se Regulatory Taking is whether ***the government*** engaged in actions to preserve private property for use by the public or to authorize the public to use private property.[8] The standard to find a Nonregulatory De Facto Taking is whether ***the government*** engaged in actions to substantially interfere with the use and enjoyment of private property.[9] And, the standard to find a Per Se Categorical taking is whether ***the government*** engaged in actions to deny all economical use of property.[10] The City's assertion that what the Landowners expected when they purchased the property is relevant to one of the three *Penn Central* Regulatory Taking guideposts – interference with investment backed expectation - is entirely meritless. The Nevada Supreme Court has recognized that the primary use of vacant land is for investment and development purposes,[11] meaning every owner of vacant land has investment backed expectations. Otherwise, there would be no purpose in ever purchasing vacant land. Therefore, an inverse condemnation of vacant land does not require an inquiry into the mind of the owner; it requires an analysis of the government actions that amount to a taking.

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[8] McCarran Airport v. Sisolak, 122 Nev. 645, 137 P.2d 1110, 1123 (2006); Hsu v. County of Clark, 123 Nev. 625 (2007).

[9] State v. Eighth Judicial District Court, 131 Nev. 411 (2015); Richmond Elks Hall Assoc. v. Richmond Red. Agency, 561 F.2d 1327, 1330 (9th Cir. 1977); Billy Sloat v. Turner, 93 Nev. 263, 268 (1977), State v. Las Vegas Bldg. Materials, 104 Nev. 479 (1988), and Schwartz v. State, 111 Nev. 998 (1995).

[10] McCarran Airport v. Sisolak, 122 Nev. 645, 137 P.2d 1110, 1123 (2006); Hsu v. County of Clark, 123 Nev. 625 (2007).

[11] *See e.g. Manke v. Airport Auth. of Washoe County,* 101 Nev. 755 (1985).

The City also continues to argue that the alleged land use designation of PR-OS (parks, recreation and open space) prevents development and bootstraps this argument to investment-backed expectations ultimately concluding that it was not reasonable for the Landowner to expect that the City would approve its plans. This argument is remarkable. During this case, the Landowners have presented no less than ***ten*** orders where this PR-OS argument has been either flatly rejected or entirely disregarded by every single district court judge that has considered it and by eight Nevada Supreme Court Justices. The City's own City Attorney's Office and Planning Department have determined the PR-OS argument is a false argument. Therefore, this City PR-OS argument should be entirely disregarded. The expectation of the Landowners were clear and beyond its own due diligence was directly confirmed by the City itself.

Moreover, this incorrect position does not grant the City the right to continue to harass the Landowners and seek documents which are either not in the control of the Landowners as previously provided in the opposition and/or simply don't exist. *See Landowners' Opposition to Motion to Compel, filed November 6, 2020.* Just as in the original motion, the City continues to argue "there must be more" "no rational lender would provide a loan without more communications" and refuses to accept otherwise. Likewise, the City's self-serving explanation of an email from its counsel (again attached as an exhibit without protection) somehow proves the Landowners had no plans to develop because it contemplated a conservation easement that would "protect it forever from development." This highlights the City's incorrect facts as the conservation easements were part of one of the Landowners plans for development of large lots that would contain "conservation easements" as part of the development of the larger lots. *See* Exhibit 5, "The New Vision" – a potential development of the 250 Acre Property that contemplated "Conservation Estates / Easements." The City, however, denied all development, meaning these conservation easements for the large conservation lots could not even be implemented.

In a last-ditch effort to get to more documents the City complains "at a minimum" the Court should order the production of :

- the agreement settling a lawsuit in 2007 between BGC Holdings and Queensridge Towers, LLC (already produced by the Peccole Family)
- the 2013 Settlement Agreement between Fore Stars and Queensridge Towers, (not our entities and thus, not in our possession)
- the lease and option to purchase the Developer's corporate offices; and
- the proposed acquisition of Nevada Legacy 14, LLC (already produced).

The motion ends with a request for documents that are either not in the possession of the Landowner or have already been produced except for a new request to produce a lease and option to purchase offices which has nothing to do with the City's alleged defense in this case. Accordingly, the City's Motion to Reconsider should be denied.

D. The City Should Be Sanctioned For Filing Another Frivolous Motion And Violating The Stipulated Protective Order

In an attempt to avoid a decision on the merits, the City is engaging in improper discovery tactics that focus on the Landowners although the Landowners conduct or knowledge of anything the City claims is wholly irrelevant to this case because only "government action" can rise to the level of a taking. A landowner cannot engage in actions that defeat or cause the taking of his or her property. This Court should prevent the City from its continued actions and sanction the City both for the violation of the Protective Order and for the filing of this frivolous motion.

Under NRCP 37, sanctions for noncompliance with a discovery order includes an award of attorney fees and costs. *See* NRCP 37(b)(2). The district court also has broad discretion to issue sanctions and contempt rulings for abusive litigation practices. *See* *Matter of Water Rights of Humboldt River*, 118 Nev. 901, 907, 59 P.3d 1226, 1229-30 (2002); *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Indeed, courts have inherent equitable powers to sanction a party for discovery and other litigation abuses. *See* *Young*, 106 Nev. at 92, 787 P.2d

at 779 ("Litigants and attorneys alike should be aware that these [equitable] powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute.").

Here, the Landowners – not the City – should be awarded reasonable attorney fees and costs for having to oppose the City's frivolous discovery motion in which the City never even addressed the reconsideration standard. To the contrary, the City simply reiterated the arguments raised in its motion to compel, which arguments the Court has already considered and rejected several times. *See* Mot. to Compel at pp. 2-27; 11/17/2021 Hearing Tran. at pp. 6-16; *cf.* Mot. for Recon. at pp. 10-12. Even a cursory comparison of the City's initial motion papers to those for reconsideration reveals no new issues of law or fact. *See id.* In fact, the City concedes as much by ignoring the reconsideration standard and instead arguing prejudice and manifest injustice. Despite its frivolity, the Landowner had no choice but to oppose the City's motion.

In addition, the City publicly filed numerous confidential documents in support of its motion for reconsideration. *See* Mot. for Recon., Exhibits A – Q. The City did so despite this Court's unambiguous order compelling the parties to enter into and abide by a stipulated protective order. *See* 02/24/2021 Order at p. 3-4. Pursuant to that protective order, the City was required to file its motion *without* attaching any confidential documents "until such time as the [Landowner] has the opportunity to seek a sealing order" and the Court has an opportunity to make a determination "of what to do with the confidential information." 02/24/2021 Prot. Order at pp. 4-5 (emphasis added). By failing to do so, the City has clearly violated the stipulated protective order and should be held in contempt and further sanctioned. *See, e.g., State, Dep't Indus. Rel. v. Albanese,* 112 Nev. 851, 856, 919 P.2d 1067, 1070-71 (1996) (civil contempt order may be used to compensate the contemnor's adversary for costs incurred because of the contempt).

III. CONCLUSION

For the foregoing reasons, the City's motion for reconsideration should be denied in its entirety. Additionally, the City should be sanctioned for violating the parties Court ordered Protective Order and for filing another frivolous motion.

DATED this 25th day of March, 2021.

LAW OFFICES OF KERMITT L. WATERS

ELIZBETH GHANEM HAM

BY: /s/ *Elizabeth Ghanem Ham*
KERMITT L. WATERS, ESQ.
Nevada Bar. No. 2571
JAMES J. LEAVITT, ESQ.
Nevada Bar No. 6032
MICHAEL SCHNEIDER, ESQ.
Nevada Bar No. 8887
AUTUMN WATERS, ESQ.
Nevada Bar No. 8917
ELIZABETH GHANEM HAM
Nevada Bar No. 6987

Attorneys for Plaintiff Landowners

EXHIBIT *"C"*

AGENDA City of Las Vegas

000648

ITEM		ACTION
	X. COMMUNITY PLANNING AND DEVELOPMENT DEPT. (CONTINUED)	
1433 to 1437	G. ZONE CHANGE - PUBLIC HEARING 3. Master Development Plan Amendment related to Z-17-90 Request for approval to amend the Master Development Plan for property located on the east side of Hualpai Way, west of Durango Drive, between the south boundary of Angel Park and Sahara Avenue. Planning Commission unanimously recommended APPROVAL, subject to: 1. A maximum of 4,247 dwelling units be allowed for Phase II. 2. Hualpai Way be extended as a public street north of Charleston Boulevard to the north property line as required by the Department of Public Works. 3. Extend Apple Lane along the north side of this site and adjacent to Angel Park, east of Rampart Boulevard to Durango Drive, as required by the Department of Public Works. 4. Signs shall be posted on the resort/casino and commercial center sites to indicate the proposed uses. 5. The surrounding property owners shall be notified when the development plans for the resort/casino and commercial center sites are submitted for review. Staff Recommendation: APPROVAL PROTESTS: 5 (at meeting) APPROVED AGENDA ITEM Larry K. Burton	**NOLEN - APPROVED as recommended subject to the conditions.** **Motion carried with Higginson "abstaining" because his employer had done business with Mr. Peccole.** **Clerk to Notify and Planning to Proceed.** ***** ROBERT PECCOLE, 2760 Tioga Pine Circle, appeared. He stipulated to the conditions indicating that the hotel and casino along with the commercial center plans would be approved by the Council. COUNCILMAN ADAMSEN said he previously wrote a letter to both the Peccole and Summerlin people asking them to post signs on the property indicating the hotel and casino sites. He also asked that when people buy property they be given a plot plan and a map which would show the future casino site in relation to their property and they are asked to sign an acknowledgment when they receive this information to resolve any problems of notification. No one appeared in opposition.

G. ZONE CHANGE - PUBLIC HEARING

3. Master Development Plan Amendment related to Z-17-90

This is a request to amend a portion of a previously approved Master Plan for the Peccole Ranch Property, Phase II. Phase II contains 996.4 acres and comprises property located south of Angel Park between Durango Drive and Hualpai Way extending south to Sahara Avenue. There are 4,247 units proposed and the gross density for Phase II is 4.3 dwelling units per acre. A related item, Z-17-90, is Item X.G.4. on this agenda.

Master Development Plans have been approved for this property in 1981, 1986 and 1989. The portion identified as Phase I was approved as part of the 1989 Plan and is currently under development. The significant changes to this plan from the 1989 plan is the addition of a golf course, a larger resort/casino site and the 100 acre commercial center site north of Alta Drive, between Durango Drive and Rampart Boulevard. The proposed multi-family uses have been reduced from 105 acres to 60 acres. A 19.7 acre school site is designated on a site south of Charleston Boulevard. The following table indicates the proposed land uses and acreage for Phase II:

LAND USE	PHASE II ACREAGE	PERCENT OF SITE
Single Family	401	40.30%
Multi-family	60	6.02%
Neighborhood Commercial/Office	194.3	19.50%
Resort/Casino	56.0	5.62%
Golf Course/Drainage	211.6	21.24%
School	13.1	1.31%
Rights-of-Way	60.4	6.07%

At the Planning Commission meeting, staff indicated that the density of this Master Plan was within the average density of 7 units per acre recommended in the General Plan. Staff recommended, however, that Apple Lane should be extended to Durango Drive in conjunction with the shopping center site. The Planning Commission recommended approval of the Plan subject to the resort site and shopping center uses being posted with signs to indicate the proposed uses. THe Planning Commission also required that the surrounding property owners be notified when development plans for the resort and commercial center sites are submitted for review.

There were several protestants at the meeting who voiced their objection to the size of the shopping center site and the proposed destination resort site.

Planning Commission Recommendation: APPROVAL

Staff Recommendation: APPROVAL

PROTESTS: 5 (at meeting)

SEE ATTACHED LOCATION MAP

HAROLD P. FOSTER, DIRECTOR
DEPARTMENT OF COMMUNITY PLANNING
AND DEVELOPMENT

CITY COUNCIL MINUTES
MEETING OF

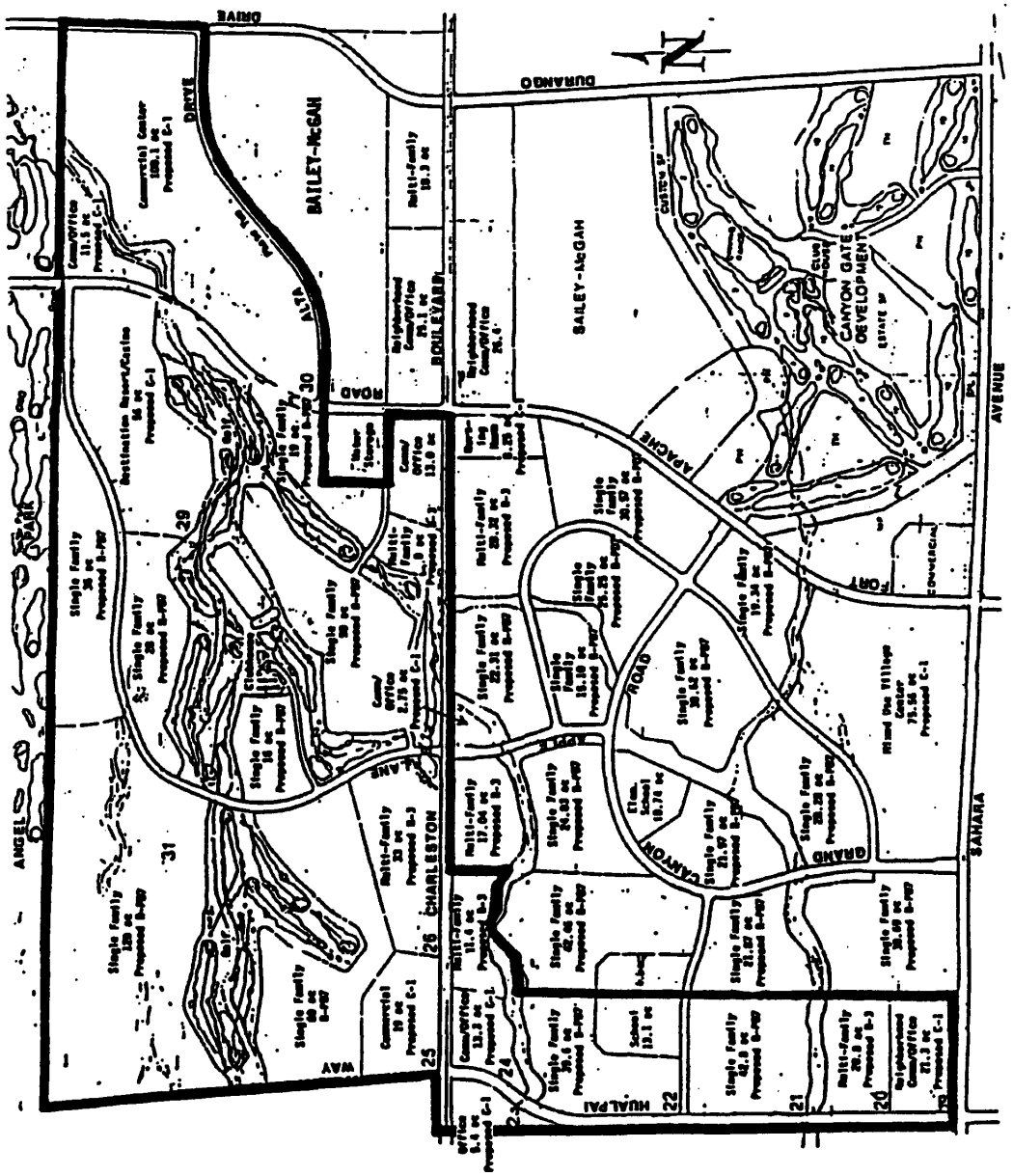
APR 04 1990

000650

CLV214946

9800

LOCATION MAP - ITEM X.G.3. - Master Development Plan Amendment



ITEM		ACTION
	X. COMMUNITY PLANNING AND DEVELOPMENT DEPT. (CONTINUED)	
1437 to 1438	G. ZONE CHANGE - PUBLIC HEARING 4. Z-17-90 - William Peccole 1982 Trust Request for reclassification of property located on the east side of Hualpai Way, west of Durango Drive, between the south boundary of Angel Park and Sahara Avenue. From: N-U (Non-Urban)(under Resolution of Intent to R-1, R-2, R-3, R-PD7, R-PD8, R-MHP, P-R, C-1, C-2 and C-V) To: R-PD3 (Residential Planned Development) R-PD7 (Residential Planned Development) and C-1 (Limited Commercial) Proposed Use: SINGLE FAMILY DWELLINGS, MULTI-FAMILY DWELLINGS, COMMERCIAL, OFFICE AND RESORT/ CASINO. Planning Commission unanimously recommended APPROVAL, subject to: 1. A maximum of 4,247 dwelling units be allowed for Phase II. 2. Conformance to the conditions of approval for the Peccole Ranch Master Development Plan, Phase II. 3. Approval of plot plans and building elevations by the Planning Commission for each parcel prior to development. 4. At the time development is proposed on each parcel appropriate right-of-way dedication, street improvements, drainage plan/study submittal, drainageway improvements, sanitary sewer collection system extensions and traffic signal system participation shall be provided as required by the Department of Public Works. - continued -	**NOLEN - APPROVED as recommended subject to the conditions.** **Motion carried with Higginson "abstaining" because his employer had done business with Mr. Peccole.** **Clerk to Notify and Planning to Proceed.** ***** WILLIAM PECCOLE, 2760 Tioga Pine Circle, was present. COUNCILMAN ADAMSEN said this was in conformance with the General Plan. The multi-family acreage was reduced from 100 to 60 and it will all be located on the major streets. No one appeared in opposition. There was no discussion. NOTE: The portion of this agenda which indicates this reclassification includes a request for R-PD3 zoning, in addition to R-PD7 and C-1, is a typographical error. The application and all other documentation correctly identifies the request as **R-3 (Limited Multiple Residence)**, R-PD7 and C-1.

APPROVED AGENDA ITEM

CLV214947

AGENDA City of Las Vegas

000652

CITY COUNCIL
COUNCIL CHAMBERS • 400 EAST STEWART AVENUE
PHONE 386-6011

ITEM	ACTION
X. COMMUNITY PLANNING AND DEVELOPMENT DEPT. (CONTINUED)	
G. ZONE CHANGE - PUBLIC HEARING	APPROVED - See page 49
4. Z-17-90 - William Peccole 1982 Trust (continued)	
5. Signs shall be posted on the resort/casino and commercial center sites to indicate the proposed uses.	
6. The surrounding property owners shall be notified when the development plans for the resort/casino and commercial center sites are submitted for review.	
7. The existing Resolution of Intent on this property is expunged upon approval of this application.	
8. Resolution of Intent with a five year time limit.	
9. Standard conditions 6-8 and 11.	
Staff Recommendation: APPROVAL	
PROTESTS: 3 (2 letters, 1 at meeting)	

APPROVED AGENDA ITEM

Lucy A. Dalton

G. ZONE CHANGE - PUBLIC HEARING

4. Z-17-90 - William Peccole 1982 Trust

This is a request to rezone 996.4 acres from N-U (under Resolution of Intent to R-1, R-2, R-3, R-PD7, R-PD8, R-MHP, C-1, C-2, P-R and C-V) to R-PD7, R-3 and C-1 for Phase II of Peccole Ranch. The proposal includes 401 acres for single family development at a density of 7 units per acre, 60 acres of multi-family at a density of 24 units per acre, 194.3 acres for commercial/office uses, 56 acres for a resort/casino, approximately 212 acres for a golf course and drainage, 13.1 acres for a school and approximately 61 acres for rights-of-way. The Master Development Plan Amendment for this property is Item X.G.3. on this agenda.

To the north is Angel Park in a C-V zone. To the west is vacant land in the County. There is N-U, R-PD7, R-PD20, R-3 and C-1 zoning to the east and south.

Last year, Phase I on the south side of Charleston Boulevard was approved to develop 3,150 dwelling units on 448.8 acres at a density of seven units per acre. Another zoning request expanded Phase I and allowed 931 additional dwelling units also at a density of seven units per acre.

Phase II of the proposed development will contain 4,247 dwelling units at an overall gross density of 4.3 units per acre for the entire 746.1 acres of residential zoning. This is below the 7 units per acre allowed in the General Plan.

Staff recommended approval of the application and the Planning Commission concurred, subject to the resort and commercial center uses being posted with signs that indicate the proposed uses. The Planning Commission also required that the surrounding property owners be notified when development plans for the resort/casino and the commercial center sites are submitted for review.

General Plan Conformance: Yes. Conforms to the density recommendations of the General Plan.

Planning Commission Recommendation: APPROVAL

Staff Recommendation: APPROVAL

PROTESTS: 3 (2 letters, 1 at meeting)

SEE ATTACHED LOCATION MAP

HAROLD P. FOSTER, DIRECTOR
DEPARTMENT OF COMMUNITY PLANNING
AND DEVELOPMENT

CITY COUNCIL MINUTES
MEETING OF

APR 04 1990

000654

CLV214950

9804

LOCATION MAP - ITEM X.G.4. - Z-17-90 - William Peccole 1982 Trust

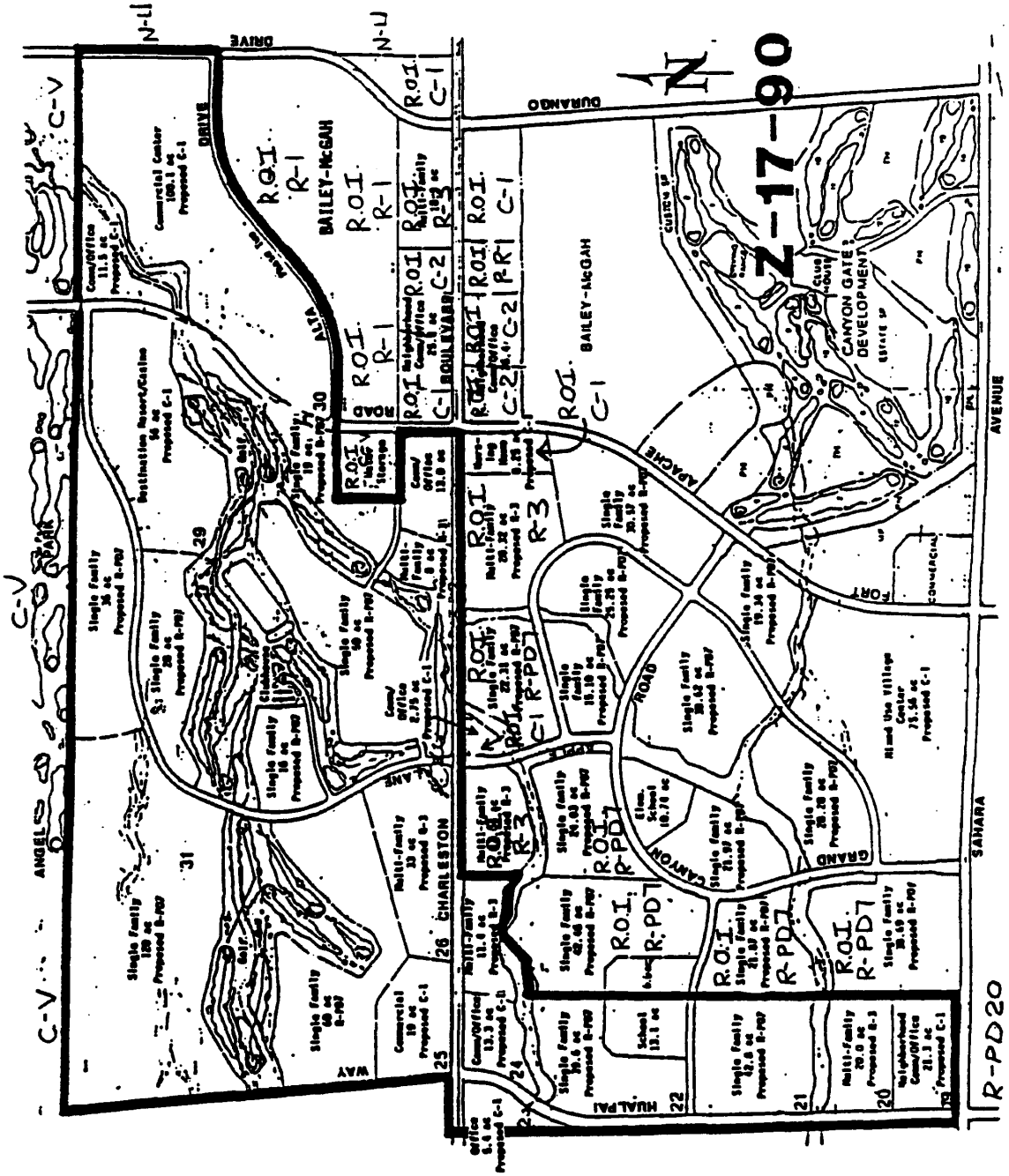


EXHIBIT “D”

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Attorneys for Plaintiff Landowners

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company; FORE STARS, LTD. 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, 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 **THIRD SUPPLEMENT TO PLAINTIFF 180 LAND COMPANY, LLC'S *AMENDED* RESPONSE TO DEFENDANT CITY OF LAS VEGAS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF**

TO: CITY OF LAS VEGAS, Defendants

TO: GEORGE F. OGILVIE III, its attorney

COMES NOW PLAINTIFF 180 LAND COMPANY, LLC, by and through its attorneys the Law Offices of Kermitt L. Waters, submit this Third Supplement to Defendant CITY OF LAS VEGAS' First Set of Requests for Production of Documents to Plaintiff.

DEFINITIONS AND GENERAL OBJECTIONS

1. "Nondiscoverable/Irrelevant" - The request in question concerns a matter that is not relevant to the subject matter of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence.

2. "Unduly burdensome" - The request in question seeks discovery that is unduly burdensome or expensive, taking into account the needs of the case, limitation on the party's resources, and the importance of the issues at stake in the litigation.

3. "Vague" - The request in question contains a word or phrase that is not adequately defined, or the overall request is confusing or ambiguous, and the Landowner is unable to reasonably ascertain what documents City of Las Vegas ("City") seeks in the request.

4. "Overbroad" and/or "Overly Broad" - The request in question seeks documents beyond the scope of, or beyond the time period relevant to, the subject matter of this litigation and, accordingly, seeks documents that are nondiscoverable/irrelevant and is unduly burdensome.

5. The Landowner objects to the City requests to the extent that they seek any information protected by any absolute or qualified privilege or exemption, including, but not limited to, the attorney-client privilege, common interest privilege, the attorney work-product exemption, accountant-client privilege, and/or the consulting expert exemption.

6. The Landowner objects to the City's requests on the grounds that they are excessively burdensome and that many of the documents requested may be obtained by the City from other sources more conveniently, less expensively, and with less burden.

7. Documents will be provided on the basis of documents available to and located by Landowner at this time. There may be other and further documents respecting the requests propounded by the City of which the Landowner, despite its reasonable investigation and inquiry, is presently unaware. The Landowner therefore, reserves the right to modify, supplement, amend, or enlarge any response with such pertinent additional documents as it may subsequently discover.

8. No incidental or implied admissions will be made by the responses. The fact that the Landowner may respond or object to any request, or part thereof, shall not be deemed an admission that the Landowner accepts or admits the existence of any fact set forth or assumed

by such request, or that such response constitutes admissible evidence. The fact that the Landowner responds to a part of any request is not to be deemed a waiver by it of its objections, including privilege, to other parts of the request in question.

9. The Landowner objects to any request to the extent that it would impose upon it greater duties than are set forth under the Nevada Rules of Civil Procedure. When necessary, the Landowner may supplement its responses to requests as required by the Nevada Rules of Civil Procedures.

10. Each response will be subject to all objections as to competence, relevance, materiality, propriety, and admissibility, and to any and all other objections on any ground that would require the exclusion from evidence of any statement herein if any such statements were made by a witness present and testifying at trial, all of which objections and grounds are expressly reserved and may be interposed at trial.

11. Any citation to a specific document or Bates-stamp range of documents is based on a reasonable review. Other individual documents, document duplicates, or other range of documents produced in this matter may additionally be responsive and shall not be deemed non responsive if not specifically indicated/identified.

12. The Landowner objects to the requests to the extent that they seek information that is unrelated and/or irrelevant to the value of the property City has taken through this action or property the Landowner alleges that City has taken prior to and through this action.

13. The Landowner objects to these requests because the requests impose an undue burden to the extent they ask the Landowner to identify documents already identified and produced in this action.

REQUEST TO PRODUCE NO. 1:

Produce all documents related to Plaintiff's acquisition of the Badlands Property including but not limited to offers, counteroffers, letters of intent, term sheets, purchase agreements, options, redemption agreements, rights of first refusal, indemnification agreements, non-disclosure agreements, joint venture agreements, access agreements, escrow files, and any documents related to any other transactions consummated in connection with Plaintiff's acquisition of the Badlands Property.

RESPONSE TO REQUEST TO PRODUCE NO. 1:

The Landowner objects to this request as irrelevant, it has no application to the City's taking of the Subject Property nor the value of the Subject Property. The Landowner further objects to this request because it is overbroad and unduly burdensome in that it seeks "any document" as such request does not describe the requested documents with reasonable particularity as required by Rule 34(b)(1). The Landowner further objections to this request as it may include privileged, proprietary and/or confidential information. Without waiving said objections, see documents Bates-stamped *LO 00004045-00004091.* Documents Bates-stamped *LO 00004063-00004079,* have been withheld due to being confidential (see privilege log).

1st Supplemental Response to Request No. 1:

Without waiving said objections, see documents Bates-stamped *LO 0018442-0022327.* Documents Bates-stamped *LO 0022328-0022899* have been withheld (see privilege log).

2nd Supplemental Response to Request No. 1:

Without waiving said objections and pursuant to a meet and confer with the City the Landowners searched for original emails at the City's request, however, the Landowners were unable to locate original email. The Landowner were able to locate the Letter of Intent which is produced herewith. See documents Bates-stamped *LO 0035970-0035972*.

3rd Supplement Response to Request No 1:

Without waiving said objections, please see documents Bates-stamped *LO 00004063-00004079 also produced as LO 000036807-000036823*.

REQUEST TO PRODUCE NO. 2:

Produce any and all documents related to the financing of Plaintiff's acquisition and proposed development of the Badlands Property including but not limited to loan documents, mortgages, deeds of trust, loan agreements, security agreements, pledge agreements, letters of credit, construction loans, promissory notes and other evidence of indebtedness, legal opinions, nondisturbance agreements, subordination agreements, guarantees, estoppel certificates, assignments, assumption agreements, contribution agreements, and any other documents related to any of the foregoing.

RESPONSE TO REQUEST TO PRODUCE NO. 2:

The Landowner objects to this request as irrelevant, it has no application to the City's taking of the Subject Property nor the value of the Subject Property. The Landowner further objects to this request because it is overbroad and unduly burdensome in that it seeks "any and all document" and "any other document" as such requests does not describe the requested documents with reasonable particularity as required by Rule 34(b)(1). The Landowner further objections to this request as it includes proprietary, privileged and confidential information. The Landowner further objects to this request as it seeks information to harass the Landowner by causing conflict with any lender. Without waiving said objections, see documents Bates-stamped *LO 00004092-00005015.* Documents Bates-stamped *LO 00004142-00004155; LO 00004416-00004479; LO 00004645-00004787; LO 00004789-00004854,* have been withheld as confidential (see privilege log).

1st Supplemental Response to Request No. 2:

Without waiving said objections, see documents Bates-stamped *LO 0016084-0018029*.

2nd Supplemental Response to Request No. 2:

Without waiving said objections, see documents Bates-stamped LO 00004142-00004155; LO00004416 - 00004428; LO 00004429-00004430; LO 00004431; 00004432-00004479; LO00004645- 00004711; LO 00004712 - 00004777; LO 00004778-00004787; LO00004789 - 00004798; LO00004799 - 00004802; LO00004803; LO 00004804-00004854; LO00006130 - 00006181; Also produced as LO 000036824-0037064.

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REQUEST TO PRODUCE NO. 3:

Produce copies of all documents disclosed to or reviewed by Plaintiff in connection with Plaintiff's due diligence investigations regarding the Badlands Property including but not limited to financial statements, interim financial statements, financial summaries, projections, title documents, title commitments, title policies (including any endorsements), title objection notices and responses thereto, appraisals, surveys, engineering reports, environmental studies (including any Phase I environmental site assessment or Phase II environmental site assessment reports), insurance policies, investigative insurance reports, disclosures, and any other reports, notes, internal memoranda, or correspondence related to Plaintiff's due diligence investigations.

RESPONSE TO REQUEST TO PRODUCE NO. 3:

The Landowner objects to this request as irrelevant as having no application to the City's taking of the Subject Property nor the value of the Subject Property. The Landowner further objects to this request as it may include proprietary, privileged and/or confidential documents. Without waiving said objections, see documents Bates-stamped *LO 00005016-00006085.*

1st Supplemental Response to Request No. 3:

Without waiving said objections, see documents Bates-stamped *LO 0025237-0029275*. Documents Bates-stamped *LO 0029276-0029411* have been withheld (see privilege log).

REQUEST TO PRODUCE NO. 4:

Produce all documents relating to the formation, organization, and any restructuring of 180 Land Co, LLC, Seventy Acres, LLC, Fore Stars, Ltd., and EHB Companies, LLC, including but not limited to articles of incorporation, articles of organization, operating agreements, bylaws, partnership agreements, joint venture agreements, contribution agreements, management agreements, affiliate agreements, minute books, resolutions, consents, certificates evidencing the membership interests, if any, schedules showing percentage interests of members and/or shareholders, and all amendments or modifications to the foregoing.

RESPONSE TO REQUEST TO PRODUCE NO. 4:

The Landowner objects to this request as irrelevant as having no application to the City's taking of the Subject Property nor the value of the Subject Property. The Landowner further objects

to this request as it includes proprietary, privileged and/or confidential information. Without waiving said objections, see documents Bates-stamped *LO 00006086-00006181*. Documents Bates-stamped *LO 00006130-00006181,* have been withheld as confidential (see privilege log).

REQUEST TO PRODUCE NO. 5:

Produce copies of all communications related to the Badlands Property between Plaintiff and any of Plaintiff's consultants, financial advisors, appraisers, surveyors, engineers, experts and other contractors, and any and all communications between and among any of the foregoing persons or entities.

RESPONSE TO REQUEST TO PRODUCE NO. 5:

The Landowner objects to this request as irrelevant as having no application to the City's taking of the Subject Property nor the value of the Subject Property. The Landowner further objects to this request as the definition of Badlands Property is vague and overly broad. The Landowner further objections to this request as it is not limited to the Subject Property, at issue in this litigation, and instead seeks discovery for other pending matters. The Landowner further objects to this request because it is overbroad and unduly burdensome in that it seeks "any communications" as such request does not describe the requested documents with reasonable particularity as required by Rule 34(b)(1). The Landowner further objections to this request as it may include proprietary, privileged and/or confidential information. The Landowner further objects to this request as it relates to documents that are protected by the attorney / expert privilege and requests documents that are non-discoverable under Nevada's Discovery rules, namely, experts and consultants that have been retained and may not be called to testify at trial. The Landowner further objects to this request as it may seek expert reports which are not currently due to be exchanged. Without waiving said objection, see documents Bates-stamped *LO 00008684-00009181*; *LO 00009850-00009859; LO 0010916-0011440.* Documents Bates-stamped *LO 00008691-00008711; LO 00008727-00008812* have been withheld as confidential (see privilege log).

1st Supplemental Response to Request No. 5:

Without waiving said objection, see documents Bates-stamped *LO 0029412-0033180.* Documents Bates-stamped *LO 0033181-0033196* and *LO 0033796-0033804* have been withheld (see

privilege log).

2nd Supplemental Response to Request No. 5:

Without waiving said objections and pursuant to a meet and confer with the City, the Landowners verified that none of the ULTRXY searches were limited to only 35-acres.

REQUEST TO PRODUCE NO. 6:

Produce copies of all communications between Plaintiff and any persons owning an interest in the Badlands Property, including but not limited to any of the former members and managers of Fore Stars, Ltd. and any other persons owning an interest in the Badlands Property, whether directly or indirectly through one or more trusts or entities.

RESPONSE TO REQUEST TO PRODUCE NO. 6:

The Landowner objects to this request as irrelevant as having no application to the City's taking of the Subject Property nor the value of the Subject Property. The Landowner further objects to this request as the definition of Badlands Property is vague and overly broad. The Landowner further objections to this request as it is not limited to the Subject Property, at issue in this litigation, and instead seeks discovery for other pending matters. The Landowner further objects to this request because it is overbroad and unduly burdensome in that it seeks "all communications" without any limitation on subject matter and/or time, such request does not describe the requested documents with reasonable particularity as required by Rule 34(b)(1). The Landowner further objections to this request as it may include proprietary, privileged and/or confidential information.

1st Supplemental Response to Request No. 6:

Without waiving said objections, see documents Bates-stamped *LO 0018030-0018441.*

2nd Supplemental Response to Request No. 6:

Without waiving said objections and pursuant to a meet and confer with the City, the document provided through Evernote on LO0023329 are produced herewith. See documents Bates-stamped *LO 0035904-0035969*.

REQUEST TO PRODUCE NO. 7:

Produce all documents that support Plaintiff's allegations that Plaintiff has vested rights.

RESPONSE TO REQUEST TO PRODUCE NO. 7:

The Landowners objects to this request to the extent it calls for a legal conclusion. Without waiving said objections, see the deeds recorded for the Subject Property, which the City is in possession of, see also the documents attached the Landowner's Motion for Summary Judgment, including but not limited to Exhibit 5, 7, 10, 24, 60, 66, 69, 71, 72, 83, 84, 85, 89, 107 also documents Bates-stamped *LO 00006182-00006184.* See also Plaintiff Landowners' Opposition to City's Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims and Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims, filed March 4, 2019, specifically, pp. 10-31.

REQUEST TO PRODUCE NO. 8:

Produce copies of all calculations of available units that can be developed under the Peccole Ranch Master Development Plan Phase II.

RESPONSE TO REQUEST TO PRODUCE NO. 8

The Landowner objects to the request as it misrepresents the title and intent of the document Bates-stamped CLV 038856-38877. The Landowner further objects to this request as it relates to documents which are attorney work product and/or that are protected by the attorney / expert privilege and requests documents that are non-discoverable under Nevada's Discovery rules, namely, experts and consultants that have been retained and may not be called to testify at trial. The Landowner further objects to this request as it may seek expert reports which are not currently due to be exchanged. Documents Bates-stamped *LO 00006185-6189,* have been withheld as attorney work product. (see privilege log).

REQUEST TO PRODUCE NO. 9:

Produce all communications with the Clark County Assessor regarding the Badlands Property including but not limited to communications between Plaintiff's lawyers and any employee or other representative of the Clark County Assessor.

//

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RESPONSE TO REQUEST TO PRODUCE NO. 9:

See documents Bates-stamped ~~*LO 00006190-00006215*~~[1] *- LO 00009862-0009904.* Documents Bates-stamped *LO 00009207-00009124; LO 00009223-00009226,* have been withheld as attorney-client privileged and confidential.

***1st Supplemental Response to Request to Produce No. 9*:**

Without waiving said objection, see documents Bates-stamped *LO 0033197-0033227*. Documents Bates-stamped *LO 000033228-0033795* have been withheld (see privilege log).

REQUEST TO PRODUCE NO. 10:

Produce all documents related to the maintenance and operation of the Badlands Property as a golf course by Plaintiff and its predecessors, including but not limited to financial statements, financial projections, business plans, budgets, statements of operating expenses, gross revenues and capital expenditures, leases, insurance documents, advertising and promotional expenses, costs of purchasing operating inventory, compensation and expenses of management staff and other employees, and any similar documents pertaining to any amenities or other activities customarily associated with or incidental to the operation of a golf course (e.g., sale or rental of golf related merchandise at a golf professional's shop, furnishing of lessons by a golf professional, operation of a driving range, and sales of food and beverages, including liquor sales).

RESPONSE TO REQUEST TO PRODUCE NO. 10

None, the Landowner never operated the golf course.

REQUEST TO PRODUCE NO. 11:

Produce all documents related to the development, negotiation and drafting of any master development agreement related to the Badlands Property including communications with city staff, by Plaintiff and it consultants and lawyers and among and between Plaintiff, its consultants and lawyers.

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[1] Due to Bates-Stamping errors Bates ranges have been abandoned and documents have been renumbered. This has been detailed in the Initial Disclosures. For purposes of this documents, the old bates numbers have been stricken and the new bates numbers have been added where appropriate.

RESPONSE TO REQUEST TO PRODUCE NO. 11:

The Landowner objects to this request as it seeks clearly privileged communication which will not be produced. The Landowner further objects to this request as it seeks documents already in the possession of the City. Without waiving said objections, see the following documents Bates-stamped:

~~LO 00006243-00006292~~- LO 0009905-0009954	*~~LO 00006297~~ - LO 0010008*
LO ~~00006297-00006411~~ - LO 0010009-0010250	*~~LO 00006245-00006282~~ - LO 0010870-0010907*
~~LO 00006293-00006296~~ - LO 0010004-0010007	*~~LO 00006297~~ - 0010008*
~~LO 00006297-00006298~~ - LO 0010009-0010010	*~~LO 00006298-00006346~~ - LO 0010011-0010059*
~~LO 00006299-00006347~~ - 0010060-0010108	*~~LO 00006347-0006348~~ - LO 0010109-0010110*
LO ~~00006348-00006370~~ - 0010111-0010133	*~~LO 00006349-00006411~~ - LO 0010257*
~~LO 00006421-00006427~~ - LO 0010251-0010257	*LO ~~00006425-00006444~~ - LO 0010258-0010277*
~~LO 00006429-00006444~~ - LO0010262-0010277	*~~LO 00006433-00006478~~ - LO 0010278-0010323*
~~LO 00006445-00006480~~ - LO 0010324-0010362	*~~LO 00006481-00006483~~ - LO 0010363-0010365*
~~LO 00006482-00006486~~ - LO 0010366-0010370	*~~LO 00006484-00006489~~ - LO 0010371-0010376*
~~LO 00006487-00006508~~ - LO 0010377-0010398	*~~LO 00006490-00006491~~ - LO 0010399-0010400*
~~LO 00006493~~ - LO 0010401	*~~LO 00006493-00006509~~ - LO 0010402-0010418*
~~LO 00006509-00006512~~ - 0010419-0010422	*~~LO 00006510-00006513~~ - LO 0010423-0010426*
~~LO 00006513-00006514~~ - LO 0010427-0010428	*~~LO 00006414-00006515~~ - LO 0010429-0010430*
~~LO 0000651500006516~~ - LO 0010431-0010432	*~~LO 00006516-00006564~~ - LO 0010433-0010481*
~~LO 00006517-00006574~~ - LO 0010482-0010539	*~~LO 00006565-00006596~~ - LO 0010540-0010571*
~~LO 00006575-00006597~~ - LO 0010572-0010594	*~~LO 00006597-00006629~~ - LO 0010595-0010627*
~~LO h00006598-00006644~~ - LO 0010628-0010711	*~~LO 00006667-00006703~~ - LO 0010712-0010748*
~~LO 00006667-00006704~~ - LO 0010749	*~~LO 00006245-00006282~~ - LO 0010870-0010907*
~~LO 00006294-00006296~~ - LO 0010913-0010915	

Documents Bates-stamped *LO 0010908-0010912,* have been withheld as attorney-client privileged and confidential (see privilege log).

***1st Supplemental Response to Request to Produce No. 11*:**

Without waiving said objections, see documents Bates-stamped *LO 0012535-0016083*.

REQUEST TO PRODUCE NO. 12:

Produce all documents showing Plaintiff's compliance with or attempts to comply with the conclusion of law in Order Granting Plaintiffs' Petition For Judicial Review entered by the Honorable Jim Crockett on March 5, 2018 in Eighth Judicial District Court Case No. A-17-752344-J that a major modification of the Peccole Ranch Master Plan is required before the City can approve land use applications on property within the master planned area.

RESPONSE TO REQUEST TO PRODUCE NO. 12:

The Landowner objects to this request for the reasons stated in the responses to request for admission that the Landowner submitted at least 2 GPAs and the Master Development Agreement that met and/or exceeded any City of Las Vegas major modification standards and procedures, which were denied by the City of Las Vegas. And, a City representative confirmed this 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." LO 0002467, lines 2353-2361. Moreover, the law does not require a major modification or General Plan Amendment when the zoning is already in place and you're not requesting a change in the zoning. LO 00000522 lines 1114-1115. See also documents Bates-stamped *LO 00007225-00007435*.

REQUEST TO PRODUCE NO. 13:

Produce all documents that support the allegations in the Complaint, including but not limited to:

a. The allegation contained paragraph 26 of the Complaint that the City is judicially estopped.

b. The allegation contained in paragraph 74 of the Complaint that Plaintiff made more concessions than any developer, other than statements made by Councilwoman Tarkanian.

c. The allegation contained in paragraph 87 of the Complaint (and others) that the City has a "scheme" to "specifically target" the Landowner's property and turn it into a city park.

d. The allegations contained in paragraphs 90, 98, 100 of the Complaint regarding the purpose and effect of Bill No. 2018-5.

e. The allegation contained in paragraph 102 of the Complaint regarding "routine over the counter request."

f. The allegation contained in paragraph 113 of the Complaint that the City would not accept Plaintiff's application for a technical drainage study.

g. The allegation contained in paragraph 127 of the Complaint regarding an allocation of $15 million to acquire the Badlands Property.

h. The allegation contained in paragraph 136 of the Complaint regarding "unprecedented lengths."

i. The allegations contained in paragraphs 144-148 and 158 of the Complaint.

j. The allegations contained in paragraphs 163 and 165 of the Complaint.

k. The allegation contained in paragraph 166 of the Complaint that any and all value in the 35-Acre Property has been entirely eliminated.

l. The allegation contained in paragraph 167 of the Complaint that the City's actions have completely deprived the Landowner of all economically beneficial use of the 35-Acre Property.

m. The allegation contained in paragraph 168 of the Complaint that open space or golf course use is not an economic use of the 35-Acre Property.

n. The allegations contained in paragraph 170 of the Complaint regarding a permanent physical invasion.

o. The allegation contained in paragraph 183 of the Complaint that the Landowner had specific and distinct investment backed expectations to develop the 35-Acre Property.

p. The allegation contained in paragraph 184 of the Complaint that the City advised Plaintiff of its vested rights.

q. The allegation contained in paragraph 185 of the Complaint that the City was expressly advised of Plaintiff's investment backed expectations.

r. The allegations contained in paragraph 190 of the Complaint that the City provided only one reason for denying Plaintiff's request to develop the 35-Acre Property.

s. The allegations contained in paragraph 199 of the Complaint that: (i) the City's actions exclude the Landowner from using the 35-Acre Property; (ii) that the City's actions

permanently reserve the 35-Acre Property for a public use; (iii) that the public is using the 35-Acre Property; and (iv) that such public use is expected to continue into the future.

t. The allegation contained in paragraph 200 of the Complaint that the City is preserving the 35-Acre Property for a future public use by the City.

u. The allegation contained in paragraph 201 of the Complaint that the City's actions have shown an unconditional and permanent taking of the 35-Acre Property.

v. The allegation contained in paragraph 208 of the Complaint that the City's actions substantially deprive the Landowner of the use and enjoyment of the 35Acre Property.

w. The allegation contained in paragraph 210 of the Complaint that the City's actions have rendered the 35 Acre Property unusable on the open market.

RESPONSE TO REQUEST TO PRODUCE NO. 13:

a: CLV000009, CLV006482-006484, ~~*LO 00007436-00007538*~~ *- LO 0010750-0010862*

b: None at this time

c: ~~*LO 00007532-00007538*~~ *- LO 0010863-0010869*

d: LO 00007539-00007573

e: None at this time

f: None at this time

g: CLV006482-006484

h: None at this time

i: CLV006482-006484, LO 00007574-00007588

j: LO 00007589-00007594

k: LO 00007595-00007599

l: LO 00007600-00007604

m: LO 00007605-00007607

n: LO 00008197-00008677

o: None at this time

p: LO 00008189

q: LO 00008190-00008192

r: LO 00008193-00008196

s: LO 00008197-00008677

t: CLV000009, CLV006482-006484

u: None at this time

v: LO 00008678-00008683

See also, Plaintiff Landowners' Opposition to City's Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims and Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims, filed March 4, 2019 and all exhibits attached thereto. This response will be supplemented as discovery continues.

REQUEST TO PRODUCE NO. 14:

Produce all documents related to water rights for the Badlands Property including but not limited contracts to sell and conveyance documents.

RESPONSE TO REQUEST TO PRODUCE NO. 14:

The Landowner objects to this request as the definition of Badlands Property is vague and overly broad. The Landowner further objects to this request as it is not limited to the Subject Property, at issue in this litigation, and instead seeks discovery for other pending matters. The Landowner further objects to this request because it is overbroad and unduly burdensome in that it seeks "all documents" as such request does not describe the requested documents with reasonable particularity as required by Rule 34(b)(1). Without waiving said objections, see documents Bates-stamped *LO 00009834-00009849*. Documents Bates-stamped *LO 00009835-00009841,* have been withheld as confidential (see privilege log).

***1st Supplemental Response to Request to Produce No. 14*:**

Without waiving said objections, see documents Bates-stamped *LO 0022900-0025230.* Documents Bates-stamped *LO 0025231-0025236* have been withheld (see privilege log).

REQUEST TO PRODUCE NO. 15:

Produce all documents related to encumbrances on the Badlands Property including but not limited easements, public dedications, rights of way, deeds of trusts, and deed restrictions.

RESPONSE TO REQUEST TO PRODUCE NO. 15:

The Landowner objects to this request as the definition of Badlands Property is vague and overly broad. The Landowner further objects to this request as it is not limited to the Subject Property, at issue in this litigation, and instead seeks discovery for other pending matters. The Landowner further objects to this request because it is overbroad and unduly burdensome in that it seeks "all documents" as such request does not describe the requested documents with reasonable particularity as required by Rule 34(b)(1). The Landowner objects to this request as overly broad as it is not limited in time. The Landowner further objects to this request as it seeks documents the City has already obtained from any title report it has pulled for the Subject Property. Without waiving said objections, see Response to Request to Produce Nos. 2 and 3 above.

THE LANDOWNER RESERVES THE RIGHT TO SUPPLEMENT AND/OR AMEND THESE RESPONSES AS DISCOVERY CONTINUES AND/OR AS DEEMED NECESSARY IN THIS MATTER

DATED this 8th day of December, 2020.

/s/ *Elizabeth Ghanem Ham*

ELIZABETH GHANEM HAM

In house counsel for the Landowners

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

CERTIFICATE OF SERVICE

Pursuant to NRCP5(b), I certify that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 8th day of December, 2020, I caused to be served the foregoing document(s)**:** **THIRD SUPPLEMENT TO PLAINTIFF 180 LAND COMPANY, LLC'S *AMENDED* RESPONSE TO DEFENDANTS CITY OF LAS VEGAS' FIRST SET OF REQUESTS FOR PRODUCTION TO PLAINTIFF** via the Court's electronic filing and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to the following:

MCDONALD CARANO LLP
George F. Ogilvie, III, Esq.
Amanda C. Yen, Esq.
Christopher Molina, Esq.
2300 W. Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com
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LAS VEGA CITY ATTORNEY'S OFFICE Bradford Jerbic, City Attorney
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/s/ Evelyn Washington
Evelyn Washington, an Employee of the
Law Offices of Kermitt L. Waters

EXHIBIT “E”

From: "C A Roberts" <caroberts@obsports.com>
Sent: Thu, 28 Aug 2014 13:23:15 -0800
To: "frank@ehbcompanies.com" <frank@ehbcompanies.com>
Cc: "Phil Green" <pgreen@obsports.com>
Subject: FW: Transition Checklist
Attachments: Transition Checklist - Badlands.doc

Hi Frank – I did speak with Phil Green today and we would be very interested in updating our proposal to manage the Badlands to include a guarantee by OB Sports to cover any operational loss in exchange for a slightly larger piece of the upside. As we briefly discussed, it would greatly help our analysis if we could obtain some historical information on the course. Attached is the information checklist we requested from Billy Bayne (and thus Par 4). Let's discuss what options may be available to still try and obtain the financials. I'll give you a call tomorrow if that's okay. Thank you!

C.A. Roberts III | President • Principal
OB Sports Golf Management
480.776.8102 direct **|** 480.948.1300 main

EXHIBIT “F”

From:	Elizabeth Ham (EHB Companies)
To:	George F. Ogilvie III; Amanda Yen; Christopher Molina
Cc:	Autumn Waters; James Leavitt; pbyrnes@lasvegasnevada.gov; sfloyd@lasvegasnevada.gov; bscott@lasvegasnevada.gov; Andrew W. Schwartz; Lauren Tarpey
Subject:	RE: 180 Land Co, LLC, et al. v. The City of Las Vegas (Case No. A-17-758528-J)
Date:	Tuesday, April 6, 2021 5:15:10 PM

Dear Mr. Ogilvie,

In response to your letter dated April 1, 2021, regarding production of documents, please note that the Landowner has fully complied with the Court Order. You are correct that Mr. Lowie has worked with the Peccole family for over 20 years and that there have been many transactions between them. As it relates to the 250 acres however, those documents are in your possession. Your attempt to bootstrap portions of counsel's argument/position during the hearing as evidence that more exists does not make it so. Moreover, contrary to your assertion, the complete transcript you reference (not the cut and paste portions you provide) along with the Mr. Lowie's declaration, and his previous deposition testimony as referenced at that hearing, are supported by those documents. As I stated in the hearing, "They support the 20-year history that from those transactions was born this right to purchase it . . ."

The only other clarification I can provide is that the "binders" I referenced are bound books that, again if you read the transcript, I had yet to fully review. In my review I found that those bound books contain construction and loan documents for the various projects referenced and in which you identify in your letter. Again, you are in possession of all of the documents relating to the transactions that in your own words "support your contention that you paid $45 million."

Best,

Elizabeth Ghanem Ham, Esq.
Counsel
EHB Companies
(702) 940-6936 (Direct)
(702) 610-5652 (Cellular)
eham@ehbccompanies.com

From: James Leavitt <jim@kermittwaters.com>
Sent: Friday, April 2, 2021 10:52 AM
To: Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>; Autumn Waters <autumn@kermittwaters.com>; Elizabeth Ham (EHB Companies) <eham@ehbcompanies.com>
Cc: PByrnes@LasVegasNevada.GOV; Seth Floyd <sfloyd@LasVegasNevada.GOV>;

bscott@lasvegasnevada.gov; schwartz@smwlaw.com; LTarpey@smwlaw.com; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Amanda Yen <ayen@mcdonaldcarano.com>; Christopher Molina <cmolina@mcdonaldcarano.com>
Subject: RE: 180 Land Co, LLC, et al. v. The City of Las Vegas (Case No. A-17-758528-J)

George:

Thank you for your letter. Elizabeth is out of town and will respond on Monday.

Have a great weekend.

Jim

Jim Leavitt, Esq.
Law Offices of Kermitt L. Waters
704 South Ninth Street
Las Vegas Nevada 89101
tel: (702) 733-8877
fax: (702) 731-1964

From: Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>
Sent: Thursday, April 1, 2021 4:34 PM
To: James Leavitt <jim@kermittwaters.com>; Autumn Waters <autumn@kermittwaters.com>; EHam@ehbcompanies.com
Cc: PByrnes@LasVegasNevada.GOV; Seth Floyd <sfloyd@LasVegasNevada.GOV>; bscott@lasvegasnevada.gov; schwartz@smwlaw.com; LTarpey@smwlaw.com; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Amanda Yen <ayen@mcdonaldcarano.com>; Christopher Molina <cmolina@mcdonaldcarano.com>
Subject: 180 Land Co, LLC, et al. v. The City of Las Vegas (Case No. A-17-758528-J)

Please find attached correspondence *sent on behalf of George F. Ogilvie III, Esq.*, with respect to the above-referenced matter. Should you have any questions, please contact Mr. Ogilvie directly.

Thank you,
Jelena Jovanovic | Legal Secretary to George F. Ogilvie III, Esq.,
and Amanda C. Yen Esq.

McDONALD CARANO

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Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiffs Landowner

DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability company, FORE STARS Ltd., DOE INDIVIDUALS I through X, 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, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **OPPOSITION TO THE CITY OF LAS VEGAS' MOTION FOR RECONSIDERATION OF ORDER GRANTING IN PART AND DENYING IN PART THE LANDOWNERS' MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES** Hearing Date: May 13, 2021 Hearing Time: 9:05 a.m.

I. INTRODUCTION

As has become the City's *modus operandi,* the City once again seeks a second bite at the proverbial apple. Indeed, this motion for reconsideration is just the latest example of the City's efforts to pile on unnecessary litigation expenses by continually relitigating and rearguing matters

which have already been decided to make it financially impossible for the Landowners to continue to pursue their constitutional right to just compensation for taking of their 35 Acres Property.[1]

The Court should summarily deny the City's motion because it indisputably raises no new issues of law or fact. Instead, the City simply reiterates the arguments raised in its opposition to the Landowners' motion to compel, which arguments the Court has already considered and rejected several times. With respect to the City's "clarification" regarding former Councilman Seroka's participation in the City Council's decision on the Landowners' development applications, that information raises no new issue of fact as it is public information that has always been readily available, it is also completely irrelevant. The City's entire argument in its latest motion to reconsider is, yet again, based on the City's false assertions that the Landowners only have a *Penn Central* regulatory takings claim. As has been argued to this Court ad nauseum, the Landowners are pursing three other causes of action unrelated to *Penn Central*, two of which deal with the totality of the Government's action,[2] not singularly the two votes of the City Council to deny staff approved development applications for the 35 Acre Property. This Court has aleady held that "[i]n determining whether a taking has occurred, Courts must look at the aggregate of all

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[1] Since the inception of this case, the City has refused to accept Court rulings filing motion after motion to reconsider and even then, ignoring rulings by the Court by continuing to make the same arguments regardless of the rulings.

[2] *See e.g. McCracken v. City of Philadelphia,* 451 A.2d 1046 (Pa.Cmwlth. 1982) (holding that a court should focus on the "cumulative effect" of government action and "[a] de facto taking occurs when an entity clothed with eminent domain power substantially deprives an owner of the use and enjoyment of his property" or where there is an 'adverse interim consequence' which deprives an owner of the use and enjoyment of the property." *Id.,* at 1050. Emphasis added.); *Robinson v. City of Ashdown*, 783 S.W.2d 53 (Ark. 1990) (when government **"**substantially diminishes the value of a landowner's land" just compensation is required. Id., at 56. Emphasis added.) *Mentzel v. City of Oshkosh*, 146 Wis.2d 804, 812-813, 432 N.W.2d 609, 613 (1988) (taking occurred when the City of Oshkosh denied the landowner's established liquor license because the City of Oshkosh desired to acquire the landowner's property and it sought to reduce the value of its acquisition.); *City of Houston v. Kolb*, 982 S.W.2d 949 (1999) (taking found where the City of Houston denied a subdivision plat submitted by the Kolbs for the sole purpose of keeping the right-of-way for a planned highway clear to reduce the cost for the State in acquiring the properties for the highway.).

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.'"Order filed May 15, 2019 at 8:10-13. Accordingly,whether former Councilman Seroka voted on the Landowners' development applications is not determinative of the discoverability of the information sought. And, while the City may wish to distance itself from Seroka, for many reasons, the fact is that Councilman Seroka is on record telling the surrounding neighbors (the public) that the Landowners' Property belongs to the surrounding neighbors and is their property to use for recreation and open space (ie the Landowners' Property is public property for public use). In accordance with Councilman Seroka's direction, the surrounding neighbors are in fact using the Landowners' Property for recreation and open space.

Seroka, as a Councilman, at a public meeting on June 21, 2018, told the Landowners' neighbors that the Landowners' Property belonged to the neighbors and the neighbors had the right to use the Landowners' Property as recreation and open space.

> "So when they built over there off of Hualapai and Sierra –Sahara –this land [250 Acres] is the open space. Every time that was built along Hualapai and Sahara, this [250 Acres] is the open space. Every community that was built around here, that [250 Acres] is the open space. The development across the street, across Rampart, that [250 Acres] is the open space….it is also documented as part recreation, open space…That is part recreation and open space…" *See Exhibit 1 at 26-27, Transcript of HOA Meeting at 17:23-18:15, attached to Plaintiff 180 Land Co. LLC's First Set Of Interrogatories To City Of Las Vegas.*

> "Now that we have the documentation clear, ***that is open space for this part of our community. It is the recreation space for this part of it***. It is not me, it is what the law says. ***It is what the contracts say between the city and the community, and that is what you all are living on right now***." *Id at 29-30, Transcript of HOA Meeting at 20:23-21:3 (emphasis added).*

And, in accordance with Councilman Seroka's direction, ***the neighbors are using the Landowners' Property***. *See Exhibit 2 at 83, Affidavit of Donald Richards and pictures attached thereto wherein Mr. Richards attests that the neighbors are using the Landowners' property and that they have told him they learned at an HOA meeting that the property "is our open space." Id.*

at §6 & 7. Accordingly, Councilman Seroka's involvement in the taking of the Landowners' property is very much in play, whether he voted on the Landowner's applications or not. Ultimately, the Court's discovery rulings were extremely reasonable and well within the scope of its broad discretion. Reconsideration should be denied.

As fully briefed previously, the Landowners are entitled to probe the City's defenses. As part of its litigation defense, the City has argued that its refusal to allow any use of the 35 Acre Property is not a taking because, according to the City's litigation defense, the 35 Acre Property is the required open space for the entire Peccole Ranch Master Plan ("PRMP") consisting of ±1,319 acres of land in Las Vegas.[3] Specifically, the City has argued that when the City permitted Mr. Peccole to develop 1,319 acres of the PRMP he "received approval to develop 4,247 residential units within the master planned area of [PRMP] ***conditioned upon setting aside*** 253 acres for golf course, open space and drainage."[4] The City claims that the 35 Acre Property is part of the "253 acres for golf course, open space and drainage." The City's litigation defense continues and claims that "[t]hrough the open space designation, [Mr. Peccole] 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." Id. At 11-13 emphasis added. Based on this litigation defense, the City claims that its denial of any and all development of the 35 Acre Property could not result in liability for a taking. Because this is a defense the City is advancing in this case, the Landowners are entitled to discovery on this defense.

Former City Councilman Seroka spoke at a Homeowners' Association meeting at Queensridge on June 21, 2018, wherein the transcript of his comments at this meeting clearly indicates that Mr. Seroka may have facts directly related to the City's litigation defense that the 35

[3] *See* City Opp. to Mot. to Determine Property Interest 8/18/20 at 7 fn. 2.

[4] City of Las Vegas Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims filed 2/13/19 at 9:7-9, emphasis added.

Acre Property was an open space dedication ("park set-aside") requirement that Mr. Peccole granted to obtain development approvals for other lands. For example, former Councilman Seroka stated:

> "[b]ecause I wasn't getting the answers, and like all of you, it didn't feel right, sound right, taste right, but we were hearing it as it was going on. So I went to school and I studied and studied the rules, and I learned as much as I could from the experts…" *Exhibit 1 at 22, Transcript of HOA Meeting at 13:7-11, attached to Plaintiff 180 Land Co. LLC's First Set Of Interrogatories To City Of Las Vegas*.
>
> "[i]t is very clear that the land formally known as the Badlands Golf Course is the agreed upon, approved, documented, required by the city open space and recreational area for this part of the city of Las Vegas. Far beyond that, far beyond Queensridge." *Exhibit 1 at 26, Transcript of HOA Meeting at 17:6-11*
>
> "So when they built over there off of Hualapai and Sierra—Sahara—this land is the open space. Every item that was built along Hualapai and Sahara, this is the open space. Every community that was built around here, that is the open space. The development across the street, across Rampart, that is the open space. It is documented, it is designated. You can track it through the system…" *Exhibit 1 at 26-27, Transcript of HOA Meeting at 17:23 -18:5*
>
> "At that time, it was generally accepted accounting principals [sp] and generally accepted percentage of acreage that is open space/recreational. It is 20 percent. What we have up here is the agreed upon roughly 20 percent." *Id at 28, Transcript of HOA Meeting at 10-14*.

Based on these recorded statements by Councilman Seroka, which are now similar to the City's litigation defense, the Landowners submitted Interrogatories to the City seeking information that Councilman Seroka may have based on his recorded statements.

1. Interrogatory No. 1

The Landowners have asked for the names, addresses, telephone numbers and a summary of the information that was allegedly provided by "experts" to Seroka.[5] It is unreasonable to argue

[5] **INTERROGATORY NO. 1:** For every "expert" that Councilman Seroka "learned as much as [he] could from" as referenced in the following statement: "So I went to school and I studied and studied the rules, and I learned as much as I could from the experts, and I did study and I learned a lot" (Page 13 lines 6-12 of the June 21, 2018 meeting transcript attached hereto), state the expert's name, address, telephone number and a summary of what Councilman Seroka "learned" from the expert.

that names, addresses, telephone numbers and a summary of the information provided somehow morphs into "mental impressions" when it comes from a former Councilman. (City Opp. at 5:12-6:2). The Landowners have recorded statements from Seroka that indicate he may have facts regarding the City's defense. The Landowners use the word *may* as it is possible that Seroka was not telling the truth, which is the point of discovery, to test veracity. If Seroka was not telling the truth, and did not have the information he claimed to have in this recorded statement, then the City is obligated to report the same in answering Interrogatories, not try and create a "mental impression" to avoid truthfully answering discovery. The City's "mental impression" claim is belied by Mr. Seroka's own statement that he gained the information from "experts" which is not his own "mental impression." Furthermore, NRCP 33(a)(2) provides that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact…" Accordingly, the Landonwers respectfully request that the City be prevented from continuing to hide this information.

2. Interrogatory No. 2

Through Interrogatory No. 2, the Landowners have asked what code, ordinance or regulation Seroka was referencing when he stated that there was a "20 percent" open space dedication requirement and who told him this information.[6] This is not seeking the "mental impression" of Seroka. Now, if Seroka made the whole thing up, then the Landowners are entitled

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[6] **INTERROGATORY NO. 2:**
State what City code, ordinance or regulation and/or Nevada statute required a "20 percent" open space dedication between 1985-2005 as referenced by Councilman Seroka in the following statement: "At that time, it was generally accepted accounting principals [sp] and generally accepted percentage of acreage that is open space/recreational. It is 20 percent. What we have up here is the agreed upon roughly 20 percent. It's in the ballpark." (Page 19 lines 10-14 of the June 21, 2018 meeting transcript). Also, state how Councilman Seroka came by this purported requirement, meaning who told him it was a "generally accepted" "open space/recreational" requirement "at that time."

to this as well. Accordingly, the Landowners' request that the City be prevented from continuing to hide this information or avoidance of truthfully responding to relevant discovery.

3. Interrogatory No. 3

Through Interrogatory No. 3, the Landowners seek the names and locations of the developments in Las Vegas wherein the City imposed the alleged "20 percent" open space dedication requirement as referenced by Seroka.[7] Again, names and locations are not "mental impressions." If there was a "20 percent" open space dedication requirement, then the City should easily be able to provide this information. The Landowners are entitled to this information. If there was never a "20 percent" open space dedication requirement, then the Landowners are entitled to know that (as is this Court) as it disproves the City's arguments that the 35 Acre Property was the open space dedication requirement imposed by the City on Mr. Peccole. Accordingly, the Landowners request that the City be prevented from continuing to hide this information.

It is telling how far the City will go to avoid answering interrogatories regarding former Councilman Seroka. No reasonable reading of the Landowners' Interrogatories 1, 2 and 3 could be interpreted to seek the "mental impressions" of Seroka. What appears more likely is that Seroka made up these statements and the City is avoiding answering interrogatories admitting that these statements by Seroka were false, baseless, and there is no evidence to support these false statements. It is important to remember that "[W]hether the governmental entity acted in bad faith may also be a consideration in determining whether a governmental action gives rise to a

[7] **INTERROGATORY NO. 3:**
Provide the name and location of every development in the City of Las Vegas that had an approximately 20 percent open space dedication requirement imposed on it by the City of Las Vegas between 1985 and 2005, as referenced by Councilman Seroka in the above provided statement.

compensable taking."[8] Accordingly, the City's latest motion to reconsider, which is nothing more than an effort to delay this matter, should be denied in its entirety.

II. ARGUMENT

A. The Court Has Already Considered *And Rejected* The City's Arguments

Reconsideration is only warranted "in very *rare* instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (emphasis added); *see also Powell v. Liberty Mut. Fire Ins. Co.,* 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3. A party seeking reconsideration of a ruling of the district court must do so pursuant to EDCR 2.24(b). Because the City raises no new issues of law or fact, the motion for reconsideration should be summarily denied.

In fact, the City does not even address the reconsideration standard, claiming instead that the Court's decision is clearly erroneous.[9] The City then simply reiterates the arguments raised in its opposition to the motion to compel, which arguments the Court has already considered and rejected numerous times. *See* Opp. to Mot. to Compel at pp. 5-8; *cf.* Mot. for Recon. at pp. 5-16. Even a cursory comparison of the City's initial opposition to the motion for reconsideration reveals

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

[9] Once again, the cases relied upon by the City are inapposite. In *Harvey's Wagon Wheel v. MacSween,* 96 Nev. 215, 606 P.2d 1095 (1980), rehearing was appropriate because the district judge to whom the first motion was made consented to the rehearing. No such circumstances exist here. In *Masonry & Tile Contrs. v. Jolley, Urga & Wirth Ass'n,* 113 Nev. 737, 941 P.2d 486 (1997), the district court reconsidered an arbitrability issue based on new clarifying case law, which fell squarely within the rigorous reconsideration standard. *Masonry & Tile Contrs.* is easily distinguishable given that the City's motion in this case is not based on any new issues of law or fact. Finally, *Trail v. Faretto,* 91 Nev. 401, 536 P.2d 1026 (1975), involved a renewed dispositive motion rather than a motion for reconsideration. Importantly, the district court granted the renewed motion to dismiss in that case based on a new issue of fact, namely that there had been a change of circumstances (i.e., an additional lapse of time) which warranted dismissal under NRCP 41(e).

no new issues of law or fact are raised. *See id.* For example, the Court already considered and rejected the City's arguments regarding the scope of a takings analysis and the relevancy of the discovery sought thereto. *See id.; see also* 03/25/2021 Order at pp. 2-3. Similarly, the Court considered and rejected the City's erroneous characterization of the discovery sought as former Councilman Seroka's privileged "mental impressions" or "subjective motivations." *See* 03/25/2021 Order at pp. 2-3*; cf.* Opp. to Mot. to Compel at pp. 8-9; Mot. for Recon. at pp. 6-12. Likewise, the Court considered and rejected the City's contention that it could not be compelled to answer Interrogatories 1, 2, and 3 based on the Court's resolution of the Landowners' petition for judicial review. *See* 03/25/2021 Order at pp. 2-3*; cf.* Opp. to Mot. to Compel at p. 4; Mot. for Recon. at pp. 13-16; Reply to Mot. to Compel at pp. 2-3, 5. Counsel's repeated efforts to avoid discovery obligations suggest an ulterior motive, namely, that the City has something to hide.

With respect to the City's "clarification" regarding former Councilman Seroka's participation in the City Council's decision on the Landowners' development applications,[10] that information raises no new issue of fact and is tied directly to the City's false argument that the Landowners' only have a *Penn Central* regulatory taking claims which has been rejected by this Court countless times. Rather, Seroka's start date on the City Council is public information that has always been readily available[11] and is irrelevant to the discovery sought as the Court must consider all the government actions in the aggregate not just two days. And while those two days (when City voted to deny any use of the Subject Property) are important, it certainly is not the end

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[10] As further "clarification" former Councilman Seroka, although not yet elected to office, opposed development of the 35 acre property chastising the Planning Commission as irresponsible and publicly exclaiming "over my dead body . . ." should development be allowed. *See Exhibit 3 at 246, Planning Commission Meeting February 14, 2017, page 32, lines 882 – 893.*

[11] *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 892 n.6 (9th Cir. 1994) (Evidence is not newly discovered if it was in the party's possession or could have been discovered with reasonable diligence.); *see also Bank of N.Y. Mellon v. Holm Int'l Props.,* No. 80178-COA, at *4-10 (Nev. App. March 12, 2021) (unpublished disposition) (district court properly disregarded newly tendered but previously available information).

of the City's actions which have taken the Landowners' Property. And, the City's argument is nevertheless spurious because, as further set forth below, whether former Councilman Seroka voted on the Landowners' development applications is not determinative of the discoverability of the facts and information sought. *See* Section II(B) *infra.* Quite simply, the City's motion falls short of the rigorous standard for reconsideration, is contrary to this Court's prior determination that Courts must look at the aggregate of all of the government actions (Order filed May 15, 2019 at 8:10-13) and should therefore be denied.

B. The Court's Decision Is Reasonable And A Proper Exercise Of Discretion

The district court has wide discretion in controlling pretrial discovery. *See MGM Grand, Inc. v. District Court*, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991) (*citing Hahn v. Yackley*, 84 Nev. 49, 54, 436 P.2d 215, 218 (1968)). Furthermore, decisions limiting discovery are generally upheld so long as they are reasonable. *See MGM Grand,* 107 Nev. at 69-70, 436 P.2d at 204 (trial court's decision to limit discovery was reasonable and therefore within scope of wide discretion).

Here, the Court's rulings on the Landowners' motion to compel are reasonable. The Landowners served Interrogatories 1, 2, and 3 related to the City's defense that there was allegedly an open space dedication requirement imposed on the 35 Acre Property long ago and, as a result, the City's actions cannot amount to a taking in this case. *See* Mot. to Compel at pp. 6-7; *see also* Reply to Mot. to Compel at pp. 3-4. The Landowners did so because former Councilman Seroka was making public statements indicating that he may know facts relevant to this defense. *See id.* The Court agreed, concluding that statements made by, and information in the possession of, an individual councilmember may be relevant and discoverable in an inverse condemnation action. *See* 03/25/2021 Order at pp. 2-3*; see also* Reply to Mot. to Compel at pp. 6-9. Importantly, the Court acknowledgd at that time that parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses. *See* NRCP 26(b)(1)(scope of discovery);

see also City of Las Vegas v. Foley, 747 F.2d 1294 (9th Cir. 1984) (court properly admitted evidence showing chain of events from which intent may be inferred, rather than merely subjective intent of individual legislators); *DR Partners v. Board of County Comm'rs,* 116 Nev. 616, 6 P.3d 465, (2000) (purely factual matters are not protected from disclosure, and public official or agency bears burden of establishing privilege).

Moreover, whether a governmental entity acted in bad faith is a consideration in determining whether government action gives rise to a compensable taking. *See, e.g., Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 487 (Tx. 2012*); see also City of Austin v. Teague*, 570 S.W.2d 389 (Tx. 1978) (recovery of damages warranted where the government's action against an economic interest of an owner is for its own advantage). And since Seroka is on record as a City Councilman instructing the public that the Landowners' Property is actually public property available for public use, and in accordance therewith, the public is using the Landowners' Property, whether Seroka voted on the Landowners' development application or not is irrelevant. As such, it was reasonable and therefore within the scope of the Court's broad discretion to compel the City to answer Interrogatories 1, 2, and 3.

Moreover, the Court denied the Landowners' motion to compel the City to answer Interrogatory 6, concluding that the amount and source of funds previously available for the acquisition of private land for parks is not relevant to this action. *See* 03/25/2021 Order at pp. 2-3. In other words, the City prevailed on some of the discovery issues, which further demonstrates the reasonableness of the Court's rulings. Rather than just truthfully answer the interrogatories, the City continues to evade discovery without any good faith, evidentiary basis for doing so.

In sum, this Court's order was correct and should stand. The fact the the City is unhappy with it and wants to distrance itself from Seroka is no justification for hiding clearly discoverable information. Reconsideration should be denied accordingly.

C. This Latest Motion to Reconsider is Simply a Delay Tactic Meant to Hide Discoverable Evidence and Increase litigation Costs for the Landowners

The City simply reiterated the arguments raised in its opposition to the Landowners' initial motion to compel, which arguments the Court has already considered and rejected . *See* Opp. to Mot. to Compel at pp. 5-8; *cf.* Mot. for Recon. at pp. 5-16. Even a cursory comparison of the City's initial opposition brief to its motion for reconsideration reveals no new issues of law or fact. *See id.* Despite its frivolity, the Landowners had no choice but to oppose the City's motion. The City should not be permitted to pile on unnecessary litigation expenses by continually relitigating and rearguing matters which have already been decided to make it financially impossible for the Landowners to pursue their constitutional right to just compensation for taking of their Property.

III. CONCLUSION

For the foregoing reasons, the City's motion for reconsideration should be denied in its entirety and full and complete responses to the Landowners' Interrogatories 1, 2, and 3 should be ordered forthwith.

DATED this 22nd day of April, 2021.

LAW OFFICES OF KERMITT L. WATERS

/s/ Autumn Waters
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I hereby certify that on the 22nd day of April, 2021, I caused a true and correct copy of the foregoing **OPPOSITION TO THE CITY OF LAS VEGAS' MOTION FOR RECONSIDERATION OF ORDER GRANTING IN PART AND DENYING IN PART THE LANDOWNERS' MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES** to be submitted electronically for filing and service via the Court's E-Filing system on the parties listed below. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

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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 **NOTICE OF ENTRY OF ORDER GRANTING CITY'S MOTION TO RECONSIDER AND COMPELLING THE CITY TO ANSWER INTERROGATORIES**

PLEASE TAKE NOTICE that the Order Granting City's Motion to Reconsider and Compelling The City to Answer Interrogatories ("Order") was entered in the above-captioned case on June 1, 2021.

///

///

A true and correct copy of the Order is attached hereto.

DATED this 1st day of June, 2021.

LAW OFFICES OF KERMITT L. WATERS

/s/ Kermitt L. Waters
KERMITT L. WATERS, ESQ.
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MICHAEL SCHNEIDER, ESQ.
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Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 1st day of June, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the **NOTICE OF ENTRY OF ORDER GRANTING CITY'S MOTION TO RECONSIDER AND COMPELLING THE CITY TO ANSWER INTERROGATORIES** was served on the below via Court's electronic filing service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to the following:

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ORD

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Plaintiff, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	Case No. A-17-758528-J Dept. No. XVI **ORDER GRANTING CITY'S MOTION TO RECONSIDER AND COMPELLING THE CITY TO ANSWER INTERROGATORIES** Date of Hearing: May 13, 2021 Time of Hearing: 9:00 a.m.

Defendant City of Las Vegas' Motion for Reconsideration of Order Granting in Part and Denying in Part the Landowners' Motion to Compel the City to Answer Interrogatories, having come before the Court for hearing on May 13, 2021, James J. Leavitt, Esq. and Elizabeth Ghanem Ham, Esq. appeared on behalf of Plaintiff Landowners 180 Land Co. ("Landowners"), George F. Ogilvie III, Esq. and Andrew W. Schwartz, Esq. appeared on behalf of the City of Las

Vegas ("City").

In a prior order the Court held as follows:

FINDINGS REGARDING INFORMATION REQUESTED FROM SEROKA

1. The Landowners sought information related to public statements made by former Councilman Seroka in Interrogatories 1, 2 and 3 which provide as follows:

> **INTERROGATORY NO. 1:**
> For every "expert" that Councilman Seroka "learned as much as [he] could from" as referenced in the following statement: "So I went to school and I studied and studied the rules, and I learned as much as I could from the experts, and I did study and I learned a lot" (Page 13 lines 6-12 of the June 21, 2018 meeting transcript attached hereto), state the expert's name, address, telephone number and a summary of what Councilman Seroka "learned" from the expert.
>
> **INTERROGATORY NO. 2**:
> State what City code, ordinance or regulation and/or Nevada statute required a "20 percent" open space dedication between 1985-2005 as referenced by Councilman Seroka in the following statement: "At that time, it was generally accepted accounting principals [sp] and generally accepted percentage of acreage that is open space/recreational. It is 20 percent. What we have up here is the agreed upon roughly 20 percent. It's in the ballpark." (Page 19 lines 10-14 of the June 21, 2018 meeting transcript). Also, state how Councilman Seroka came by this purported requirement, meaning who told him it was a "generally accepted" "open space/recreational" requirement "at that time."
>
> **INTERROGATORY NO. 3:**
> Provide the name and location of every development in the City of Las Vegas that had an approximately 20 percent open space dedication requirement imposed on it by the City of Las Vegas between 1985 and 2005, as referenced by Councilman Seroka in the above provided statement.

2. The City objected to these interrogatories arguing, inter alia, that this information sought was the mental impressions of the councilman, that the City can only act by way of its entire City Council and that the information sought was not relevant to the Landowners' claims or the City's defenses.

3. The Landowners countered that the information sought is relevant to one of the City's defenses and that if Seroka had no information to support his claims, yet made public statements to the contrary, then that could be relevant to the Landowners' claims.

CONCLUSION REGARDING INFORMATION SOUGHT FROM SEROKA

1. The information sought in Interrogatories 1, 2 and 3 is discoverable. While official City acts requires a vote of the City Council, statements made by and information in the possession of individual councilmember could certainly be relevant and is discoverable.

Based on these findings, the Court ordered the City to respond to Interrogatories 1, 2, and 3.

The City requested that this Court reconsider this order.

The Court having reviewed the papers and pleadings on file, heard argument of counsel, and for good cause appearing hereby **GRANTS** the City's motion to reconsider, **DENIES** the City's request, and orders the City to respond to Interrogatories 1, 2, and 3 within one week of this order being filed.

Dated this 1st day of June, 2021

E49 C60 A576 15A9
Timothy C. Williams
District Court Judge

NS

Respectfully Submitted By:

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James Jack Leavitt*
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DISTRICT COURT
CLARK COUNTY, NEVADA

180 Land Company LLC, Petitioner(s) vs. Las Vegas City of, Respondent(s)	CASE NO: A-17-758528-J DEPT. NO. Department 16

AUTOMATED CERTIFICATE OF SERVICE

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10/4/2021 3:01 PM
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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, Petitioner, vs. CITY OF LAS VEGAS, Respondent.	CASE#: A-17-758528-J DEPT. XVI

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS
DISTRICT COURT JUDGE
THURSDAY, AUGUST 19, 2021

RECORDER'S TRANSCRIPT STATUS CHECK

APPEARANCES VIA BLUEJEANS:

For the Petitioner:	JAMES J. LEAVITT, ESQ. ELIZABETH M. GHANEM, ESQ.
For the Respondent:	CHRISTOPHER MOLINA, ESQ. PHILIP R. BYRNES, ESQ. REBECCA L. WOLFSON, ESQ.

RECORDED BY: REBECCA GOMEZ, COURT RECORDER

Case Number: A-17-758528-J

Las Vegas, Nevada, Thursday, August 19, 2021

[Case called at 9:29 a.m.]

THE COURT: All right. We're going to move on. Next up happens to be page 5 of the calendar, and that's 180 Land Company v. City of Las Vegas. Let's go ahead and set forth our appearances for the record.

MR. LEAVITT: Good morning, Your Honor. On behalf of the Plaintiff 180 Land landowner, James J. Leavitt.

MS. GHANEM: Good morning, Your Honor. On behalf of Plaintiff landowners, Elizabeth Ghanem, in-house counsel.

MR. MOLINA: Good morning, Your Honor. Chris Molina on behalf of the City of Las Vegas.

MR. BYRNES: Good morning, Your Honor. Philip Byrnes on behalf of City of Las Vegas.

MS. WOLFSON: And, good morning, Your Honor. Rebecca Wolfson also on behalf of the City of Las Vegas.

THE COURT: Okay. Does that cover all appearances? I guess it does.

Anyway, it's my understanding this is a status check regarding trial readiness. Tell me, where are we at on this matter?

MR. LEAVITT: Yes, Your Honor. James J. Leavitt on behalf of the Plaintiff landowner. As you'll recall, there was several continuances in this matter. There is a trial, which is currently set for October 25th. Pursuant to NRS 37.055, this eminent domain action was

set first on the October 25th stack, because it has preferential trial setting. So that's where we are. And as far as the landowners are concerned, Your Honor, we're ready to appear at that trial. We have completed discovery with the City of Las Vegas.

One item that we would need to consider at this hearing, Your Honor, is as you'll recall there's a two-step process in all of these inverse condemnation cases. The first is to determine the property interest that the landowners had, and you entertained --

THE COURT: And I don't want to cut --

MR. LEAVITT: -- that motion --

THE COURT: Mr. Leavitt, I don't want to cut you off, but I was actually thinking the exact same thing as you were beginning to discuss that issue, and that's a trial protocol issue, right? And so, I just wanted to make --

MR. LEAVITT: Exactly.

THE COURT: Yeah, I was thinking that exact same issue. So, anyway, go ahead, sir, I want to hear what you have to say.

MR. LEAVITT: Yeah, so the protocol for all these inverse condemnation cases is that first the Court determines the property interest issue that the landowners had prior to any governmental interference with that property interest. We filed a motion on that issue, there was significant argument. The Court entered an order, and the date of that order was October 2020.

Subsequent to that decision being made, the landowners then filed the motion to determine take. Obviously, that motion to

determine take had to be filed after the motion to determine property interest was filed, because you can't determine whether the property has been taken without defining that property. Since this Court has already defined the property interest, the landowners brought the motion to determine whether that property interest was taken. That motion was filed in March of this year, approximately four months ago.

As you'll recall, the City of Las Vegas filed a 56(d) motion and requested that it be given an opportunity to, number one, visit the landowners' property; number two, take the deposition of Mr. Lowie; and, number three, that discovery close. All three of those things have now occurred.

And so what we would request from this status conference today is that that motion to determine take be put back on calendar, and that the City be given an opportunity to file an opposition to that motion to determine take within the next seven to ten days, and that we set a hearing date for that motion to determine take for either the week of September 5th or the week of September 12th. We've done this argument several times before. We've done the motion to determine take argument several times before, and we've always set a special setting. We anticipate that argument taking approximately three to four hours on the motion to determine take. It will be an evidentiary hearing where we would present the facts, playing out the City's actions that resulted in the taking of that underlying property interest.

Just a matter of procedure, as you'll recall, the City of Las Vegas asked for that 56(d) continuance, so it could do those three things.

In the meantime, Your Honor, the City filed motions for summary judgment in the three other cases prior to completing those three items that it wanted to do to determine the take. So, Your Honor, we think the City is ready to respond, since the City filed motions to determine take in those other three cases even prior to completing the three items they stated to this Court it needed to complete prior to appearing on that motion to determine take.

So, Your Honor, in short, what we would like to do is keep our October 25th trial date as it exists. I understand the concerns that you have communicated to the other parties. I fully understand that. In the meantime, we can schedule the motion to determine take. We can have briefing done. And hopefully, we can have that motion to determine take resolved by the first or second week in September.

At that time, we can analyze whether we go forward with the trial or not because the City has not produced any expert reports. They didn't exchange any initial expert reports. They didn't -- they have no valuation evidence for the relevant date of valuation. Therefore, we believe that the motion to determine take may very well resolve all the issues in this case. I'm willing to respond to any other questions that this Court may have.

THE COURT: Mr. Leavitt, I don't have any questions at this time, sir.

MS. GHANEM: Thank you, Your Honor. This Elizabeth Ghanem on behalf of the Plaintiffs. I just want to add one other thing. We would need a special setting, I believe, Jim, if I'm right, on the

summary judgment hearing. And so we would ask that it be set at a separate time. And I think we're estimating maybe two or three hours for that hearing. Am I correct, Mr. Leavitt?

MR. LEAVITT: Yes, Ms. Ghanem. And this is James Leavitt again on behalf of the landowner. So I apologize, Your Honor. So what we would like is for that motion to determine take be scheduled either the first or second week in September for a special setting. Like I said, it's already been fully briefed by the landowners. This is probably the third or fourth time that this issue has been fully briefed. And so the City has had an opportunity to oppose this. It's had our brief for approximately four months on this issue and, of course, it's responded to these same issues in the other three cases.

And so we believe seven to ten days is sufficient time for the City to respond, and if we could have that date set the first or second week in September for that special evidentiary hearing. I think that would be adequate time for everybody to resolve this necessary motion in this case.

THE COURT: Okay. Thank you, sir. And let's hear from the City.

MR. MOLINA: Thank you, Your Honor. This is Chris Molina on behalf of the City. I'll just respond briefly to one comment that Mr. Leavitt made about this case being entitled to statutory priority under the eminent domain statutes. This is not an eminent domain case. This is an inverse condemnation case. The procedure is entirely different. We did not, you know, commence an action against the Plaintiffs to

condemn their property. The City is being sued for inverse condemnation. The policy of that statutory priority for eminent domain cases, which this is not, is based on the idea that the Government needs to be able to act efficiently and immediately, you know, take, you know, possession of the property and condemn the property for public improvement. This is not that type of case. And so the statutory priority argument that Mr. Leavitt is making is simply not applicable.

With regard to the motion to determine take that was filed in March 26th, 2021, you will recall that the City filed a motion pursuant to Rule 56(d) for a continuance. That motion was filed on order shortening time because the City did not feel that it should have, you know, been forced to file an opposition without having an opportunity to complete discovery. And as we mentioned in the status report that was filed yesterday, that there was ongoing discovery issues at the that that motion to determine take was filed and, therefore, the City, you know, filed a 56(d) motion on order shortening time.

Now the order that was issued on May 3rd, 2021, the minute order basically indicated that the motion to determine take, the hearing was vacated, and that the developer would be free to refile the motion to determine take after completion of discovery. The discovery to close occurred on July 26th, 2021, but we had to take one deposition after the close of discovery, Mr. Lowie, just last week -- last Thursday, actually, which was the last deposition that we had taken.

So discovery is now closed and, you know, we've concluded the discovery that we were permitted to complete in this case. There's

still some, you know, discovery issues that the City feels were not fully resolved, but, you know, at this point in time, it would appropriate for the Plaintiff to refile that motion to determine take, and the City would just request that it be heard and briefed in the normal course, as opposed to what Mr. Leavitt is suggesting right now.

And one other thing is that the City also intends to file a motion for summary judgment, you know, prior to the August 25th deadline, most likely before the end of the week, and we think that it makes sense for the Court to establish a briefing schedule and set hearings for this. Our preference would be to set a hearing out in September or possibly mid-October after, you know, full briefing has occurred, and the Court has had an opportunity to review everything. We think that, you know, all issues in this case should be decided by summary judgment and that, you know, after we get through the summary judgment hearings, we would ask the Court to basically enter a new scheduling order, you know, based on what issues may possibly be left for decision.

THE COURT: Okay. Is that all from the City? Appears to be. Mr. Leavitt.

MR. LEAVITT: Yes, Your Honor, just a brief response. In regards to -- I'll just say for eminent domain actions and inverse condemnation cases, and as far as the statutes apply in inverse condemnation cases, in the 1985 *County of Clark v. Alper* decision, the Nevada Supreme Court held that inverse condemnation cases are the constitutional equivalent of an eminent domain case and, therefore, the

same rules and procedures apply to both cases. Therefore, when this Court set this on a preferential trial setting under NRS 37.055, it was properly following the law that applies to inverse condemnation cases.

Secondly, as far as continuing the hearing on the landowner's motion, Your Honor, we have a set procedure in the State of Nevada for deciding these cases under *ASAP Storage* and under the *Sisolak* case. The landowner is required to bring the motion to determine the property interest and also the motion to determine the take. We've strictly followed that procedure and complied with that procedure with the City of Las Vegas having that second motion to determine take for four months now.

As you'll recall, we also tried to have that motion heard prior to that date. We believe that there is a significant delay that's occurring. As you'll recall, the City of Las Vegas asked for its 56(d) motion because it said it could not respond to the motion to determine take until it had completed those three things. Those three things are done. However, the City filed a motion to determine take in the other three cases before those three things were completed. I don't know what the City's tactic is and why it's trying to delay the motion to determine take in this case, but we see a significant delay occurring.

The motion has been pending for four months. We didn't refile because we thought it would be better to come to this Court, set a briefing schedule, and get an evidentiary hearing date set. And so that's what we're asking for. I'm not sure what other motions the City may be filing. I believe it's just going to be a motion to determine take. Having

said that, Your Honor, the motion to determine take should be heard as soon as possible because, as I stated, it's been pending for four months, and it's one of the required motions that's necessary in these inverse condemnation cases. Again, I don't know what other motions the City is going to file, but those motions should not delay the required motion that's necessary before this Court.

So, Your Honor, we would ask that the City be given seven to ten days to respond. That we would reply, obviously, within the appropriate time, and then have an evidentiary hearing for approximately three hours the week of September 5th or September 12th, on that underlying issue. If the City has other issues that it wants to file, it can bring those in the normal course, Your Honor, but this is a motion that we have contemplated and has been pending for some time. Thank you, Your Honor.

THE COURT: I'm just checking with my court clerk right now, counsel.

MR. LEAVITT: Thank you.

[Court and Clerk confer]

THE COURT: All right. This is what we'll do. And, Mr. Leavitt, you are correct, this motion has been pending for over four months. I did grant the Rule 56(d) relief for a couple reasons. Number one, the argument made by the City as to the necessity to complete discovery in order to appropriately respond, first of all. And, second, I don't mind telling you this, I like taking appellate issues off the table, all right. At the end of the day, that's gone now. I gave them the time.

Because that's one thing I think our Nevada Supreme Court, and rightfully so, should be concerned about, due process issues, right.. Judge, did you pull the trigger too quickly? And so, that's why I did that. I don't mind telling you this.

So what I'm going to do is this. I'm going to go ahead and first give you a date, and this is the quickest date I can give you because of my calendar. But we're going to set this for 1:30 in the afternoon, and the date will be September 23rd, 2021. I'm not -- I'm sorry, Mr. Leavitt, I'm not as optimistic as you are that it's going to take two to three hours. I don't think so. I can see it going two or three days, potentially. Maybe not two or three, but it's going to go a day, I think. And what we'll do at that time, assuming we don't finish, we'll just reset it. But that's what we're going to do.

And so my next question from the City is this, and the ticker is going to start running today, sir. Is ten days enough to get your -- ten days from today enough -- and that's the time under the rule, right, ten days?

THE CLERK: Yes.

THE COURT: Yeah. Is that enough time to get your opposition on file?

MR. MOLINA: I think ten days is fine. We had proposed a briefing schedule that's based on the existing deadline to file dispositive motions because, as I said before, we do intend to file our motion for summary judgment within the next few days, and then just add oppositions and reply briefs from both sides due on the same date.

THE COURT: Yeah.

MR. MOLINA: So I would prefer to have them synced together so that all issues can be, you know, heard at one hearing. And I agree with you, Your Honor, that it's unlikely that anything will get done in just one afternoon.

THE COURT: It's not going to happen.

MR. MOLINA: That was our proposal in our status report. The other thing that I will mention is that one of the attorneys that's working on this case is going to be in trial for two weeks starting September 20th, 2021, so that September 23rd date would conflict with that.

THE COURT: All right. Okay.

[Court and Clerk confer]

THE COURT: And you see the problem is, I can tell you this right now, I mean, I would love to go earlier, but we just don't have the room. And what we have going on, we have two issues. Number one, we have a lot of afternoon sessions, and then we have a bench trial. And bench trials are going. They are. And, surprisingly, we've been trying those remotely, and I think it's been quite successful. It really has. It kind of surprised me.

So where do we go from here, because I want to get this matter done. And here's my concern, and it really is a concern. I mean, I understand that we have a close of discovery coming up very quickly in this matter, but this has been pending for four months, right, and I granted a Rule 56(d) relief because I feel it's very important to give both

sides a full and fair opportunity to work their cases up. But now, I have to hear this motion, right.

MR. LEAVITT: Yes, Your Honor. And if I may interject here. James J. Leavitt on behalf of 180 Land. We also will have people out at that time, however, Your Honor, the two individuals that will be arguing the motion and presenting the evidence, myself on behalf of the landowner and Andrew Schwartz on behalf of the City of Las Vegas, are available during that time. I understand that there might be other attorneys who are not available --

THE COURT: Okay.

MR. LEAVITT: -- including from our office, but all of the attorneys who will -- who actually have, in the past, presented these arguments are available for that September 23rd date.

THE COURT: All right. And that's the status of the case, right?

MR. LEAVITT: That's correct, Your Honor.

THE COURT: Okay.

MR. MOLINA: Yes, Your Honor.

THE COURT: What we're going to do --

MR. LEAVITT: So my point is, Your Honor --

THE COURT: Yes.

MR. LEAVITT: Oh, go ahead. Sorry, Your Honor. Go ahead.

THE COURT: Yeah, we're going to go ahead and go with that 23rd date. And my law clerk told me, in all probability we'll bleed into the 30th, if necessary, is that correct?

[Court and Clerk confer]

THE COURT: Oh, okay. Well, this might work out pretty well, because we'll have that Thursday -- oh, yeah, we have to go with this date, because we have Thursday, the 23rd, and I'm also blocking out Friday, the 24th? Is that correct, Mr. Court Clerk?

THE CLERK: Yes, Your Honor.

THE COURT: And so I would hope -- this is potentially really good and that's the time I have available because I know it's going to go longer than two to three hours, but I don't think it will go more than a day-and-a-half. And so, hypothetically, we can have all this done that week.

MR. LEAVITT: I agree with that. On behalf of James -- James J. Leavitt on behalf of the 180 Land landowners. I agree, Your Honor, and I believe we can get it done in that day-and-a-half. And I appreciate the scheduling for that, Your Honor.

THE COURT: Okay. And that's the best I can do, everyone. But that's what we're going to do. That's going to be the date for the -- we're going to recalendar you motion, Mr. Leavitt. It's going to be heard on Thursday, September 23rd, 2021, at 1:30 p.m. And assuming we need more time, and I can almost guarantee you we will, we will continue that until Thursday -- I'm sorry, Friday, September 24th, 2021, and we'll have the whole day.

MR. LEAVITT: Thank you, Your Honor. And would you like us to prepare an order on that?

THE COURT: Prepare an order. And as far as the City is

concerned, the City can go ahead and file whatever motions they feel would be appropriate, right, prior to the close of the dispositive motion deadline. If they can't, they can always seek the appropriate relief under the rules. That's kind of how we do it, right.

MR. LEAVITT: Right. Sounds good, Your Honor.

THE COURT: Okay. And, Mr. Leavitt --

MR. LEAVITT: And we'll prepare the order and circulate it.

THE COURT: -- prepare the order and circulate it.

MR. MOLINA: Your Honor.

THE COURT: Yeah.

MR. MOLINA: Your Honor, if I could just ask one quick point of clarification. Regarding the current trial stack, it's October 25th, and what we had suggested in our status report would be to have another trial readiness status check hearing after the hearings on dispositive motions have --

THE COURT: Oh, thank you.

MR. MOLINA: -- been decided, so that we know what the issues are that have been narrowed for --

THE COURT: Certainly.

MR. MOLINA: -- trial, and at that point in time we would request additional time to file motions in limine.

THE COURT: Well, sir, and thank you for bringing that up. I get it. We'll have another -- we'll do it this way. We don't need to set any new dates. On the 24th of September, 2021, and that will be the following Friday, in addition to continuing -- because we'll have

argument that day. We'll also have a trial readiness discussion on the 24th, and that will be on the calendar too. Because after the dust settles, we do have to decide, potentially, if there's a necessity for a jury trial and how it's going to be conducted.

I will say this, and I think it's important for everyone to understand this, and it's a really big issue, as far as I'm concerned. Pre-COVID -- I mean, number one, I'm doing business court now. And I wasn't a big fan of the third floor. My courtroom is probably a third of the size than it was in the towers, right, and so just so everyone knows, all the business court judges are being moved back up to the towers, and we'll be on the 16th floor, and probably courtroom B or C, which is a really big courtroom. And unlike this courtroom, I feel comfortable if we have to, after the move, we can still mitigate and do the appropriate protocols, and try a case in that courtroom. In this courtroom, I don't think so. I really don't.

And that's another factor to consider, right. I mean -- and if we -- I don't know if we're going to have any jury trials before the end of the year, but if we did have one, it wouldn't be in this courtroom. I would have to find a courtroom, because this is not large enough. It's not. And also remember this, everyone, you have to know -- I know you know this because you're practitioners, you're litigators, you're trial lawyers, don't you want to be able to conduct a meaningful voir dire, potentially, where everyone in the panel doesn't have a face mask on?

MR. LEAVITT: That would be good, Your Honor.

THE COURT: You see where I'm going, right. I mean, right,

you want to be able to look at them, size them up. If you have a consultant there. I mean, there's so much that goes -- involved. And this is important when it comes to witnesses. And I realize some other departments have done jury trials and this is a real necessity in criminal cases, but I sit back, and I try to figure out, how can you do that meaningfully, you know. It's difficult, and I don't have the answer. But the bottom line is we'll deal with that later. We'll talk about it. And I will see everyone, I guess, on the 23rd, at 1:30 p.m., and we'll deal specifically with whatever motions are on file. All right.

MR. LEAVITT: Appreciate it, Your Honor. And thank you very much on behalf of the landowners and have a great day.

THE COURT: Okay. Everyone have a good day and stay safe.

MR. MOLINA: Thank you, Your Honor.

MS. GHANEM: Thank you, Your Honor.

THE COURT: Stay safe.

[Proceedings concluded at 9:54 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Jessica B. Cahill

Maukele Transcribers, LLC
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(Additional Counsel Identified on Signature Page)

Attorneys for Defendant City of Las Vegas

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 DEVELOPER'S MOTION TO DETERMINE TAKE AND MOTION FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF

AND

COUNTER-MOTION FOR SUMMARY JUDGMENT

Hearing date: September 23, 2021
Hearing time: 1:30 pm

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State Cases

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Federal Statutes

State Statutes

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Other Authorities

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INTRODUCTION

Resolution of this case does not require a deep understanding of regulatory takings, merely logic and common sense. At the time the Developer purchased the Badlands golf course and drainage in 2015, the property was designated Park/Recreation/Open Space ("PR-OS") in the City's General Plan. The Badlands had been designated PR-OS since 1992 when the original developer, as a condition of approval of the Peccole Ranch Master Plan ("PRMP"), set aside the Badlands as a golf course and drainage to serve the surrounding community. The Developer thus walked into the Badlands with its eyes open. When it bought the Badlands, the PR-OS designation did not permit residential use. The City Council would be required to exercise its discretion to change the PR-OS designation to permit construction of housing.

Because the Badlands could not be redeveloped with housing without a change in the law, which change was subject to the City's discretion, the Developer paid $4.5 million for the Badlands, or $18,000/acre, which was the going price for golf courses. The Developer claims, however, that the value of the Badlands *if* it can be developed with housing is $1,542,857/acre.[1] In sum, a real estate developer bought a golf course on the speculation that it could persuade the City to change the applicable law to permit residential development, in which case the developer stood to make a profit.

The Developer's gamble paid off. In June of 2017, the City lifted the PR-OS designation and approved the Developer's 435-unit luxury housing project on a 17-Acre portion of the Badlands, which, by the Developer's own evidence, increased the value of just the 17-Acre portion of the Badlands to $26,228,569, nearly six times the Developer's investment in the entire 250-acre property.[2] Despite the City's *approval* of the 435-unit project, the Developer has indicated that it has no intention of building anything in the Badlands and claims instead that the City has effected a "taking" of the entire Badlands, including the 17-Acre Property that the City *approved* for 435 luxury housing units. For its taking claim, the Developer demands that this Court compel the taxpayers to pay it $386

[1] *See* Developer's Initial Disclosures, City's Appendix in Support of Motion for Summary Judgment and Opposition to Developer's Motion for Summary Judgment. Ex. VVV at 1319. References to lettered exhibits are to the City's Appendix of Exhibits. References to numbered exhibits are to the Developer's Appendix of Exhibits.

[2] 17 acres x $1,542,857/acre (Developer's figure) = $26,228,569.

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million in damages, an 8,500 percent profit.[3] A finding that the City is liable for a taking of the Developer's property would not only reward a plaintiff that has suffered no injury, but would bring down the entire system of land use regulation in the State of Nevada. The Court should reject this lawsuit and enter summary judgment for the City.

It is hard to conceive of a greater abuse of the legal system than this case. The takings doctrine was designed to provide relief to owners who buy property subject to a regulatory scheme that allows the buyer's intended use, and the government later changes the law to disallow any use of the property, destroying the property's value. This case presents the polar opposite facts. Were the Developer to prevail, this would be the first regulatory taking case in the history of American Jurisprudence where the agency not only did not decrease the use and value of the property, but rather approved the Developer's applications to develop the property in full, thus *increasing* the use and value.

In this lawsuit, the Developer claims that the City has "taken" the 35-Acre Property the Developer carved out of the Badlands, even though the economic impact of the City's regulation on the parcel as a whole – the 250-acre Badlands – was to increase its value. Because the Developer purchased the Badlands in a single transaction from a single owner for a single price and the entire 250-acres had been used continuously for golf course and drainage for the previous 23 years, the courts treat the entire Badlands, at a minimum, as the parcel as a whole for a regulatory taking analysis. *See*, *e.g.*, *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 650-51, 855 P.2d 1027, 1034-35 (1993).[4] The PR-OS designation applied to the entire Badlands when the Developer bought the Badlands in 2015. The Developer's segmentation of the Badlands into four development sites is a transparent ploy – prohibited by the courts in cases such as *Kelly* – for the Developer to claim that the economic impact of the long-standing PR-OS designation has had a severe economic impact on a single segment, in this case, the 35-Acre Property. Indeed, the Developer makes the same taking claim

[3] 250 acres x $1,542,857/acre = $386,000,000.

[4] As will be shown, the parcel as a whole is actually the 1,539-acre PRMP, of which the Badlands was a part. 84% of the PRMP has been developed with thousands of housing units, retail, hotel, and casino. Accordingly, even if the City did not permit any part the Badlands to be developed, the City would not be liable for a taking because the City allowed substantial development of the parcel as a whole. Even if the Badlands deemed the parcel as a whole, however, the approval of 435 luxury housing units undercuts the Developer's taking claims.

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in the other three cases where the Developer has sued for damages for each of the properties the Developer segmented from the Badlands (including the 17-Acre Property, where the City *approved* the Developer's housing project). But even if the City ultimately decides not to change the PR-OS designation for the 35-Acre Property, the City could not be liable for a taking by merely leaving intact the regulation that historically applies to the property.

Undaunted by the fact that it has no injury, only an enormous profit, the Developer engages in elaborate acrobatics of argument, all the while misrepresenting and contorting the facts and law, to conjure a narrative of victimization by the City. First, the Developer contends that the City nullified its approval of the 435-unit project, despite the Nevada Supreme Court's March 2020 Order reinstating the City's approval and the City's September 2020 letter to the Developer stating:

> Remittitur issued on August 24, 2020. . . . Accordingly, the City Council's February 2017 action approving all discretionary entitlements required for your client's 435-unit project on the 17-acre portion of the Badlands *are now valid and will remain so for two years after the date of the remittitur* . . . . Now that there are no more discretionary entitlements required to develop your client's project, the City will accept applications for any ministerial permits required to begin construction . . . .

Ex. GGG at 1021 (emphasis added). The Developer's contention that the City "clawed back" or "nullified" the 17-acre approval is demonstrably false. In the 65-Acre case, Judge Herndon found that the Developer's claim that the City has nullified the Developer's permits to develop 435 housing units in the Badlands is "frivolous." Ex. CCCC at 1508. As a matter of fact and law, the City's approval of 435 houses in the Badlands, by itself, is fatal to the Developer's taking claims.

The Developer makes the bizarre claim that the City's approvals of the 435-unit project (Ex. SSSS) have vanished into thin air, despite the Nevada Supreme Court's reinstatement of the approvals in September 2020 and the City's September 2020 notice to the Developer that the approvals are valid. The Developer's failure to move forward with the 435-unit project, its rejection of its permits for the 435-unit project, the Developer's opposition to remanding its 133-Acre applications to the City Council for a decision on the merits, the Developer's failure to file a second application to develop the 35-Acre Property at a lower density, and the Developer's failure to file any applications to develop the 65-Acre Property, demonstrate that the Developer has no intention of developing anything on the Badlands. The Developer has made it clear that it only wants a $386 million gift from the taxpayers,

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for doing nothing other than applying for development and then suing the City.

Even if the Court were to suspend reality and disregard the approval of the 435-unit project, the Developer cannot prevail. This Court has already entered findings of fact and conclusions of law that demolish the Developer's taking claims. In its order denying the Developer's Petition for Judicial Review ("PJR"), this Court held:

> The four Applications submitted to the Council for a general plan amendment [etc.] were all subject to the Council's discretionary decision making, no matter the zoning designation."). ¶¶ ***The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS)*** and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor. ¶ The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course. ¶ It is up to the Council – through its discretionary decision making – to decide whether a change in the area or conditions justify the development sought by the Developer and how any such development might look. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723. ¶ The Applications included requests for a General Plan Amendment and Waiver. In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, no matter the zoning designation. UDC 19.00.030, 19.16.030, 19.16.050, 19.16.100, 19.16.130. ¶ The City's General Plan provides the benchmarks to ensure orderly development. A city's master plan is the "standard that commands deference and presumption of applicability." *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723; *see also City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010). ¶ [T]the City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development.

Ex. XXX at 1392-94 (emphasis added).

Having no basis whatsoever in the law (the Developer fails to cite a single case that supports its claims), the Developer's case for $386 million in damages is an emotional one only. The Developer contends that the City will not permit any use of the 35-Acre Property other than golf course and drainage, and those uses, according to the Developer, have no value. To the contrary, the Badlands had been in continuous use as two golf courses and drainage for at least 16 years *before* the Developer bought the property. During that time, the PR-OS designation of the Badlands was a matter of public record. Although housing was not a legal use of the Badlands, the Developer voluntarily shut down the

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golf course in 2016. The City has not stopped the Developer from using its property for its historic use as a golf course and drainage. Even if the 35-Acre Property has no economic value under the PR-OS designation (the Developer has not made that showing), the City did not compel the Developer to buy the Badlands. The Developer, according to its own allegations, bought a property that had no economic use under the applicable law. As a logical and legal matter, the Developer paid a price for the Badlands that took into account the legal constraints on redeveloping the property with housing. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). If the property had no economic use allowed by law as the Developer's claims (i.e., if golf course is not an economically viable use), then the Developer could either have declined to buy the property or paid a nominal amount for it. The takings doctrine does not make the City an involuntary guarantor of the Developer's business decisions. The City's job is to regulate the use of the Badlands in the public interest.

Even indulging the fiction that the City did not change the PR-OS designation to allow 435 housing units in the Badlands, the Developer would still have exactly what it bought after the City declined to change the long-standing law – golf course – for which it paid the golf course price of $18,000/acre. Accordingly, even if the Court accepts isolation of the 35-Acre Property as the parcel as a whole, the 35-Acre Property was worth $18,000/acre *before* the City's alleged refusal to amend the PR-OS designation, and $18,000/acre *after* the City's alleged refusal to amend the PR-OS designation. No change in the law means no change in use, no reduction in value, no injury, and no taking.

The Developer attempts a Houdini-esque escape from these inconvenient facts and laws – and from matters already decided by this Court – by misrepresenting that the City imposed the PR-OS designation for the sole purpose of thwarting the Developer's plans to build housing in the Badlands, or that the City failed to follow proper procedures in adopting the PR-OS designation. Unfortunately for the Developer, that horse left the barn in 1992, when the City imposed the PR-OS designation on the Badlands.[5] The Badlands have been designated PR-OS continuously since then. The City cannot

[5] As one of the developers of housing in the PRMP, the Developer benefitted from the PR-OS designation. The original developer, the Peccole family, agreed to set aside 16% of the PRMP land area for a recreation, open space, and drainage amenity to serve the other 84% of the PRMP. The recreational and open space amenity protected by the PR-OS designation increased the value of, and profit from, the housing and retail the Developer built in the PRMP. The Developer, therefore, seeks a double windfall.

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be liable for a regulatory taking – under either law or logic – by simply maintaining the status quo, especially when the Developer had full knowledge of that status quo when it purchased the property and paid a lower price reflecting that legal restriction. That explains why the Developer completely ignores the history of the development of the PRMP and the regulation of the Badlands (as well as the 17-Acre approval), pretending that this case started in 2017 when the City denied a single set of applications to develop housing on the 35-Acre Property. The Developer's actual complaint is with the PR-OS designation in 1992. The 25-day statute of limitations under NRS 278.0235 to challenge that designation, however, expired 23 years before the Developer bought the Badlands.

Attempting another miraculous escape from the overwhelming facts and law and this Court's prior ruling against it, the Developer relies on the nonsensical claim that zoning, any zoning, of property grants each owner of property in the zone a constitutionally protected "property right" or "vested right" to build whatever it wants, as long as the use is a "permitted" use in the district. All property in the City is located in a zoning district that "permits" one or more uses; *e.g.*, office, housing, retail, industrial. According to the Developer, therefore, all property owners in the City have constitutional rights to approval of their applications to develop their property. This claim necessarily means that the City has *no discretion* to limit that development, as long as the use is "permitted" by the zoning. The City would have no say over the density, form, location, height, setbacks, access, drainage, fire safety, or other aspects of construction, except to require that the development be a use "permitted" in the zoning district, or else pay the owner for a "taking" of its "property right."

This contention is completely without authority and is preposterous. Zoning limits the use of property; it does not confer rights on property owners, no less constitutional rights. Like virtually every other state in the nation, the Nevada State Legislature has ordered local agencies to engage in sound land use planning to ensure a high quality of life for the state's residents and guests. In that regard, the Legislature directs every city in Nevada to adopt a General Plan that designates land uses for all areas of the city. NRS 278.150. In the following section of NRS Chapter 278, the Legislature requires cities to adopt zoning ordinances that implement the General Plan. NRS 278.250. In the case of a conflict between a zoning ordinance and the General Plan, zoning must yield to the higher authority of the General Plan. NRS 278.250(2).

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In this case, the City followed the Legislature's mandate by designating the Badlands PR-OS to preserve the open space and drainage amenity that the original developer set aside to benefit the surrounding community. Exs. I, L, N, O, P, Q. The zoning of the Badlands (Residential – Planned Development) implements the General Plan by allowing the City to exercise its *discretion* to designate the location of housing *and open space supporting that housing* in the R-PD zone. LVMC (Uniform Development Code ["UDC"]) 19.10.050.

If the City has *no discretion* to implement the General Plan and zoning because the owner of the zoned property has a constitutionally protected right to build whatever it desires, the general plans of every city in Nevada and the Legislature's dictate that zoning must be consistent with the General Plan would be rendered meaningless. Moreover, every time a City changes the zoning of property to further limit use in any way (e.g., increase the setback requirement or require solar on roofs), the city would have to pay compensation for a "taking" to every property owner in the zoning district, an unthinkable result. The Developer cannot possibly prevail here unless this Court ignores state statutes directly on point. And if the Developer were to prevail, the result would be devastation of Nevada's carefully crafted system of land use regulation. This Court correctly rejected the Developer's outlandish claim:

> The decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. *See Enterprise Citizens Action Committee v. Clark County Bd. of Comm'rs*, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996); *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). ¶¶ A zoning designation does not give the developer a vested right to have its development applications approved. . . *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60 [(2004)] (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). ¶ "[C]ompatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest." *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *see also Nevada Contractors*[*v. Washoe Cty.*], 106 Nev. [310,] at 311, 792 P.2d [31,] at 31-32 [(1990)] (affirming county commission's denial of a special use permit even though property was zoned for the use). ¶ In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. ***It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment*** or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, ***no matter the zoning designation***. ¶ The Court rejects the Developer's attempt to distinguish the *Stratosphere* case, which concluded that the very same decision-

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> 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. The Court rejects the Developer's argument that the RPD-7 zoning designation on the Badlands Property somehow required the Council to approve its Applications. ¶ Statements from planning staff or the City Attorney that the Badlands Property has an RPD-7 zoning designation do not alter this conclusion.

Ex. XXX at 1385-86, 1391-92 (emphasis added).[6]

Moreover, the Developer cannot have a constitutionally protected "property right" to build housing on the 35-Acre Property because that use would conflict with the PR-OS General Plan designation. PR-OS does not permit housing. The Developer ignores the Court's finding of fact that the 35-Acre Property is validly designated PR-OS and the Court's conclusion of law that the Developer could build housing on the 35-Acre Property only if the City, in its discretion, agreed to lift the PR-OS designation. Because that finding alone requires rejection of the Developer's takings claims, the Developer offers the smoke-and-mirror argument that the General Plan does not exist, or if it exists it is invalid, or if it's valid it does not apply. The Developer further argues that if the PR-OS designation applies, the R-PD7 zoning conflicts with the PR-OS designation, and zoning controls over a General Plan designation. This Court has rejected each of these unsupported contentions. Ex. XXX at 1392-94 (*see* Judge Williams' FFCL above at p. 4).

The R-PD7 zoning that the Developer contends grants a constitutional right to build as one pleases actually grants the City broad discretion to approve, disapprove, or condition proposed development, which cannot be reconciled with the Developer's claim that zoning confers a constitutional right to develop. Because the City had complete discretion to deny an amendment of the PR-OS designation, the Developer cannot have a constitutional right to develop the 35-Acre Property with housing.

Out of pure desperation, the Developer attempts to shed this Court's decisive findings of fact

[6] Judge Herndon found that he did not need to reach the issue as to whether a property owner has a constitutional vested right to develop its property under zoning because the Developer had not filed, and the City had not denied, at least two meaningful applications to develop the 65-Acre Property standing alone. Ex. CCCC at 1504-15. Judge Herndon found that the claim that the City has "taken" the 65-Acre Property is not ripe because the City had not denied at least two applications for development. On that basis, Judge Herndon held, he could not tell whether the City would deny all or nearly all development, which is required for regulatory taking. *Id*. The same reasoning applies here. If the Developer were to file the appropriate applications, it is possible that the City Council could lift the PR-OS designation and allow residential development of the 35-Acre Property.

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and conclusions of law denying its PJR by contending that *none of the Court's findings of fact and conclusions of law denying the PJR exist for purposes of the Developer's taking claims*. True, denial of a PJR does not necessarily mean that the alleged government action does not effect a taking. The standard of liability for a PJR (lack of substantial evidence) is different from the standard of liability for a regulatory taking (denial of essentially all economic use or value and interference with investment-backed expectations), the evidence could be different (PJR: limited to evidence in the Administrative Record; taking: any formal action of the City Council that has the force of law can be considered), and the remedies are different (PJR: equitable; taking: damages). It is the height of absurdity, however, to contend that the City Council had discretion to decline to amend the PR-OS designation if the Developer later files a PJR, but had no discretion if the Developer later challenges the very same action of the City Council as a taking.

The Developer's argument to disappear the Court's FFCL is tantamount to saying that a regulatory taking proceeding is an alternative universe where the Court should ignore facts *and* law that exist in the original universe; i.e., the facts and law that exist if the Developer chooses one form of relief, a PJR, are not the facts and law if the Developer chooses a different remedy, a taking claim. The Developer's argument has no support in the law. This is like saying that the sky is blue is a fact if the Developer files a PJR, but is not a fact if the Developer files a taking claim. The *fact* of the PR-OS designation of the Badlands (City Ordinances Exs. I, L, N, O, P, Q and diagrams showing the Badlands as PR-OS), the *law* that the City has discretion to lift the PR-OS designation (*e.g.*, *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995); *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989)), the *law* that zoning does not confer a constitutional "property right" or anything like it (*e.g.*, *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. at 527-28, 96 P.3d at 759-60 (2004); *Boulder City v. Cinnamon Hills Assocs*., 110 Nev. 238, 246, 871 P.2d 320, 325 (1994)), and the *law* that even if the zoning of the 35-Acre Property and the General Plan designation conflict (they don't), the General Plan designation would be controlling (*e.g.*, NRS 278.250; *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112), are a basis for denial of *both* the PJR and the categorical and *Penn Central* taking claims. The City had complete discretion to lift the PR-OS designation in effect when the Developer bought the 35-Acre Property. Such

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discretion cannot, as a matter of long-standing Nevada law and of logic, coexist with a constitutionally protected property right to build housing in the Badlands. *Boulder City*, 110 Nev. at 246, 871 P.2d at 325 ("If the City Council had any discretion in granting or denying the permit, there could be no entitlement and no constitutionally protected interest."); *Stratosphere Gaming*, 120 Nev. at 528, 96 P.3d at 760 (the City's site development process "requires the Council to consider a number of factors and to exercise its discretion in reaching a decision. There is no evidence that the Stratosphere had a vested right to construct the proposed ride"). Given the Court's prior rulings, the Developer's regulatory taking claims fail.

In arguing that the City had discretion to deny the 35-Acre Applications if the Developer chooses to file a PJR, but no discretion if the Developer later sues the City for a taking, the Developer misunderstands regulatory taking law. A regulatory taking cannot be found unless the City denies all or virtually all economic use of the property. The City does not argue that it has discretion to deny all economic use of the 35-Acre Property. To the contrary, the City contends that because the Developer acquired the Badlands while it was subject to the PR-OS designation, which does not permit residential development unless the City Council, in exercise of its discretion, amends that designation, by electing not to amend the designation the City did not take anything from the Developer. The Developer still has the value ($18,000/acre) and use (PR-OS) it bought – nothing more, nothing less. Moreover, because the City has discretion to amend the PR-OS designation, the Developer cannot possibly have a constitutional property right to build housing on the property. This Court's conclusion of law that the PR-OS designation is valid and prevents residential development unless the City exercises its discretion to amend the PR-OS designation is relevant and fully applicable to the Developer's taking claims.

The Developer's inability to show that the City's regulation effected a wipe out or near wipe out of use and value, as required under the takings doctrine, explains the Developer's novel theory that the City has taken its property "right." There is no authority that a public agency can take a property "right," only a property "interest." The regulatory takings doctrine provides that destruction of the use and value of property is the functional equivalent of eminent domain, where the government takes fee title to the property after paying the owner the value of the property. The only property interest at issue

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is the Developer's fee simple title to the 35-Acre Property. By slight of hand, the Developer requests that the Court adjudicate the nature of the property "interest" the Developer holds (the Developer's motion was entitled "Motion to Determine Property Interest"), but then in its motion and proposed order, the Developer asks the Court to declare that it has a property "right" that the City has "taken." If liable for a taking in either eminent domain or inverse condemnation, the City would be required to pay the Developer the fair market value of the property, and then it would take fee title to the property. Fee title is a property interest, it is not a "right." If found liable for a taking under the Developer's theory, the City would be buying the Developer's rights to build housing, but the Developer would keep title to the property. This absurd result follows from the Developer's unprecedented theory of relief and would not fit within any takings case.

Recognizing that it has no chance of success on its claims for excessive regulation of the use of the Badlands, the Developer resorts to a claim that the City has effected a physical regulatory taking of the Badlands, which the Developer styles as a "per se regulatory taking," because the City adopted an ordinance, Bill 2018-24, allegedly requiring the Developer to allow the public to occupy the Badlands. This claim is without the slightest merit. On its face, the legislation never applied to the Developer or the Badlands and did not require the Developer to allow the public on its land.

The Developer also purports to state a "nonregulatory taking" claim. That claim, however, requires either (a) a physical taking by the government, where the government physically occupies the property or a public improvement fails and causes physical damage to the property, or (b) unreasonable precondemnation conduct. A nonregulatory taking must render the property valueless and useless. The nonregulatory taking claim fails because there is no evidence that the City physically occupied the Badlands, that a City improvement damaged the property, that the City condemned or indicated an intent to condemn the Badlands, or that the City took any other nonregulatory action that rendered the Badlands valueless or useless. To the contrary, the City's regulatory action increased the value of the Badlands by six times what the Developer paid for the property only two years earlier, and the Developer still has 233 acres on which to seek development or to use as a golf course.

Further attempting to deflect facts and unanimous legal authorities against it, the Developer attempts to recast its taking claims as a due process claim. The Developer spends most of its argument

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in this case on allegations that after the City had approved the 435-unit project, two former members of the seven-member Las Vegas City Council made it clear that they opposed further development of housing in the Badlands. Because the City can limit the use of the Badlands only by a law adopted by a majority of the City Council, the statements or actions of individual members of the City Council cannot be attributed to the City Council as a whole and are irrelevant. In a regulatory taking case, it is axiomatic that only *laws* passed by a majority vote of the legislature can restrict the use of property, not statements of individual legislators. This Court agrees:

> The statements of individual council members are not indicative of any arbitrary or capricious decision making. The action that the Court is tasked with reviewing is the decision of the governing body, not statements made by individual council members leading up to that decision. . . . The Council's action to deny the Applications occurred with its vote, not with the prior statements made by individual council members.

Ex. XXX at 1391.[7]

Moreover, even if the statements of the two Councilmembers were relevant, the Developer's claim that the Councilmembers based their vote to deny the 35-Acre Applications on improper reasons sounds in due process, rather than takings. Due process is concerned with the wisdom of government regulation; i.e., the quality of the reasons for a decision. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543-44 (2005). Takings, in contrast, is concerned solely with the economic impact of regulation; the reasons for the regulation are entirely irrelevant. *Id*. In denying the PJR, this Court rejected the Developer's disguised due process claim:

> The Council's Decision was free from any arbitrary or capricious decision making because it provided multiple reasons for denial of the Applications, all of which are well supported in the record. . . . The Council properly exercised its discretion to conclude that the development proposed in the Applications was not compatible with surrounding areas and failed to set forth an orderly development plan to alter the open space designation found in both the City's General Plan and the Peccole Ranch Master Development Plan.

Ex. XXX at 1388. As will be shown, the Ninth Circuit tossed out an identical claim brought by the Developer against the City in a separate action. That decision is an issue preclusion bar to the Developer's claim that it has a property right in zoning and the due process claim in this case.

[7] By the same token, statements of individuals Councilmembers made after the Council's action are irrelevant.

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Mischaracterizing garden-variety land use regulation as the City's "war" on the Developer, the Developer portrays the statements and actions of the two individual Councilmembers as demonstrating a sinister conspiracy with neighboring property owners to deny the Developer's constitutional rights. But the entire purpose of the City Council's land use regulation is to limit the use of private property for the good of the surrounding community. *That is the City Council's job*. Federal, Nevada, and Las Vegas law give the City Council broad powers to adopt zoning and General Plan designations to limit the use of private property to protect community interests. For example, the zoning and General Plan designations that limit the density of development protect the surrounding community from traffic and parking congestion. Height limits protect light, air, and views for surrounding properties. As the United States Supreme Court declared, protection of community, rather than individual property interests is the very essence of land use regulation:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 33 (1954). Nevada law is the same. *See also* NRS 278.150, 278.250; *Boulder City*, 110 Nev at 246, 871 P.2d at 325 ("'[This] standard represents a sensitive recognition that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government—not by federal courts.'") (citing *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972)); *id*. 110 Nev at 249, 871 P.2d at 327 ("The United States Constitution simply does not forbid democratic government to succumb to individual and public pressures in reaching land use decisions that work to the detriment of an individual litigant.").

Under the modern system for land use regulation in the United States and Nevada, even if the City Council had maintained the PR-OS designation for the entire Badlands (it didn't), that would have been a political decision that does not involve the courts. The only limit on the City's discretion in amending the PR-OS designation is a constitutional one – the Takings Clause – which applies only if, after the Developer bought the Badlands, the City changed the law to wipe out or nearly wipe out the value or use of the property. Here the City did the opposite, increasing the value of the Developer's property by a factor of six and leaving the remaining 233 acres for potential use for development or as

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a golf course. The Developer's claims boil down to the contention that if an individual public official opposes a development project because he/she believes that the project would not be in the best interest of the community, the City violates the developer's constitutional rights. The Developer fundamentally misconstrues land use regulation. The purpose of land use regulation is not to grant rights to property owners, but rather to limit the owner's use to protect the public.

This case is a frontal assault on the power of local government in Nevada to regulate land use for the good of the community. The case is meritless and should never have been brought. Stripped of the Developer's rhetoric and obfuscations of fact and law, it is a naked attempt to use the Court to extort money from the taxpayers. The City's Countermotion for Summary Judgment should be granted and the Developer's Motion for Summary Judgment and to "Determine Take" should be denied.

FACTUAL BACKGROUND

Judge Williams' Facts: The following facts are relevant facts reproduced verbatim from this Court's Findings of Fact and Conclusions of Law on Petition for Judicial Review filed 11/21/18 ("Judge Williams FFCL").

[Start of quote from Judge Williams FFCL]

> 7. The City's General Plan identifies the Badlands Property as Parks, Recreation and Open Space ("PR-OS"). (ROR 25546).
>
> 13. Like its predecessor, the Master Development Plan identified the golf course area as being for flood drainage and golf course purposes, which satisfied the City's open space requirement. (ROR 2658-2660).
>
> 47. Based on the reduction and compatibility effort made by the Developer, the Council approved the 17-Acres Applications with certain modifications and conditions. (ROR 11233; 17352-57).
>
> 48. Certain nearby homeowners petitioned for judicial review of the Council's approval of the 17-Acres Applications. *See Jack B. Binion, et al v. The City of Las Vegas, et al.*, A-17-752344-J.
>
> 49. On March 5, 2018, the Honorable James Crockett granted the homeowners' petition for judicial review, concluding that a major modification of the Master Development Plan to change the open space designation of the Badlands Golf Course was legally required before the Council could approve the 17-Acres Applications ("the Crockett Order"). The Court takes judicial notice of the Crockett Order.

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C. The 35-Acres Applications at Issue in this Petition for Judicial Review

51. The Applications consisted of: an application for a General Plan Amendment for 166.99 acres to change the existing City's General Plan designation from Parks Recreation/Open Space to Low Density Residential (ROR 32657); a Waiver on the size of the private streets (ROR 34009); a Site Development Review for 61 lots (ROR 34050); and a Tentative Map Plan application for the 35-Acre Property. (ROR 34059).

52. The development proposed in the Applications was inconsistent with the proposed 2016 Development Agreement that was being negotiated. (ROR 1217-1221; 17250-52; 32657; 34050; 34059).

63. The City Council voted to deny the Applications. (ROR 24397). **[End of quote from Judge Williams FFCL]**

Ex. XXX at 1376-85.

Judge Herndon Facts: The following additional facts are, in general, reproduced verbatim from Judge Herndon's Findings of Fact and Conclusions of Law Granting City's Motion for Summary Judgment filed 12/30/21 in the 65-Acre Case ("Judge Herndon FFCL"). The City has updated the facts to reflect development since December 2020. The City which Judge Herndon cited are the same exhibits submitted in the instant action.

[Start of quote from Judge Herndon FFCL]

I. The Badlands as open space for Peccole Ranch

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. Ex. G at 114-124, 130, 135-37. Peccole reserved 207 acres for a golf course to satisfy this requirement. Ex. E at 96, 98; Ex. G at 123-124.

4. In 1990, Peccole applied to amend the PRMP for Phase II. Ex. H at 138-161. 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 145. 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 183-94.

II. The PR-OS General Plan designation of the Badlands

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. Ex. I at 195-204, 212-18. The 1992 General Plan included maps showing the existing land uses and proposed future land uses. *Id.* at 246. The future land use map for the Southwest

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Sector designated the area set aside by Peccole for an 18-hole golf course as "Parks/Schools/ Recreation/Open Space." *Id.* at 248. 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 234-35.

6. From 1992 to 1996, 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 248 *with* Ex. TT; *see also* Ex. J, UU. The 9-hole course was also designated "P" for "Parks" in the City's General Plan as early as 1998. *See* Ex. K. 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 ("2020 Master Plan"), it retained the "parks, recreation, and open space" [PR-OS] designation. Ex. L at 265; compare *id.* at 269 with Ex. I at 234-35, 248. Beginning in 2002, the City's General Plan maps show the entire Badlands designated as PR-OS. Ex. M at 274-77.

7. In 2005, the City Council incorporated an updated Land Use Element in the 2020 Master Plan. Ex. N at 278-82. This 2005 Land Use Element designated all 27 holes of the Badlands golf course as PR-OS for "Park/Recreation/Open Space." *Id.* at 291. Each ordinance of the City Council updating the Land Use Element of the General Plan since 2005 has approved the designation of the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged. *See* Ex. O at 292, 300-01 (Ordinance #6056 9/2/2009); Ex. P at 302-04, 316-17 (Ordinance #6152 5/8/2011); Ex. Q at 318, 331-32 (Ordinance #6622 6/26/2018).

III. The R-PD7 zoning of the Badlands

8. In 1972, the City established R-PD7 zoning (Residential-Planned Unit Development, 7 units/acre). Ex. R. "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 333. The "PD" in R-PD stands for "Planned Development." Planned Development zoning, generally applicable to larger development sites, "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 in the Las Vegas Uniform Development Code 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. R at 333. "As a[n R-PD7] 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. Therefore, portions of the subject area can be restricted in density by various General Plan designations." Ex. ZZZ at 1414-15.

9. . . . In 1990, the City adopted a resolution of intent to rezone the 996.4 acres in Phase II in accordance with the amended PRMP. Ex. H at 189-94. To obtain the City Council's approval of tentative R-PD7 zoning for housing lining the fairways of a golf course, Peccole agreed to set aside 211.6 acres for a golf course and drainage. *Id*. at 159, 163-165, 167-168, 171-172, 187-188.

IV. The Developer's acquisition and segmentation of the Badlands

21. In early 2015, Peccole owned the Badlands through a company known as

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Fore Stars Ltd ("Fore Stars"). Ex. V at 365-68; Ex. VV. In March 2015, the Developer acquired Fore Stars, thereby acquiring the 250-Acre Badlands. Ex. W at 379; Ex. AAA. At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. Ex. QQQ at 1160; Ex. X at 382-410; Ex. XX. 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. W at 379; *see also* Ex. V at 370-77. Each of these entities is controlled by the Developer's EHB Companies LLC. *See* Ex. V at 371 and 375 (deeds executed by EHB Companies LLC). The Developer then 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. HH; Ex. BBB; Ex. LL; Ex. Z.

V. The City's approval of 435 luxury housing units on the 17-Acre Property

22. In November 2015, the Developer, acknowledging the need to make application to the City in order to develop a parcel of property, applied for a General Plan Amendment, Re-Zoning, and Site Development Plan Review to redevelop the 17-Acre Property from golf course use to luxury condominiums ("17-Acre Applications"). Ex. Z at 446-66. 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 449-52. The Planning Staff Report for the 17-Acre Applications noted that the proposed development required a Major Modification Application to amend the PRMP. Ex. AA at 470. In 2016, the Developer submitted a Major Modification Application and related applications, but later that year withdrew the applications. Ex. BB at 483-94; Ex. CC.

23. 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. Ex. DD at 586, 587-89, 591-97; Ex. SSS. In approving the 17-Acre Applications, the City did not require the Developer to file a Major Modification Application.

VI. The homeowners' challenge to the City's approval of the 17-Acre Applications

24. 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. Ex. EE at 599, 609 (the "Crockett Order"). On March 5, 2018, Judge Crockett granted the homeowners' petition over the objection of both the Developer and the City, vacating the City's approval on the grounds that the City Council was required to approve a Major Modification Application before approving applications to redevelop the Badlands. *Id.* at 598, 610-11. The Developer appealed the Crockett Order. *See* Ex. DDD. Although the City did not appeal the Crockett Order, it did file an amicus brief in support of the Developer's position that a Major Modification Application was not required. Ex. CCC.

26. Ultimately, the Nevada Supreme Court reversed Judge Crockett's decision granting the Petition for Judicial Review. In its Order of Reversal filed March 5, 2020, the Nevada Supreme Court found that a Major Modification Application was not required to develop the 17-Acre Property because the City's

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UDC required Major Modification Applications for property zoned PD, but not property zoned R-PD. Ex. DDD. The Supreme Court subsequently denied rehearing and en banc reconsideration and issued a remittitur, rendering its determination final. Ex. EEE. 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. CCC at 1003-06. The District Court thereafter, consistent with the Nevada Supreme Court's decision, entered an Order on November 6, 2020, denying the petition for judicial review. *See* Ex. RRR.

27. The Nevada Supreme Court's reversal of the Crockett Order reinstated the City's approval of the Developer's applications to develop the 17-Acre Property. Ex. DDD. The City provided the Developer with notice of that fact by letter on March 26, 2020. Ex. FFF at 1019. 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." *Id.* The City also notified the Developer that the approvals would be valid for two years after the date of the remittitur. *Id*. On September 1, 2020, the City notified the Developer that the Nevada Supreme Court had issued remittitur, 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. Ex. GGG at 1021. The City again notified the Developer that the approvals would be extended for two years after the date of the remittitur. *Id*.

VII. The Master Development Application

29. Before the City denied the 35-Acre Applications, the Developer sought a new Master Development Agreement (MDA) for the entire Badlands, including the 35-Acre Property. Ex. LL; Ex. II at 679. On August 2, 2017, the City Council disapproved the MDA by a vote of 4-3. Ex. MM at 880-82; Compl. ¶¶ 39, 42. The Developer did not seek judicial review of the City's decision to deny the development agreement.

VIII. The 133-Acre Applications

30. In October 2017, the Developer filed applications to redevelop the 133-Acre Property ("133-Acre Applications"). Compl. ¶ 46. On May 16, 2018, after the Crockett Order but before the Nevada Supreme Court's reversal of said order, the City Council voted to strike the 133-Acre Applications as incomplete because they did not include an application for a Major Modification, as the Crockett Order required. Compl. ¶¶68, 77, 85; Ex. BBB at 989-98.

31. The Developer filed a petition for judicial review (the 133-Acre Property case) challenging the City's action to strike the 133-Acre Applications and a complaint for a taking and other related claims. That action was assigned to Judge Sturman in Department 26, who dismissed the petition for judicial review on the grounds that the parties were bound by the Crockett Order and, therefore, the Developer's failure to file a Major Modification Application was valid grounds for the City to strike the application. Judge Sturman allowed the Developer's inverse condemnation claims to proceed. Ex. NN. The City removed the case to federal court, and it has since been remanded back to state court.[8]

[8] Rather than consider the merits of the 133-Acre Applications, the City Council struck the 133-Acre Applications in 2018 because the Developer failed to comply with the Crockett Order requiring the filing of an MMA. Following the Nevada Supreme Court's reversal of the Crockett Order, the City (footnote continued on next page)

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IX. The 65-Acre Applications

32. To date, there has been no evidence presented to the court that Developer has submitted any development applications to the City for consideration of a proposed development of the individual 65-Acre parcel. As noted above, there was a Master Development application, Ex. LL; Ex. II at 679, that was eventually denied by the City but no individual applications for the 65-Acre property. Judge Herndon rejected the Developer's contention that he must hear the Developer's Motion to Determine Property Interest before the City's Motion for Summary Judgment. Judge Herndon accordingly held a single hearing on the Developer's Motion to Determine Property Interest and the City's Motion for Summary Judgment. Judge Herndon found that he did not need to reach the issue as to whether a property owner has a property or vested right to develop its property under zoning because the Developer had not filed, and the City had not denied, at least two meaningful applications to develop the 65-Acre Property standing alone. Ex. CCCC at 1514-15. Judge Herndon found that the claim that the City has taken the 65-Acre Property is not ripe and granted summary judgment to the City, also denying the Developer's Motion to Determine Property Interest as moot. *Id*.

After Judge Herndon was seated on the Nevada Supreme Court, the 65-Acre case was assigned to Judge Trujillo. In considering the Developer's Motion for a New Trial and Rehearing, Judge Trujillo questioned Judge Herndon's conclusion on a single issue of law – whether final decision ripeness applies to categorical wipeout taking claims – and whether Judge Herndon had ruled on all of the Developer's claims. Judge Trujillo has not yet ruled on the Motion for New Trial. Judge Trujillo has not questioned any other aspect of Judge Herndon's FFCL, including the finding that the 65-Acre regulatory taking claims were unripe because the Developer failed to obtain the City Council's denial of two separate applications to develop the 65-Acre Property standing alone and on the merits. The City has since renewed its Motion for Summary Judgment and the Developer has refiled its Motion to Determine Property Interest. Judge Trujillo heard both motions in the same hearing. The motions and the Developer's Motion for New Trial are under submission..

X. The increased value of the Badlands due to the City's approval of 435 units on the 17-Acre Property

33. Under the Membership Purchase and Sale Agreement between the Peccole Family and the Developer, the Developer purchased the 250-acre Badlands golf course for $7,500,000, or $30,000 per acre ($7,500,000/250 acres = $30,000). Ex. AAA at 966. This figure does not represent the total cost to Developer as there were clearly monies spent during its due diligence process (Developer has stated that the total cost for due diligence and purchase was $45 million). $7,500,00 is however the stated figure, per the Purchase and Sale Agreement, that Developer paid for the

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wrote to the Developer inviting it to resubmit the 133-Acre Applications for the City's consideration on the merits. Ex. OOO at 1153-54. The Developer did not respond to that letter or resubmit its applications. The City also filed a formal motion asking Judge Sturman to remand the 133-Acre Applications to the City Council to allow the Council to consider the 133-Acre Applications on the merits. The Developer's staunch opposition to that motion, coupled with its refusal to use its approvals for 435 luxury housing units, indeed, its absurd denial that such approvals exist, establishes beyond a doubt that the Developer does not want to build anything in the Badlands; its sole objective is to extort more than $300 million from the taxpayers.

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actual property. Ex. UUU at 1300.[9]

34. The Developer contends in its Initial Disclosures that if the Badlands can be developed with housing, it is worth $1,542,857 per acre. Ex. VVV at 1319-36.

Herndon fn The Developer's Initial Disclosures in the 65-Acre case make the same claim. Ex. JJJ at 1135-36. Both initial disclosures are based in part on the Lubawy appraisal of 70 acres of the Badlands that includes the entire 17-Acre Property and a portion of the 65-Acre Property. Ex. QQQ at 1165. The Lubawy appraisal assumed that the land being appraised could be developed with medium density housing. *Id*. at 1196-97. [End of fn]

Thus, according to the Developer's own evidence, the City's approval of 435 housing units in the Badlands has increased the value of the 17-Acre Property alone to $26,228,569 (17 x $1,542,857 = $26,228,569), thereby multiplying the Developer's property purchase investment in the Badlands by a factor of six ($26,228,569/$4,500,000 = 6 [rounded]). Furthermore, the Developer still owns the remaining 233 acres with the potential to continue golf course use or develop the remaining acreage.

35. Even if the Developer paid $45 million for the Badlands as it contends, or $180,000/acre ($45,000,000/250 acres = $180,000/acre), the City's approval of 435 housing units in the Badlands has increased the value of the Badlands by $23,168,569 (the City's approval improved the value of each acre in the 17-Acre Property from $180,000 to $1,542,857, an increase of $1,362,857 per acre ($1,362,857 x 17 = $23,168,569). **[End of quote from Judge Herndon FFCL]**

Ex. CCCC at 1484-96.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Under NRCP 56(a), summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The non-moving party must "'set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against

[9] For more than a year, the Developer refused to produce any records showing the purchase price for the Badlands, despite the City's repeated discovery requests. The City established from records ultimately produced by the Developer pursuant to this Court's order granting the City's motion to compel that $3,000,000 of that purchase price was consideration for other real estate interests, putting the price paid for the Badlands at $4,500,000, or $18,000 per acre. Ex. FFFF at 1591-95. The Developer has no evidence to contravene the City's evidence that the purchase price for the Badlands was $4,500,000. Although the Developer alleges that the purchase price was $45 million (Ex. 12 at 456; Ex. 57 at 2-3), it concedes that it has no documents or other objective evidence to support that claim. Ex. UUU at 1300; Ex. FFFF at 1595-97. Moreover, section 9.05 of the Purchase and Sale Agreement ("PSA") by which the Developer purchased the Badlands provides: "This Agreement (along with the documents referred to herein [none of which state that the purchase price was $45 million]) constitutes the entire agreement among the Parties pertaining to the subject matter contained herein and supersedes all prior agreements, representations and understandings of the Parties. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by the Party to be bound." Ex. AAA at 973.

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him.'" *Id.* (quoting *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110 825 P.2d 588, 591 (1992)).

The City's liability for a regulatory taking is a question of law. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006). The Developer admits that liability for a taking must be established through official government records of official government action:

> 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 at 2. Accordingly, there are no triable issues of fact in this case. The City imposes land use regulations only by vote of a majority of the City Council's Members. The official City Council actions alleged to constitute takings are matters of public record. The Developer, by filing its own motion for summary judgment, concedes that there is no triable issue of fact in this case. Based on the undisputed material facts and overwhelming legal authority, the Court should reject each of the Developer's claims and enter judgment for the City.

ARGUMENT

The Developer alleges five taking claims: (1) categorical, (2) *Penn Central* [*Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978)], (3) regulatory per se, (4) nonregulatory, and (5) temporary. Compl. ¶¶ 162-223.[10] None of the Developer's claims has any support in the facts or law.

I. The City should have summary judgment on the Developer's categorical and *Penn Central* taking claims because the City's regulation did not deprive the Developer of all or virtually all use or value of the 35-Acre Property

The Developer seeks a ruling that the City has no discretion to retain the PR-OS designation of the Badlands or to limit the Developer's redevelopment of the Badlands in any way. That result would turn Nevada land use law upside down.

A. Nevada grants broad discretion to cities to limit land uses to promote the general health, safety, and welfare

Under their land use regulatory powers delegated by the state, Nevada cities are required to

[10] The Developer added a sixth claim for a judicial taking contingent on this Court's following the Crockett Order. Compl. ¶¶ 224-26. Because the Crockett Order was reversed, this cause of action is moot.

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adopt a General Plan (the terms "General Plan," "Master Plan," and "Comprehensive Plan" are used interchangeably) that designates the uses of land in each area of the city:

> 1. The planning commission shall prepare and adopt a comprehensive, long-term general plan for the physical development of the city . . . which in the commission's judgment bears relation to the planning thereof.
>
> 2. The plan must be known as the master plan, and must be so prepared that all or portions thereof . . . may be adopted by the governing body . . . as a basis for the development of the city

NRS 278.150. To implement the policies in the General Plan, in a later section of the NRS, the Legislature requires cities to adopt zoning ordinances:

> 1. . . . [T]he governing body may divide the city, county or region into zoning districts of such number, shape and area . . . . Within the zoning district, it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land.
>
> 2. The zoning regulations must be adopted in accordance with the master plan for land use.

NRS 278.250. The General Plan and zoning are in the same relationship as a constitution and statutes; the General Plan establishes fundamental policies for future land use, while the zoning ordinances implement those policies. Zoning ordinances must be consistent with the General Plan. In the case of a conflict between a zoning ordinance and the General Plan, zoning must yield to the higher authority of the General Plan. NRS 278.250(2).

State statute makes clear that cities are to exercise broad discretion in adopting, amending, and applying General Plan policies and zoning ordinances. Planning Commissions are required to adopt General Plan policies "which in the commission's judgment bears relation to the planning [for physical development of the city]." NRS. 278.250(1).

> [Z]oning regulations must be designed:
>
> (a) To preserve the quality of air and water resources.
>
> (b) To promote the conservation of open space and the protection of other natural and scenic resources from unreasonable impairment.
>
> (c) To consider existing views and access to solar resources by studying the height of new buildings…
>
> (d) To reduce the consumption of energy by encouraging the use of products and materials which maximize energy efficiency in the construction of buildings.

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(e) To provide for recreational needs.

(f) To protect life and property in areas subject to floods, landslides and other natural disasters.

(g) To conform to the adopted population plan, if required by NRS 278.170.

(h) To develop a timely, orderly and efficient arrangement of transportation and public facilities and services…

(i) To ensure that the development on land is commensurate with the character and the physical limitations of the land.

(j) To take into account the immediate and long-range financial impact of the application of particular land to particular kinds of development, and the relative suitability of the land for development.

(k) To promote health and the general welfare.

(l) To ensure the development of an adequate supply of housing for the community, including the development of affordable housing.

(m) To ensure the protection of existing neighborhoods and communities, including the protection of rural preservation neighborhoods and, in counties whose population is 700,000 or more, the protection of historic neighborhoods.

(n) To promote systems which use solar or wind energy.

(o) To foster the coordination and compatibility of land uses with any military installation in the city, county or region, taking into account the location, purpose and stated mission of the military installation.

NRS 278.250(2).

It would be impossible to implement the above policies without broad discretion. All real property is unique, all development projects are unique, and the community surrounding each development project is unique. It is therefore plain that "[i]n exercising the powers granted in this section [NRS 278.250], the governing body may use any controls relating to land use or principles of zoning *that the governing body determines to be appropriate*." NRS 278.250(4) (emphasis added). In short, in adopting and applying General Plan policies and zoning ordinances to comply with its responsibilities for planning sound communities under state law, the City must have broad discretion.

The discretion granted to the Council generally in applying land use regulations is even more explicit in the R-PD7 zoning ordinance that the Developer incorrectly claims here allows *no discretion* on the part of the City Council. R-PD stands for "Planned Development." That zoning classification applies to large acreage parcels where a single developer seeks to build significant improvements.

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Under this zoning category, the City is granted wide discretion to locate different uses in the property to provide a comprehensive, safe, healthy, efficient, quality living, working, and recreational environment for the residents and surrounding community. UDC 19.10.050 provides:

> **19.10.050 - R-PD Residential Planned Development Districts**
>
> **A. Intent of R-PD District**
>
> The R-PD District has been to provide for *flexibility and innovation* in residential development, with *emphasis on enhanced residential amenities, efficient utilization of open space*, the separation of pedestrian and vehicular traffic, and homogeneity of land use patterns. . . ."
>
> **C. Permitted Land Uses**
>
> 1. Single-family and multi-family residential and supporting uses are permitted in the R-PD District *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*. In addition, the following uses are permitted as indicated:
>
>   a. Home Occupations for which proper approvals have been secured.
>
>   b. Child Care-Family Home and Child Care-Group Home, *to the extent the Director determines that such uses would be permitted in the equivalent standard residential district*.
>
> * * *
>
> **D. Plan Amendment Approvals, Conditions, Conformance**
>
> Amendments to an approved Site Development Plan Review shall be reviewed and approved pursuant to LVMC 19.16.100(H). *The approving body may attach to the amendment to an approved Site Development Plan Review 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.*

(Emphasis added.) UDC 19.18.020, entitled "Words and Terms Defined," defines "Permitted Land Uses" as that term is used in UDC 19.10.050C:

> **Permitted Use**. Any use allowed in a zoning district as a matter of right *if it is conducted in accordance with the restrictions applicable to that district*.

(Emphasis added). Accordingly, while the Developer claims that R-PD7 zoning allows the City *no discretion to disapprove or condition its development applications*, discretion in fact pervades the ordinance. The Staff Report for the Developer's 35-Acre Applications explained how R-PD7 zoning functions:

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> The subject parent parcel . . . is a significant portion of a developed golf course that is located within the Peccole Ranch Master Plan. . . . As 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. Therefore, portions of the subject area can be restricted in density by various General Plan designations.

Ex. ZZZ at 1414-15. The terms of the R-PD7 zoning ordinance on which the Developer relies, granting wide discretion to the City Council, cannot be reconciled with the Developer's claim that zoning confers constitutional rights on property owners to be free from that exercise of discretion. *Boulder City*, 110 Nev. at 246, 871 P.2d at 325 ("If the City Council had any discretion in granting or denying the permit, there could be no entitlement and no constitutionally protected interest."); *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759 ("In the context of governmental immunity, we have defined a 'discretionary act' as 'an act that requires a decision requiring personal deliberation and judgment.' The language used in section 19.18.050 clearly indicates a discretionary act on the part of the City Council."); *id*. 120 Nev. at 528, 96 P.3d at 760 ("Under section 19.18.050, the City Council must approve the Stratosphere's proposed development of the property through the City's site development plan review process. That process requires the Council to consider a number of factors and to exercise its discretion in reaching a decision. There is no evidence that the Stratosphere had a vested right to construct the proposed ride"). This Court agreed:

> The four Applications submitted to the Council for a general plan amendment [etc.] were all subject to the Council's discretionary decision making, no matter the zoning designation."). ¶ It is up to the Council – through its discretionary decision making – to decide whether a change in the area or conditions justify the development sought by the Developer and how any such development might look. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723. ¶ The Applications included requests for a General Plan Amendment and Waiver. In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, no matter the zoning designation. UDC 19.00.030, 19.16.030, 19.16.050, 19.16.100, 19.16.130.

Ex. XXX at 1392-94. Judge Herndon also agrees:

[Start of quote from Judge Herndon FFCL]

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Courts generally defer to the exercise of land use regulatory powers by the legislative and executive branches of government

3. In the United States, planning commissions and city councils have broad authority to limit land uses to protect health, safety, and welfare. ***Because the right to use land for a particular purpose is not a fundamental constitutional right***,[11] courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use. The United States Supreme Court declared that the Court does "not sit to determine whether a particular housing project is or is not desirable," since "[t]he concept of the public welfare is broad and inclusive." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Instead, where the legislature and its authorized agencies "have made determinations that take into account a wide variety of uses," it is "not for [the courts] to reappraise them." *Id.*

4. The role of the courts in overseeing land use regulation is limited to cases of the most extreme restrictions on the use of private property under the regulatory takings doctrine. The narrow scope of the doctrine stems from the separation of powers between the legislative and executive branches of government and the judicial branch. *See*, *e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (judicial restraint respects the political questions doctrine and separation of powers because it requires that the courts refrain from replacing the policy judgments of lawmakers and regulators with their own with regard to non-fundamental constitutional rights); *Gorieb v. Fox*, 274 U.S. 603, 608 (1926) ("State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions . . . require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.").

5. Nevada's Constitution expressly prohibits any one branch of government from impinging on the functions of another. *Secretary of State v. Nevada State Legislature,* 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Nevada State Constitution provides that the state government "shall be divided into three separate departments" and prohibits any person authorized to exercise the powers belonging to one department to "exercise any functions, appertaining to either of the others" except where expressly permitted by the Constitution. Nev. Const. art. 3 § 1.

6. Separation of powers "is probably the most important single principle of government." *Blackjack Bonding v. Las Vegas Mun. Ct.,* 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). Within this framework, Nevada has delegated broad authority to cities to regulate land use for the public good. The State has specifically authorized cities to "address matters of local concern for the effective operation of city government" by "[e]xpressly grant[ing] and delegat[ing] to the governing body of an incorporated city all powers necessary or proper to address matters of local concern so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government." NRS 268.001(6), (6)(a).

7. "Matters of local concern" include "[p]lanning, zoning, development and redevelopment in the city." NRS 268.003(2)(b). "For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing

[11] [Emphasis added.] This conclusion of law by itself is fatal to the Developer's claim to a constitutionally protected property right under zoning to build whatever it pleases and requires rejection of its regulatory taking claims.

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bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land." NRS 278.020(1); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 254, 439 P.2d 219, 222 (1968) (upholding a county's authority under NRS 278.020 to require an applicant for a special use permit to present evidence that the use is necessary to the public health and welfare of the community).

8. As a charter city, the City has the right to "regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land within those districts" and "[e]stablish and adopt ordinances and regulations which relate to the subdivision of land." Las Vegas City Charter § 2.210(1)(a), (b). Cities in Nevada limit the height of buildings, the uses permitted and the location of uses on property, and many other aspects of land use that could have an impact on the community. *See, e.g.*, *Boulder City v. Cinnamon Hills Assocs*., 110 Nev. 238, 239, 871 P.2d 320, 321 (1994) (upholding City's denial of building permit application); *State ex rel. Davie v. Coleman*, 67 Nev. 636, 641, 224 P.2d 309, 311 (1950) (upholding Reno ordinance establishing land use plan and restricting use of land).

To avoid encroaching on the police powers of other branches of government, courts intervene in land use regulation only in cases of extreme economic burden on the property

9. In its Third through Seventh Causes of Action, the Developer alleges a variety of types of takings under the Fifth Amendment of the United States Constitution, which provides "nor shall private property be taken for public use, without just compensation," and its counterpart in Article 1, Section 8 of the Nevada Constitution. The Just Compensation Clause of the Fifth Amendment was originally intended to require compensation only for eminent domain – *i.e*., direct government takings. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In 1922, the Supreme Court held that a regulation that "goes too far," such that it destroys all or nearly all of the value or use of property, equivalent to an eminent domain taking, can require the regulatory agency to compensate the property owner for the value of the property before the regulation was imposed. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005). This type of inverse condemnation that does not involve a physical occupation of private property by the government, but rather alleges excessive regulation of the property owner's use of the property, is known as a "regulatory taking."

Herndon fn The Developer conflates eminent domain and inverse condemnation. The two doctrines have little in common. In eminent domain, the government's liability for the taking is established by the filing of the action. The only issue remaining is the valuation of the property taken. In inverse condemnation, by contrast, the government's liability is in dispute and is decided by the court. If the courts finds liability, then a judge or jury determines the amount of compensation. [End of fn]

Under separation of powers, however, courts intervene in regulation of land use by the legislative and executive branches of government only in cases of (1) extreme regulation where the economic impact of the regulation is equivalent to an eminent domain taking, wiping out or nearly wiping out the use of value of the property, similar to a physical ouster of the owner by eminent domain, or (2) interference with reasonable investment-backed expectations. *Lingle*, 544 US. at 539 (categorical and *Penn Central* regulatory takings test both "aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which

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government directly appropriates private property or ousts the owner from his domain").

Herndon fn In settling the test for a regulatory taking, *Lingle* resolved inconsistencies in prior federal and state court decisions. The *Lingle* opinion was unanimous and had no footnotes, indicating that the Supreme Court intended to bring clarity and simplicity to the regulatory takings doctrine. [End of fn]

10. The Nevada Supreme Court has established an identical test, requiring an extreme economic burden to find liability for a regulatory taking. *State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "'completely deprive an owner of all economically beneficial use of her property'") (quoting *Lingle*, 544 U.S. at 538); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993) (regulation must deny "all economically viable use of [] property" to constitute a taking under either categorical or *Penn Central* tests); *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35 (taking requires agency action that "destroy[s] all viable economic value of the prospective development property").

11. The Developer cites to numerous statements and actions of the City Council, individual Council members, City officials, and City staff that the Developer contends were unfair to the Developer. Fairness, however, is not the test for a regulatory taking. Because courts defer to the authority of local government to regulate land use for the public good, the regulatory takings doctrine is not concerned with the soundness or fairness of government regulation of land use. Because the regulation is presumed valid in regulatory takings cases, it is inappropriate to delve into the validity of or the motives underlying the regulation:

> The notion that . . . a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable. [The] inquiry [as to a regulation's validity] is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking.

Lingle, 544 U.S.at 543 (citing *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987)); *cf. Sproul Homes of Nev. v. State ex rel. Dept. of Highways*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (judicial interference by mandamus, not by inverse condemnation, is appropriate if an agency's action was arbitrary or accompanied by manifest abuse). Assuming the truth of the Developer's allegations regarding the statements and actions of the City Council, individual Council members, City officials, and City staff, they are not relevant unless they can be shown to result in a wipeout or near wipeout of use and value or interfere with the Developer's reasonable investment-backed expectations.

12. A requirement that regulatory agencies pay compensation to property owners for regulation short of a wipeout would encroach on the powers of the legislative and executive branches of government to regulate land use to promote the general health, safety, and welfare. *Lingle*, 544 U.S. at 544 ("[R]equir[ing] courts to scrutinize the efficacy of a vast array of state and federal regulations" to determine whether they substantially advance legitimate state interests is "a task for

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which courts are not well suited. Moreover, it would empower-and might often require-courts to substitute their predictive judgments for those of elected legislatures and expert agencies."); *id.* at 537 (recognizing compensable regulatory takings only when the effect of government regulation is tantamount to a direct appropriation or ouster). As a result, a regulation is not a taking unless it virtually wipes out all the economic value or use of the property, because only then is it the functional equivalent of eminent domain. *Id.* at 539. Moreover, a standard for public liability for a regulatory taking that merely reduces the use or value of private property without destroying the use or value would lose its connection to the United States and Nevada Constitutions because that regulation would not be the functional equivalent of an eminent domain taking. *Id*. at 539.

13. Complying with government regulation, like the alleged regulation of the redevelopment of the Badlands in this case, is simply a cost of doing business in a complex society. "'[G]overnment regulation—by definition—involves the adjustment of rights for the public good.'" *Id.* at 538 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)); *see also Mahon*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978) ("Legislation designed to promote the general welfare commonly burdens some more than others.").

The Developer alleges a categorical and *Penn Central* regulatory taking

14. The Developer has alleged two types of regulatory takings: categorical and *Penn Central*. A categorical taking occurs either when a regulation results in a permanent physical invasion of property, 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*, 505 U.S. at 1019). A *Penn Central* taking is determined based on review of several factors; "[p]rimary" among them is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id*. at 538-39 (quoting *Penn Central*, 438 U.S. at 124. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). Under both the categorical and the *Penn Central* takings tests, the only regulatory actions that cause takings are those "that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

Herndon fn The Developer's "categorical" and "regulatory per se" takings are the same thing. The majority in *Lucas v. S.C. Coastal Council* 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. 505 U.S. at 1015, 1052 (Blackmun, J., dissenting). A unanimous Supreme Court in *Lingle* also uses the terms interchangeably. 544 U.S. at 538. Similarly, the Nevada Supreme Court in *Sisolak* refers to physical takings interchangeably as "categorical" and "per se." 122 Nev. at 662-63, 137 P.3d at 1122-23). [End of fn]

15. 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); see also *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient to show a taking); *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S.

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602, 645 (1993) (citing cases in which diminutions of 75% and 92.5% insufficient to show a taking); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (1979) (95% diminution not a taking); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% diminution in property value not a taking); *Brace v. United States*, 72 Fed. Cl. 337, 357 (2006) ("diminutions well in excess of 85 percent" required to show a taking).

16. The Developer cites several federal cases finding a taking even where the diminution in value was less than 100%. *E.g*., *Formanek v. United States*, 26 Cl.Ct. 332 (Fed. Cl. Ct. 1992) (finding a taking where government action resulted in 88% decline in value). Even though the Developer's cases were decided before *Lingle* clarified the regulatory takings doctrine in 2005 to require that liability for a taking can be found only where government action wipes out or nearly wipes out the economic value of property, the cases cited did require a near wipeout of value before a finding of a taking.

17. The Developer also relies on *Tien Fu Hsu v. County of Clark*, 173 P.3d 724 (Nev. 2007); *Sisolak*, 137 P.3d 1110; *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23 (2012); *ASAP Storage v. City of Sparks*, 123 Nev. 639 (2008); and *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327 (9th Cir. Ct. App. 1977) for the contention that regulation that "substantially impairs" or "direct[ly] interfere[s] with or disturb[s]" the owner's property can give rise to a regulatory taking. These cases are physical takings cases (*Tien*, *Sisolak*, *Arkansas*, and *ASAP*) or precondemnation cases (*Richmond*) and are inapplicable. The Developer also contends that takings are defined more broadly in Nevada than in federal law, citing *Vacation Village, Inc. v. Clark County*, 497 F.3d 902 (9th Cir. 2007). *Vacation Village*, however, concludes only that physical takings are broader in Nevada, not regulatory takings, citing *Sisolak*. *Id*. at 915-16. The scope of agency liability for regulatory takings in Nevada is identical to the federal standard. *See State*, 131 Nev. at 419, 351 P.3d at 741 (2015); *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35. **[End of quote from Judge Herndon FFCL]**

Ex. CCCC at 1496-1504 (emphasis added).

Judge Herndon's characterization of *Sisolak* is particularly significant. Judge Herndon soundly rejects the Developer's attempt to confuse the Court by citations to *Sisolak*, a physical taking case, as authority for the standard of liability for the Developer's categorical and *Penn Central* claims. Those claims concern regulation of the Developer's *use* of the 35-Acre Property; physical taking cases like *Sisolak* do not apply. The Court in *Sisolak* held:

> 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 second type of per se taking, complete deprivation of value, is *not at issue in this case* because Sisolak never argued that the Ordinances completely deprived him of all beneficial use of his property.

122 Nev. 662-63, 137 P.3d at 1122 (emphasis added). The *Sisolak* Court explained the origins of the

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physical taking doctrine:

> In *Loretto* [*v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982)], a New York statute required landlords to permit a cable television company to install cables and junction boxes in their buildings. The Supreme Court held that the New York statute authorized a permanent physical occupation of the landowners' property that required compensation.

122 Nev. 666-67, 137 P.3d at 1124-25. The Court went on to find that "the Ordinances authorize a physical invasion of Sisolak's property and require Sisolak to acquiesce to a permanent physical invasion. Thus, the County has appropriated private property for public use without compensating Sisolak and has effectuated a *Loretto*-type per se regulatory taking." 122 Nev. at 667, 137 P.3d at 1125. Accordingly, *Sisolak* is a physical taking case and is not relevant to the Developer's categorical and *Penn Central* taking claims.

B. The Developer's categorical and *Penn Central* taking claims are not ripe

In his FFCL, Judge Herndon held that the Developer's categorical and *Penn Central* claims in the 65-Acre case were not ripe and granted summary judgment for the City. Judge Herndon's findings of fact and conclusions of law are directly applicable to this 35-Acre case and compel the same conclusion with respect to the Developer's categorical and *Penn Central* claims.

[Start of quote from Judge Herndon FFCL]

> 20. A regulatory takings claim is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is also denied. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) ("*Williamson County*"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) ("[T]he final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted."); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53 (1986) (at least two applications required to ripen takings claim).
>
> 21. The Nevada Supreme Court has fully embraced the final decision requirement:
>
> > Generally, courts only consider ripe regulatory takings claims, and "a claim that the application of government regulations effects a taking of a property interest **is 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. . . [The] regulatory takings claim is unripe for review for a failure to file any land-use application with the City. And although Ad America contends that exhaustion was futile

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> because there was a de facto moratorium on developing property within Project Neon's path, the record does not support this contention. The opinion of Ad America's political consultant, which was based on alleged statements from only one of seven City Council members, is insufficient to establish the existence of such a moratorium." (emphasis added).

State v. Eighth Jud. Dist. Ct., 131 Nev. at 419-20, 351 P.3d at 742 (quoting *Williamson County*, 473 U.S. at 186). Because the Nevada Supreme Court follows *Williamson County*, the courts of this state require that at least two applications be denied before finding that a regulatory takings claim is ripe.

> 22. A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id*." **[End of quote from Judge Herndon FFCL]**

Ex. CCCC at 1504-05 (emphasis original).

C. Both categorical and *Penn Central* claims require a showing that the City's regulation wiped out or nearly wiped out the economic use of the property

In its first and second causes of action for categorical and *Penn Central* takings, the Developer alleges that the City's regulation prevented any and all *use* of the 35-Acre Property. A categorical taking by excessive regulation of the *use* of property occurs 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*, 505 U.S. at 1019). If a regulation does not completely wipe out "all economically beneficial use," a property owner may still allege a *Penn Central* taking. Liability for a *Penn Central* taking is determined based on review of several factors; "[p]rimary" among them is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id*. at 538-39 (quoting *Penn Central*, 438 U.S. at 124. The Supreme Court made clear, however, that even a *Penn Central* claim requires a near wipeout:

> [T]hese . . . inquiries (reflected in . . . <u>*Lucas*</u> . . . and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. . . . In the *Lucas* context [categorical taking], of course, the complete elimination of a property's value is the determinative factor. . . . And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact

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and the degree to which it interferes with legitimate property interests.

Lingle, 544 U.S. at 539-40. As Judge Herndon held, "[u]nder *both* the categorical and *Penn Central* takings tests, the only regulatory actions that cause takings are those 'that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.' *Lingle*, 544 U.S. at 539." Ex. CCCC at 1502-03. Judge Herndon went on to hold:

> 15. 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); see also *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81% diminution in value not sufficient to show a taking); *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing cases in which diminutions of 75% and 92.5% insufficient to show a taking); *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (1979) (95% diminution not a taking); *Pace Res., Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% diminution in property value not a taking); *Brace v. United States*, 72 Fed. Cl. 337, 357 (2006) ("diminutions well in excess of 85 percent" required to show a taking).
>
> 17. The Developer also relies on *Tien Fu Hsu v. County of Clark*, 173 P.3d 724 (Nev. 2007); *Sisolak*, 137 P.3d 1110; *Arkansas Game & Fish Comm. v. United States*, 568 U.S. 23 (2012); *ASAP Storage v. City of Sparks*, 123 Nev. 639 (2008); and *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327 (9th Cir. Ct. App. 1977) for the contention that regulation that "substantially impairs" or "direct[ly] interfere[s] with or disturb[s]" the owner's property can give rise to a regulatory taking. These cases are physical takings cases (*Tien*, *Sisolak*, *Arkansas*, and *ASAP*) or precondemnation cases (*Richmond*) and are inapplicable. The Developer also contends that takings are defined more broadly in Nevada than in federal law, citing *Vacation Village, Inc. v. Clark County*, 497 F.3d 902 (9th Cir. 2007). *Vacation Village*, however, concludes only that physical takings are broader in Nevada, not regulatory takings, citing *Sisolak*. *Id*. at 915-16. The scope of agency liability for regulatory takings in Nevada is identical to the federal standard. *See State*, 131 Nev. at 419, 351 P.3d at 741 (2015); *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35.

Ex. CCCC at 1503-04.

D. The final decision ripeness requirement of *Williamson County* and *State* applies to both categorical and *Penn Central* claims

The Developer contends that the *Williamson County* final decision requirement as adopted by the Nevada Supreme Court in *State* applies only to its *Penn Central* claim and not to its categorical taking claim.[12] This contention is preposterous. Judge Herndon correctly found that the final decision requirement applies to both the Developer's categorical and *Penn Central* claims and granted

[12] The final decision requirement does not apply to the Developer's physical or nonregulatory taking claims. It applies only where an owner claims that regulation has limited the *use* of the property.

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summary judgment to the City. Ex. CCCC at 1504-15. Moreover, it is illogical to suggest that the final decision requirement of *Williamson County* applies to *Penn Central* claims (near wipe-outs) but not categorical claims (total wipe-outs). In both instances, if a property owner rests its claim on only one (or no) government denial of an application for development, doubt will remain as to whether the government might permit some lesser—but still economically beneficial—use of the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19 (2001). Indeed, even where an initial government decision arguably denies the owner all economically beneficial use of its property, unless the owner takes "reasonable and necessary steps" to allow the government to "exercise [its] full discretion in considering development plans for the property, including the opportunity to grant variances or waivers . . . the extent of the restriction on [the] property is not known." *Id.* at 620-21.

Consistent with this logic, the Supreme Court has made it clear that the *Williamson County* ripeness requirement applies equally to all regulatory taking claims alleging denial of use, including categorical claims. In *Palazzolo*, for instance, the Court applied the *Williamson County* ripeness analysis to a categorical claim, in which the landowner alleged that the government's denial of a development proposal "deprived him of 'economically, beneficial use' of his property […], resulting in a total taking requiring compensation" under *Lucas*. 533 U.S. at 616, 618-26. The *Palazzolo* Court's explanation of the rationale behind the *Williamson County* final decision requirement leaves zero doubt that it applies to both *Penn Central* and categorial claims:

> 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, *see Lucas*, *supra*, at 1015, 112 S.Ct. 2886, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, *see Penn Central*, *supra*, at 124, 98 S.Ct. 2646. These matters cannot be resolved in definitive terms until a court knows the extent of permitted development on the land in question.

Id. at 618 (internal quotations omitted).

The lower federal courts have likewise consistently held that the *Williamson County* ripeness doctrine applies to both *Penn Central* and categorical takings claims. *See*, *e.g.*, *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 124-25, 131 (2d Cir. 2003) (applying *Williamson County* to claim alleging categorical taking under *Lucas*) (*abrogated on other grounds by*

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San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005)); *Barlow & Haun, Inc. v. U.S.*, 805 F.3d 1049, 1057-59 (Fed. Cir. 2015) (same to claim alleging categorical taking of oil and gas leasing rights); *Seiber v. U.S.*, 364 F.3d 1356, 1365-66, 1368 (Fed. Cir. 2004) (same to claim alleging that denial of logging permit effected temporary categorical taking of landowner's property).[13]

In sum, there is no legal or logical basis for the Developer's contention that the *Williamson County* and *State* final decision ripeness requirement does not apply to its categorical taking claim.

E. The Developer failed to file the necessary applications to allow the Court to determine whether the categorical and *Penn Central* claims are ripe

"[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). If the government does not take final action, however, a court cannot determine the value of the property "after the government action." A regulatory taking claim, therefore, is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is also denied. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), *overruled on other grounds by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) ("*Williamson County*"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) ("[T]he final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted."); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-43 (1986) (at least two applications required to ripen takings claim). This is the final decision ripeness doctrine: "[a] court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348. Here, the City did not make a final decision as to the uses that the 35-Acre Property could be put. Accordingly, the Court cannot determine how far the

[13] Tellingly, the majority of courts applying the *Williamson County* final decision requirement apply it to claims that are only described as "regulatory takings claims." *See*, *e.g.*, *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 96 (2d Cir. 1992) (landowner's "takings argument represents a regulatory taking claim to which . . . the *Williamson* ripeness test [is] fully applicable"). This lack of distinction underscores not only that *Williamson County* applies to all regulatory takings claims, but also that this principle is so uncontroversial that it requires no explanation.

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City's regulation goes, and the categorical and *Penn Central* taking claims are not ripe.

The court in *State* concluded that the regulatory takings claim was unripe in that case because the developer had "fail[ed] to file any land-use application with the City." *State*, 131 Nev. at 419-20. It rejected the developer's contention that filing an application would be futile, finding that an opinion of futility based on an alleged statement of only one City Council member was insufficient to show futility. *Id.* Because the Nevada Supreme Court follows *Williamson County*, the courts of this State require that at least two applications be denied before finding that a regulatory takings claim is ripe.

A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id*. The Developer has failed to meet its burden to show that its categorical and *Penn Central* claims are ripe.

Judge Herndon found that the Developer failed to obtain a final decision from the City as to the level of development the City would allow on the 65-Acre Property because the Developer did not file, and the City did not deny, at least two applications for development of the 65-Acre Property standing alone. Ex. CCCC at 1504-15. Because the City was not given the chance to definitively decide the use of the 65-Acre Property, Judge Herndon concluded that he would have to speculate as to what action the City would have taken on hypothetical applications for development, and further speculate as to the value of the 65-Acre Property after the hypothetical denials of the applications. *Id*. Accordingly, Judge Herndon held that the Developer's categorical and *Penn Central* claims are unripe. *Id*.

The Developer filed this action seeking damages for a taking of the 35-Acre Property only. *See* Compl. ¶ 8. The Developer filed only one application to develop the 35-Acre Property standing alone. Ex. HH; Compl. ¶ 32; Ex. 46; *see also* Ex. II at 673-78. The Developer has submitted no evidence that it has filed a subsequent application for a variance, reduced density, or an alternate project after the City denied its initial application. As such, like the 65-Acre case, the City cannot be said to have reached a "clear, complete, and unambiguous" decision or that the City has "drawn the line, clearly and emphatically, as to the sole use to which [the 35-Acre Property] may ever be put." *Hoehne*, 870

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F.2d at 533. Thus, the City is entitled to summary judgment on the Developer's categorical and *Penn Central* taking claims in this 35-Acre case on the same basis as the 65-Acre case.

Judge Herndon also correctly rejected the Developer's argument that the filing of further applications would be futile. In so holding, Judge Herndon dismissed the Developer's assertion that applications to develop property *other than* the 35-Acre Property standing alone count as applications to develop the 35-Acre Property for purposes of final decision ripeness. Judge Herndon held that it is incumbent on the Developer to file and have rejected two applications, regardless of representations of City staff or individual City Councilmembers as to their preference for applications to develop the Badlands:

> 25. It can certainly be said that Developer may have very well been frustrated with what had occurred. Its first application was approved, only to then find itself being sued by a group of homeowners, thereafter receiving an unfavorable District Court ruling necessitating a Nevada Supreme Court appeal and the perceived need to file multiple lawsuits. That frustration does not, however, excuse the necessity of first making application to develop the 65-Acre Property before filing the instant case against the City alleging a taking of that property. This is especially true where, as here, Developer chose to file four separate court actions specifically directed at each individual parcel of property that Developer alleged was taken.
>
> 26. It must also be noted that fifty percent (50%) of Developer's applications directed to the individual properties were approved. Their first application for the 17-Acre Property was approved by the city. The application for the 35-Acre Property was denied. The application for the 133-Acre Property was deemed incomplete because of the then controlling Crockett Order and it was never resubmitted. And, as stated above, no application was ever submitted for the 65-Acre Property at issue in the instant case.
>
> 27. This court holds that any argument that proffering a development proposal for the 65-Acre Property would be futile is without merit as the City approved fifty percent (50%) of the individual applications it received, and felt it had legal authority to consider. This court would be engaging in inappropriate speculation were it to try and guess at what type of proposal Developer would have made for the 65-Acre Property and what type of response the City would have provided.

Ex. CCCC at 1506-07.

1. The Master Development Agreement was not an application to develop "the property at issue" as required by the Nevada Supreme Court in *State*

The Developer asserts that its categorical and *Penn Central* regulatory taking claims are ripe because the City disapproved the Developer's Master Development Agreement ("MDA") and that

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when added to the City's denial of the 35-Acre Applications, the City denied two applications on the merits as required under *State* for final decision ripeness. The MDA, while it included the 35-Acre Property, covered the entire 250-acre Badlands. Ex. LL at 801. It did not constitute an application to develop the 35-Acre Property standing alone, which is "the property at issue" in the takings inquiry. *See State*, 131 Nev. at 419. The City's denial of the MDA, therefore, is not considered a second application to develop the 35-Acre Property for purposes of ripeness.

Judge Herndon considered the Developer's argument and rejected it:

> 28. The Developer argued that the denial of the Master Development Agreement (MDA) also plays into the futility argument but the court finds that stance to be unpersuasive. To begin, the MDA was made after the individual 17-Acre Property proposal was made (which was approved) and after there was an application pending before the City for the development of the individual 35-Acre Property. Any denial of the MDA proposal while multiple individual proposals were pending and/or already approved cannot be said to be at all unreasonable. Moreover, even if the MDA denial was considered as part of the futility argument, the City would still have granted one-third (1/3) of the Developer's three proposals with the fourth proposal being deemed incomplete. As such, Developer's argument still places this court in the position of having to speculate about a possible 65-Acre Property proposal and the possible response by the City. Lastly, Developer made its 133-Acre Property application after the City denied the MDA. As such, it is clear that Developer did not believe that the MDA denial rendered further individual property development applications futile, rather, Developer chose to only proceed with the application for the 133-Acre Property.
>
> 29. The city's actions simply cannot be said to have been so "clear, complete, and unambiguous as to excuse the need for Developer to propose a development plan for the 65-Acre Property before Developer made the choice to seek court intervention for that specific parcel of property.
>
> 35. The Developer asserts that its Penn Central regulatory taking claim is ripe because the City disapproved the Developer's MDA for the entire Badlands. The MDA, while it included parts of the 65-Acre Property, covered the entire 250-acre Badlands outside of the 17-Acre Property, development on which the City had already approved. Ex. LL at 801. It did not constitute an application to develop the 65-Acre Property standing alone, which is "the property at issue." See State, 131 Nev. at 419. The City's denial of the MDA, therefore, is not considered an application to develop the 65-Acre Property for purposes of ripeness. Even assuming that it was an application to develop the 65-Acre Property standing alone, the Developer's regulatory takings claim would not be ripe until the Developer files at least one additional application. The Developer has presented no evidence that it has done so.
>
> 36. The Court also does not consider the MDA to constitute an initial application to develop the 65-Acre Property for purposes of a final decision because the MDA was not the specific and detailed application required for the City to take final action on a development project. *See* Ex. LL at 810-19 (general outline of proposed development in the Badlands). The MDA divided the Badlands into four "Development Areas" and proposed permitted uses, maximum densities, heights,

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> and setbacks for the four areas. *Id.* at 812, 814. For Development Areas 2 and 3, which contained portions of the 65-Acre Property, the MDA proposed a maximum residential density of 1,669 housing units, and the Developer was to have the right to determine the number of units developed on each Area up to the maximum density. *Id.* at 813-14. The indefinite nature of the MDA is also evident from the uncertainty expressed about various uses. For example: "[t]he Community is planned for a mix of single family residential homes and multi-family residential homes including mid-rise tower residential homes"; "[a]ssisted living facilit(ies) . . . may be developed within Development Area 2 or Development Area 3"; and "additional commercial uses that are ancillary to multifamily residential uses shall be permitted." *Id.* at 812. Finally, the MDA provided that [t]he Property shall be developed as the market demands . . . and at the sole discretion of Master Developer." *Id*. at 814. Accordingly, the MDA was not clear as to how many housing units would eventually be built in the 65-Acre Property. Nor was the City Council apprised by the MDA of the types and locations of uses, the dimensions or design of buildings, or the amount and location of access roads, utilities, or flood control on the 65-Acre Property. *See id*. at 813-16.
>
> 37. Given the uncertainty in the MDA as to what might be developed on the 65-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 65-Acre Property. This once again places the court in the untenable position of having to speculate about what the City might have done, said speculation being improper.
>
> 40. The Developer contends that following the City's denial of the MDA, it would have been futile to file the UDC Applications to develop the 65-Acre Property. As with the earlier discussion on futility, the court finds Developer's position here to be unpersuasive. The Developer cites no evidence for its statement that the City insisted that the MDA was the only application it would accept to develop the 65 Acre Property was the MDA. The Developer previously acknowledged that City Councilmembers expressed a preference for a holistic plan addressing the entire Badlands. Ex. WWW at 1323. Such a preference does not indicate a refusal to consider other options. Indeed, the City did consider—and approve—significant development on the 17-Acre Property within the Badlands, indicating that the City is open to considering development of this area.

Ex. CCCC at 1507, 1509-12.

The MDA was not the specific and detailed second application to develop the 35-Acre Property required for the City to take final action on a development project. *See* Ex. LL at 810-19 (general outline of proposed development in the Badlands). As indicated by Judge Herndon, the MDA divided the Badlands into four "Development Areas" and proposed permitted uses, maximum densities, heights, and setbacks for the four areas. *Id.* at 812, 814. For Development Area 4, which included the 35-Acre Property, the MDA proposed "a maximum of sixty-five (65) residential lots." *Id*. at 812-14. The Developer was to have the right to decide the number of units developed on each Area up to the maximum density. *Id.* As Judge Herndon ruled, the MDA was "not the specific and detailed application required for the City to take final action on a development project." Ex. CCCC at 1512.

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The MDA also did not constitute a valid set of land use applications for the 35-Acre Property. A development agreement is not a substitute for the required UDC Applications. The UDC states that "all the procedures and requirements of this Title shall apply to the development of property that is the subject of a development agreement." UDC 19.16.150(D). To develop the 35-Acre Property even if an MDA had been approved, the Developer would be required to file a Site Development Review application and seek a General Plan Amendment. *See* Ex. LL at 819 (City would process "all applications, including General Plan Amendments, in connection with the Property"); *id.* at 820 ("Master Developer shall satisfy the requirements of the Las Vegas Municipal Code section 19.16.100 for the filing of an application for a Site Development Plan Review"). The version of the MDA the City Council rejected on August 2, 2017 acknowledged that the Developer must comply with all "Applicable Rules," defined as the provisions of the "Code and all other uniformly-applied City rules, policies, regulations, ordinances, laws, general or specific, which were in effect on the Effective Date." *Id.* at 804, 810. Similarly, the MDA indicated that the property would be developed "in conformance with the requirements of NRS Chapter 278, and as otherwise permitted by law." *Id.* at 802. Because the Developer did not submit two site-specific development applications related to the 35-Acre Property, the City Council's denial of the MDA did not constitute a final decision by the City Council regarding what development would be permitted on the 35-Acre Property.

Given the uncertainty in the MDA as to what might be developed on the 35-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 35-Acre Property. This once again places the Court in the untenable position of having to speculate about what the City might have done. Accordingly, the Developer cannot carry its burden to show that compliance with the two-application requirement of *Williamson County* and *State* would be futile.

2. The City's approval of the 17-Acre Project and finding that the 133-Acre Applications were incomplete based on the Crockett Order demonstrates that a second application to develop the 35-Acre Property would not have been futile

The Developer's contention that proffering a second development proposal for the 35-Acre Property would be futile is also without merit because, as Judge Herndon held, the City approved fifty percent of the individual applications it received and had legal authority to consider. Ex. CCCC at 1506-07. The City approved the Developer's first application for the 17-Acre Property and that

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approval was ultimately upheld by the Nevada Supreme Court. The Developer's contention that the City disapproved the 17-Acre Applications because the Developer failed to file an MMA and that the City argued before Judge Crockett that an MMA was required because the property was designated PR-OS is a flagrant misrepresentation. The City approved the 17-Acre Applications and did not require an MMA. *Judge Crockett* invalidated the 17-Acre Approvals over the City's objection. The City's approval of the 17-Acre Applications is evidence that the City could approve a second, revised application to develop the 35-Acre Property.

The City deemed the application for the 133-Acre Property incomplete because of the then-controlling Crockett Order. The Developer's contention that the City disapproved the 133-Acre Applications because the property was designated PR-OS is another flagrant misrepresentation. The City Council did not disapprove the 133-Acre Applications. It struck the Applications as incomplete because, as this Court and Judge Sturman found, the City was bound by the Crockett Order and would have been in contempt of court had it disobeyed that Order. The City Council did not consider the 133-Applications on the merits. Nor did its action turn on the PR-OS designation. The Developer never resubmitted the 133-Acre Applications, even after the Supreme Court reversed the Crockett Order, resulting in the 133-Acre Applications now being complete and ready for consideration on the merits, and even after the City invited the Developer to resubmit the Applications. Ex. OOO at 1153. Moreover, the Developer has opposed the City's Motion to Remand the 133-Acre Applications to the City Council for a decision on the merits. The City has given the Developer ample opportunity to ripen its taking claims. But the last thing the Developer wants is to actually build anything in the Badlands, preferring instead to seek cash from the taxpayers based on its unripe taking claims.

Finding that the City approved an application for significant development of the 17-Acre Property, struck the 133-Acre Applications under a court order, disapproved the first and only 35-Acre Applications, and that the Developer failed to file any application for the 65-Acre Property, Judge Herndon correctly ruled that the Developer's taking claims regarding the 65-Acre Property were not ripe. This Court would similarly be engaging in inappropriate speculation were it to guess what type of second proposal the Developer would have made for the 35-Acre Property and what response the City would have provided. The categorical and Penn Central taking claims are unripe.

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3. Statements at the City Council hearing on the MDA indicate that a second application to develop the 35-Acre Property would not be futile

At the City Council hearing on the MDA, no Councilmember indicated that he/she would not approve development of the Badlands at a reduced density if the Developer submitted a revised development agreement. *See* Ex. WWW at 1365-70. The vote to deny the development agreement was 4-3 (*id*. at 1370). Therefore, had a modified proposal been made regarding the MDA or the 35-Acre Property standing alone, it was only necessary for one of the four members who voted to deny the application to become satisfied with the proposed changes for it to be approved. And two of the four City Councilmembers who voted against the MDA, Seroka and Coffin, are no longer members of City Council. Moreover, four of the seven members of the City Council that considered the MDA are no longer on the Council. *See* https://www.lasvegasnevada.gov/Government/Mayor-City-Council.[14] Accordingly, there is a realistic chance that a modified proposal for the 35-Acres would be approved.

Much of the commentary about the MDA from Councilmembers at the public hearing indicates that they might approve a lower density development. For example, Councilmember Coffin, who voted against the MDA, stated that he would support "some sort of development agreement" for the Badlands. Ex. WWW at 1327; *see also id.* at 1328 (Badlands "still could be developed if you paid attention to [preserving the desert landscape]"). Similarly, Councilmember Seroka, who voted to deny the MDA, noted that three different drafts of the development agreement had been circulated in the previous week (*id*. at 1362); he had insufficient time to review and understand the version of the agreement before the City Council (*id*.); the proposed residential development was too dense (*id*. at 1361-62); and the development agreement contained no timeline for development of the Badlands (*id*. at 1363). Seroka explained that "a reasonable and equitable development agreement is possible, but this is not it," and that the Developer could resubmit a development agreement for the Council's consideration. *Id*. at 1365-66. Similarly, the majority of citizens testifying at the City Council hearing on the development agreement indicated not that they were opposed to all development of the Badlands, but rather that the density of residential development proposed in the agreement was excessive. *E.g.*, *id.* at 1339, 1344-45, 1350, 1353-55, 1357-60. The City's disapproval of the MDA

[14] Two of the three members who voted for the MDA are still on the City Council.

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falls short of the "clear, complete, and unambiguous" proof that the agency has "drawn the line, clearly and emphatically, as to the sole use to which the [35-Acre Property] may ever be put." *Hoehne*, 870 F.2d at 533.

In sum, the Developer chose to file applications to develop two of the three other individual properties at issue in the aforementioned cases, while also filing a MDA. The Developer chose not to file a second application for the individual 35-Acre Property before instituting this court action, which is specific to the 35-Acre Property. The City has granted one of the two individual applications that were proposed, while denying a third due to the then controlling Crockett Order. Filing a second application for the 35-Acre Property would not have been futile. Accordingly, the Developer's categorical and *Penn Central* regulatory takings claims are unripe and the Court has no jurisdiction over the claims.

4. The Developer's contention that the City "nullified" or "clawed back" its approval of 435 luxury housing units on the 17-Acre Property is frivolous

The Developer argues that the approval of the 17-Acre Property was somehow vacated and therefore no applications could be said to have been granted by the City. The City approved the 17-Acre Applications, defended them in Judge Crockett's Court, defended them in the Nevada Supreme Court, and notified the Developer as soon as the remittitur had been issued that the Approvals were once again valid and the Developer was free to proceed with the 435-unit project. The Developer has not a shred of evidence that the City has taken any action since the Supreme Court reinstated the 17-Acre Approvals to "nullify" or "claw back" the approvals. Nor has the Developer presented any authority that the City has the power to "nullify" its approvals of development, no less approvals that the Nevada Supreme Court validated and ordered to be reinstated. Judge Herndon found that the Developer's claim that the City nullified the 17-Acre Approvals to be wholly unsupported by evidence and "frivolous." Ex. CCCC at 1508. Judge Herndon concluded:

> 30. To the extent Developer argues that the approval of the 17-Acre Property was somehow vacated and therefore no applications could be said to have been granted by the City, the Court finds this position to also be without merit. There is no evidence that the City has taken any action to limit the Developer's proposed use of the 17-Acre Property for 435 luxury housing units. The Developer's contention that the City "nullified' the 435-unit approve is without any support in the evidence. The Developer's contention that the City's

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declining to extend the 17-Acre approvals after Judge Crockett invalidated the approvals means that the City "nullified" the approvals is frivolous. The City supported Developer and opposed Judge Crockett's Order at the trial court level and in the Nevada Supreme Court, where the City filed an amicus brief requesting that the Supreme Court reverse the Crockett Order and reinstate the 17-Acre Property approvals. Ex. CCC.

31. Prior to the Supreme Court's Order of Reversal, the 17-Acre approvals were legally void and there was nothing to extend. If the City had attempted to extend the approvals, the City could arguably have been in contempt of Judge Crockett's Order. *See* NRS 22.010(3) (disobedience or resistance to any lawful writ or order issued by the court shall be deemed contempt); *see also Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007) (a judgment has preclusive effect even when it is on appeal), abrogated on other grounds by *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008). After the Supreme Court reinstated the approvals, the City had no power to nullify the approvals even if it had intended to do so. To the contrary, upon reinstatement, the City twice wrote to the Developer extending the approvals for two years after the date of the remittitur. Ex. FFF at 1019; Ex. GGG at 1021. The Court accordingly rejects the Developer's argument that the City "nullified" the City's approval of 435 luxury housing units on the 17-Acre Property. All evidence establishes the opposite. The 17-Acre approvals are valid, and the Developer may proceed to develop 435 luxury housing units on the 17-Acre Property.

Ex. CCCC at 1507-08.

In addition to the specious claim that the City nullified the 17-Acre approvals by refusing to "extend" an entitlement that Judge Crockett had voided,[15] the Developer asserts that the City's alleged denial of its attempt to add access to the Badlands and build fencing around a pond in the Badlands shows that the City has somehow nullified the 17-Acre Approvals. The Developer blatantly misrepresents facts.

The 17-Acre Property already had access at the time the Developer filed the 17-Acre Applications. The Developer had not applied for additional access in the Applications. Ex. DDDD at 1518. Even if the City had denied additional access to the 17-Acre Property, it would not have voided the 17-Acre Approvals. The Developer fails to mention that the fencing the Developer sought was not even on the 17-Acre Property. Ex. DDDD at 1519, 1541.

The Developer also misrepresents that the City denied its requests to install fencing and build three new access points to the Badlands. On the contrary, the Director of the City Planning Department correctly applied the City Code when it required the Developer to file the *correct*

[15] Judge Herndon found that if the City had granted an extension to a permit that Judge Crockett had voided, the City would likely be contempt of court. Ex. CCCC at 1508.

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applications for major review before building fencing and adding access points. *See* Ex. DDDD ¶¶ 9-18; Exs. DDDD-5 at 1537, DDDD-7 at 1539-41. The Developer never filed the proper applications. Ex. DDDD at 1519. It is therefore untrue that the City "denied" the Developer access or fencing. Moreover, if the Developer was aggrieved by the City's requirement that the Developer file the appropriate applications for access or fencing, its remedy was to appeal that decision to the City Council. If it was still aggrieved, its remedy would be a PJR, not an action for a taking, which is essentially asking this Court to second-guess the City Planning staff's application of Las Vegas' ordinances to the Developer request for additional access or fencing. *See* UDC 19.16.100; *see also* NRS 278.3195. The Developer never appealed the Directors decision, nor did it file a PJR. The Developer, therefore, cannot be heard to complain that the City imposed improper requirements to apply for access or fencing or that the City's alleged denial nullified the 17-Acre Approvals. *See* NRS 278.3195.

The 17-Acre approvals are valid and the Developer may proceed to develop 435 luxury housing units in the Badlands. The fact that the Developer has done nothing to date to develop the 17-Acre Property and has opposed a remand of the 133-Acre Applications to the City Council for a decision on the merits speaks volumes as to the Developer's motivation in bringing and continuing to prosecute this lawsuit. The Developer wants the taxpayers not only to bail it out of its $4.5 million investment, but also to reward its absurd contention that it cannot build in the Badlands with compensation of $386 million. If the Developer admits that it has the right to proceed with construction of its 435-unit luxury housing project, its narrative of victimization in this and the other three lawsuits is exposed as a fraud and a cynical appeal to the courts to help it extort hundreds of millions of dollars from the taxpayers.

5. The City's adoption of legislation affecting the application requirements for redevelopment of golf courses does not show futility

The Developer's reliance on Bills 2018-5 and 2018-24 in support of its claim of futility is misplaced. Judge Herndon found that the bills merely imposed new requirements that a developer discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City, along with imposing other requirements for applications to redevelop property. Ex.

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CCCC at 1513. He further found that the purpose of the legislation was to increase public participation, that it did not impose substantive requirements for the development project, and that it did not prevent the Developer from applying to redevelop the 65-Acre Property. *Id*. Moreover, the second bill was adopted in the Fall of 2018, after the Developer filed this action for a taking. Judge Herndon found that the bill could not have taken the 65-Acre Property that, like the 35-Acre Property, was allegedly already taken. *Id*. Both bills were repealed in January 2020, and are therefore inapplicable to show futility. *See* Exs. LLL, MMM.

The Developer's claim that the two bills were aimed specifically at the Developer is also wrong. The legislation applied to all golf courses in the City. Ex. 130 at 3202-03. The evidence cited to support the Developer's claim consists entirely of statements of a citizen who supported the Developer, the Developer's own attorneys, and one member of the City Council who supported the Developer. Dev. MSJ at 29 & fns. 25, 26. However, legislative intent is not relevant in a takings case. Even if it were, the opinions of private citizens or the Developer's counsel, or even one member of the City Council do not determine legislative intent. *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) ("[I]f motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant."). Finally, the bill could not have been targeted at the Developer where it applied to "proposals" for redeveloping golf courses (Ex. DDDD-9 at 1554), and the Developer had no "proposals to redevelop the Badlands pending at the time they were enacted, and did not propose any redevelopment of the Badlands during the 15-month period in which the bills were in effect. Finally, the bills could not have been aimed at the Developer where the "maintenance of ongoing public access" provision of which the Developer complains applied only at the City's discretion, and the City never elected to apply that provision to the Developer. Ex. DDDD at 1519-20.

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F. Even if the City had made a final decision disallowing housing on the 35-Acre Property, declining to change the PR-OS designation in effect when the Developer bought the Badlands would not change the use or value of the property and thus could not amount to a taking

Even if the Court finds that the Developer's categorical and *Penn Central* takings claims are ripe, the claims fail on the merits. There can be no genuine dispute that the City is required by state law to adopt a General Plan and General Plan maps designating the future uses of all property, the City has discretion in enacting and amending its General Plan, and the City's General Plan designation of the 35-Acre Property as PR-OS does not permit residential development. As a matter of law and logic, therefore, the City cannot have "taken" the 35-Acre Property by declining to change the legal limits on development of the property that were in effect when the Developer bought it.

The Developer has the burden to show that the City's refusal to approve the Developer's housing project for the 35-Acre Property either (a) has "completely deprived [the 35-Acre Property] of 'all economically beneficial us[e]'" under the categorical and *Penn Central* tests (*Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019); *see also Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35 (taking requires agency action that "destroy[s] all viable economic value of the prospective development property")), or (b) "has interfered with distinct investment-backed expectations'" under the *Penn Central* test. *Lingle*, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124). The Developer cannot make that showing in this case.

The Developer also would have the Court waste time reviewing the mountain of irrelevant evidence it has submitted in its multi-volume appendix by asserting that the Court should look at "all City actions in the aggregate" to determine whether the City took the Developer's property, in reliance on a Michigan case. However, there is no Nevada Supreme Court precedent finding that the "aggregate" of an agency's action is relevant to determine whether a regulatory taking has occurred. The only actions of the City relevant to a regulatory taking claim under Nevada law are, by definition, *regulations*. The regulation must have the force of law, restrict the use of the property, and virtually wipe out or nearly wipe out the economic use the property. The only actions of the City that have the force of law are actions of a majority of the City Council. None of the City Council's actions meets the above tests for a regulatory taking.

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1. Even if the City had declined to lift the PR-OS designation, by leaving the law unchanged, the City would merely have maintained the status quo

The Developer cannot meet either the categorical or *Penn Central* tests. Even if the Court were to suspend reality and disregard the City's approval of 435 residential units in the Badlands, the Developer's taking claims would be meritless because the Badlands has been designated PR-OS in the City's General Plan since 1992. *See* Exs. I, L, N, O, P, Q. The PR-OS designation does not permit residential use. *E.g.*, Ex. N at 290. Even if the City declined to amend the General Plan to approve the Developer's housing project for the 35-Acre Property, that action could not wipe out the value of the 35-Acre Property. As a matter of logic, the 35-Acre Property would have the same use (golf course and drainage) and value when the Developer bought the property ($630,000).[16] The City's hypothetical action (not changing the law; maintaining the status quo) would not only *not* wipe out the use or value of the 35-Acre Property, it would have *no* economic impact on the property. *See Colony Cove*, 888 F.3d at 451 ("[E]conomic impact is determined by comparing the total value of the affected property before and after the government action."). Accordingly, the Developer cannot show the economic impact required to establish a categorical taking or *Penn Central* taking as a matter of law.

Nor could the City's hypothetical action interfere with the Developer's investment-backed expectations. The law requires that the Developer's expectations be objective. *See Bridge Aina Le'a, LLC v. Land Use Commission*, 950 F.3d 610, 633-34 (9th Cir. 2020) ("[W]e must 'use 'an objective analysis to determine the reasonable investment backed expectations of the owners.'"") (citation omitted). The Developer bought a golf course and drainage property designated PR-OS in the City's General Plan at the time of purchase, meaning the Developer acquired property whose legal use was limited. Having bought the Badlands subject to the PR-OS designation, the Developer cannot allege a taking where the City merely declined to change the law and permitted the property to continue in its historic use as a golf course and drainage. *See Penn Cent.*, 438 U.S. at 136 (New York City law did not interfere with property owner's "primary expectation concerning the use of the parcel" where the law did not interfere with "present uses" of the property); *see also Kelly*, 109 Nev. at 651, 855 P.2d at 1035 (rejecting takings claim where at time developer purchased property "he had adequate notice that

[16] $4,500,000/250 = $18,000/acre x 35 = $630,000.

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his development plans might be frustrated"); *Bridge Aina Le'a, LLC*, 950 F.3d at 634-35 (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, 1120-21 (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"); *Dodd v. Hood River Cty.*, 136 F.3d 1219, 1230 (9th Cir. 1998) (*Penn Central* claim rejected where owner had no reasonable investment-backed expectation to build housing in area designated exclusively for forest use at time owner purchased property). The PR-OS designation is fatal to the Developer's categorical and *Penn Central* claims.

The Developer argues, without authority or logic, that it should not be bound by the PR-OS designation because its "due diligence" before purchasing the Badlands indicated that the General Plan PR-OS designation was either invalid or did not apply. It is hard to take this remarkable contention seriously. The Developer describes itself as "accomplished and professional developers that have constructed more homes and commercial development in the vicinity of the 35 Acre Property than any other person or entity and, through this work, gained significant information about the 250 Acre Residential Zoned Land (which includes the 35 Acre Property)." *Id*. at 9-10. Any real estate developer and its attorneys could easily find NRS 278.150 requiring the City to prepare a General Plan to designate future uses permitted in each area of the City; the City's General Plan website where the Badlands is clearly shown in green for "PR-OS" on the map of the Southwest Sector (https://files.lasvegasnevada.gov/planning/Land-Use-Rural-Neighborhoods-Preservation-Element.pdf at 68), which map indicates that it was adopted by ordinance of the City Council; the General Plan definition of PR-OS precluding residential development; NRS 278.250 providing that zoning is subordinate to the General Plan; and the text of the City's General Plan and UDC 19.00.040 and UDC 19.16.010(A) stating that zoning is subordinate to the General Plan under NRS 278.250. Indeed, the Developer expressly acknowledged that the Badlands was designated PR-OS in its sales literature in 2016, before it applied to develop property in the Badlands, confirming that it knew full well that the PR-OS designation was a major obstacle to any redevelopment of the Badlands for residential. Ex. Y at 420. Moreover, according to the Developer's own evidence, if the Developer had a constitutional

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right to develop the Badlands with housing, it would have paid more than $1.5 million/acre rather than $18,000/acre.

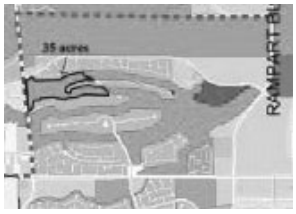
2. The Developer's arguments to disappear the PR-OS designation are unavailing

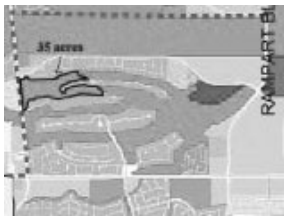
To avoid the reality that the PR-OS designation of the 35-Acre Property demolishes its taking claim, the Developer pretends that the General Plan ordinances and maps the City attached to its Appendix (Exs. I, L, K, N, O, P, Q) showing the Badlands subject to the PR-OS designation are not real; if real, are meaningless; if not meaningless, are cancelled out by zoning. The Developer is wrong on all counts.

a. Because the original developer of the PRMP set aside the Badlands for recreation, open space, and drainage as a condition of approval of the PRMP, the City designated the Badlands PR-OS

The original developer of the PRMP set aside the Badlands for recreation, and open space in 1990. Ex. E at 96, 98; Ex. G at 23-24; Ex. H at 145, 153. In 1992, the City Council imposed the PR-OS designation on the Badlands to ensure that the property remained open space. Ex. I at 212-18, 234-35, 246, 248 (Ordinance approving 1992 General Plan). These Ordinances designating the Badlands as PR-OS in the General Plan have the force of law. NRS 278.250. 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). The Developer simply ignores these ordinances.

The following maps show the PR-OS designation in green on the Badlands as reflected in the City's land use element maps adopted by Ordinance 6152 on May 8, 2012 (Ex. P) and Ordinance 6622 on June 20, 2018 (Ex. Q). The 35-Acre Property is outlined in black.





Thus, before, during, and after the Developer's purchase of the Badlands in 2015, the 35-Acres (and the remainder of the Badlands) were designated PR-OS. The City could not have taken the 35-

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Acre Property by simply declining to amend the long-standing PR-OS designation.

b. This Court already decided that the PR-OS designation is valid and prevents residential use of the property unless the City Council exercises discretion to amend the designation

In denying the Developer's PJR, this Court has already rejected the Developer's argument, finding that "[t]he Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS) and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage." Ex. XXX at 1392. This Court further concluded that "[i]t is up to the Council—through its discretionary decision making—to decide whether a change in the areas or conditions justify the development sought by the Developer and how any such development might look." *Id.* at 1394-95 (citing *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723). Finally, the Court concluded that "[a] city's master plan is the 'standard that commands deference and presumption of applicability.'" *Id.* (quoting *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723).[17]

The Developer's attempt to erase the PR-OS designation despite this Court's prior ruling is remarkable in that the Developer does not cite a single case or statute to support its argument. The Developer has no answer for the City's overwhelming authority showing that the PR-OS designation is valid and binding, or that a General Plan map can be amended only by the City Council in the exercise of discretion. *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60. Nevada law is clear that all development in Las Vegas must be consistent with the General Plan and the City Council must amend the General Plan to allow a change in land use. NRS 278.150; NRS 278.250; UDC 19.00.040; *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 11.

Rather than cite any decisional or statutory authority for its contention that the PR-OS designation is invalid, the Developer relies on "ten orders" that it claims support its position. In actuality, the "ten orders" either contradict the Developer's position or say nothing about the PR-OS designation. The majority of the orders are interlocutory denials of the City's Motions to Dismiss, which mean only that the Developer has properly plead claims, or the Nevada Supreme Court's denial

[17] This Court made these conclusions of law in its order denying the PJR. The Court later issued an order *nunc pro tunc* which did not affect its findings and conclusions cited above. Ex. YYY at 1404.

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of a Writ Petition where the Supreme Court expressly stated that it made no ruling on the merits. Dev. MSJ at 6-7, citing LO Appx., Exs. 11, 132.

Accordingly, the Court should affirm its prior conclusions of law and determine, consistent with all Nevada law, that the PR-OS designation on the 35-Acre Property undermines the Developer's taking claims.

c. The Developer's argument that this Court's ruling that the PR-OS designation is valid and controlling does not apply to the Developer's taking claims is nonsense

The Developer attempts to avoid the unanimous Nevada Supreme Court authorities that reject the Developer's "property rights in zoning claim" (*e.g.*, *Stratosphere Gaming*, *Boulder City*) and this Court's entire FFCL by contending that none of these decisions of the Nevada Supreme Court and none of this Court's findings of fact and conclusions of law denying the PJR exist for purposes of the Developer's taking claims because these are "PJR facts and law," rather than "takings facts and law." Although denial of a PJR does not necessarily mean that the alleged government action does not effect a taking, there is nothing to prevent the validity of both causes of action from turning on the same underlying facts and substantive law. The fact that liability for a PJR (lack of substantial evidence) is different from the standard of liability for a regulatory taking (denial of essentially all economic use or value and interference with investment-backed expectations), the evidence could be different (PJR: limited to evidence in the Administrative Record; taking: court can consider any formal action of the City Council that has the force of law), and the remedies are different (PJR: equitable; taking: damages), is a distinction without a difference. Both causes of action turn on Nevada land use and property law. *It is nonsensical to contend that the City Council had discretion to decline to amend the PR-OS designation if the Developer later files a PJR, but had no discretion if the Developer later challenges the very same action of the City Council as a taking*.

The Developer's taking argument relies on the identical underlying claim it made in the PJR: that it has a constitutionally protected property right to build housing in the Badlands. Property rights are created and defined by state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972); *see also Malfitano v. County of Storey By and Through Storey County Board of County Commissioners*, 133 Nev. 276, 282 (2017) (citing *Roth*); *Vandevere v. Lloyd*, 644 F.3d 957, 963 (9th

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Cir. 2011) ("whether a property right *exists* […] is a question of state law") (emphasis in original). Therefore, courts look to state and local law to determine the existence of property rights in takings actions. Where state law does not recognize a plaintiff's claimed property right, her takings claim necessarily fails. *Vandevere*, 644 F.3d at 966 (no regulatory taking where permits were not a protected property interest under Alaska law); *see also Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 723 (10th Cir. 1989) (plaintiff had property interest in permits only to the extent Oklahoma state law or local ordinances gave it one); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1548 (11th Cir. 1991) (no protected property interest in rezoning application where, under Florida law, a property owner has no vested or cognizable interest in an existing or future zoning classification); *Quinn v. Board of County Commissioners for Queen Anne's County, Maryland*, 862 F.3d 433 (4th Cir. 2017) (no property right to sewer service where Maryland law did not create one). The unanimous holdings of *Stratosphere*, *Boulder City*, etc. that a property owner has no property rights under zoning is based squarely on Nevada law of property rights. These laws apply to any cause of action, PJR or otherwise.

Moreover, the Ninth Circuit's decision in *180 Land v. City of Las Vegas* (Ex. III at 1125-26) rejecting the Developer's identical "property rights" claim as a basis for a due process violation, and the Nevada Supreme Court's rejection of a due process challenge by a developer claiming a vested right to a building permit in *Boulder City*, 110 Nev. at 246, 871 P.2d at 325, *are not PJR cases*. Like the instant case, they involve *constitutional challenges* to government regulation. *Stratosphere*, et al., on which this Court relies to reject the Developer "property rights" claim, are directly on point.

Accordingly, the *fact* of the PR-OS designation of the Badlands (City Ordinances Exs. I, L, N, O, P, Q and diagrams showing the Badlands as PR-OS), the *law* that the City has discretion to lift the PR-OS designation (*e.g.*, *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. at 807, 898 P.2d at 112; *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989)), the *law* that zoning does not confer a constitutional "property right" (*e.g.*, *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60; *Boulder City*, 110 Nev. 238, 246, 871 P.2d 320, 325 (1994)), and the law that even if the zoning of the 35-Acre Property and the General Plan designation conflict, the General Plan designation would be controlling (*e.g.*, NRS 278.250; *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112),

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are a basis for denial of *both* the PJR and the MTDPI. The City had discretion to deny the 35-Acre Applications under zoning and the General Plan. Likewise, the Developer cannot have a constitutionally protected property right to build housing in the Badlands if the City has discretion to decline to allow housing on the 35-Acre Property under either or both the zoning and PR-OS designation in effect when the Developer bought the property.

The Developer's assertion that the recent Nevada Supreme Court decision in *City of Henderson v. Eighth Judicial District Court*, 137 Nev. 26 (2021) prohibiting joinder of civil complaints and PJRs requires this Court to disregard its FFCL is wrong. The findings and conclusions are directly relevant to both the PJR and the Developer's civil complaint and do not vanish merely because the two pleadings were improperly joined.

d. The statements of the City's Planning Director, Planning Staff, City Attorney, the Developer's counsel, and other persons that the R-PD7 zoning granted the Developer a right to build housing in the Badlands regardless of the PR-OS designation are irrelevant

The Developer ignores contrary language in NRS 278.150, NRS 278.250, UDC 19.00.040, UDC 19.16.010(A), and duly adopted ordinances of the City to assert that the City Planning Director and former City Attorney were either unaware of the PR-OS designation of the Badlands or were of the opinion that the General Plan designation is subordinate to the zoning. The Planning Director, Planning Staff, and the City Attorney do not make the law; the City Council makes the law. Under Nevada's Open Meeting Law, the City can only adopt regulations through the City Council at a properly noticed public meeting that meets all statutory requirements. *See* NRS 241.015, .020, .035, .036; *see also Pac. Tel. & Tel. Co. v. City of Seattle*, 14 F.2d 877, 880 (W.D. Wash. 1926) (A "city can speak only through its council."). A public body that must be composed of elected officials, such as the Las Vegas City Council, may not act except by vote of a majority of those elected officials. NRS 241.0355(1). Absent compliance with all statutory requirements, the City's action would be void. NRS 241.036. The City Council adopted ordinances designating the Badlands PR-OS.

That a City employee is unaware of or misunderstands the law does not determine whether that law exists or is valid. Moreover, the Developer undercuts its reliance on the statements in question where it simultaneously contends that City staff orally informed the Developer that the General Plan

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designation was irrelevant but then refused to accept the Developer's applications without an application to lift the PR-OS General Plan designation. Dev. MSJ at 6.

The Developer also claims that the Peccoles, the Developer's attorneys, the CC&Rs for a property adjacent to the Badlands, and other persons stated that the Developer could build housing in the Badlands, that the PR-OS designation does not apply, and the City Council has no discretion to prevent residential use of the Badlands. Dev. MSJ at 9-13. For the same reasons stated above, these statements are irrelevant. The Nevada Legislature and the Las Vegas City Council make the law, not these other parties. Under that law, the PR-OS designation does not permit residential use of the Badlands unless the City Council, in its discretion, amends that designation.

e. The 35-Acre Property has been designated PR-OS in the General Plan at all relevant times

Rather than cite any decisional or statutory authority for its contention that the PR-OS designation is either non-existent, meaningless, or unenforceable, the Developer contends that the Badlands were designated "M" or "MED" in the City's 1981 General Plan, meaning "medium density housing," and that that designation applies today. The Developer presented no evidence that City's General Plan contained an "M" or "MED" land use designation in 1981. Regardless, the City Council adopted a series of ordinances beginning in 1992 designating the Badlands PR-OS in the General Plan that supersede any prior General Plan designation. Exs. I, K, M, N, O, P, Q; *see also* Ex. QQQQ at 2376-39 (declaration of Community Development Director explaining that "M" or "MED" did not exist in 1981 General Plan, and even if they did, they would be superseded by ordinances designating Badlands PR-OS since 1992).

f. The notation on the official General Plan maps does not undermine the validity of the maps

The Developer selectively quotes from a notation on the lower right corner of the General Plan maps stating that the map "is for reference only," arguing that the map is somehow *not* the City's General Plan map.[18] The full notation reads "GIS maps are normally produced only to meet the needs

[18] The Court can take judicial notice that the maps the City submits to the Court in its Appendices are the official General Plan maps and have the force of law. Aside from the official City seal on each
(footnote continued on next page)

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of the City . . . this map is for reference only." See Exs. N, O, P, Q. This notation serves to notify the public that the City's General Plan maps are constantly changing as the City amends the map, either by the City Council's changing the designation of areas in the City or by approving development applications where the City Council amends the map. The changes are concurrently incorporated in a digital version of the map on the City's website at https://files.lasvegasnevada.gov/map/Citywide-General-Plan.pdf. Accordingly, once a map is approved by ordinance and printed, it is only accurate on the date it is printed. The City thus avoids misleading the public that General Plan designations in printed General Plan maps are static, hence the warning. By no means does the notation mean that the map is not the legally binding General Plan map of the City. All General Plan maps of the City's Southwest Sector submitted to the Court from 1992 through 2018 bear the City's official seal, date adopted, date printed, the number of the City Council ordinance that approved the map, and other identifying information proving that the maps are authentic and are judicially noticeable. The maps uniformly show the Badlands as PR-OS, including the current map that can be accessed at the link above, which clearly shows the Badlands designated PR-OS as it has been for more than 22 years. *See* Exs. I, L, M, N, O, P, Q. The PR-OS designation of the Badlands on the official maps the City submitted to the Court is binding law.

g. The Developer cannot shift the burden to the City to show that the ordinances adopting and readopting the PR-OS designation complied with proper procedures

The Developer contends that the City failed to follow the requirements of NRS Chapter 278 and LVMC 19.16.030 in adopting the Ordinances imposing the PR-OS, without stating what those requirements are or why the City's ordinances did not comply, and without presenting any evidence to support the claim. The Developer attempts to flip the burden to the City to show that it complied with applicable procedures when it adopted ordinances from 1992-2018. To the contrary, the Developer has the burden to show that the City failed to comply with the law. The 25-day statute of limitations to challenge each of the City's ordinances, however, has expired. NRS 278.0235; *League to Save Lake*

map, references to the ordinance adopting the maps, and other indicia that the maps are official, the City's Community Development Director has authenticated the maps. *See* Ex. QQQQ at 2376-79; Exs. QQQQ-8 at 2803, QQQQ-10, QQQQ-14 at 3458, QQQQ-16 at 3552.

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Tahoe v. Tahoe Reg'l Planning Agency, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977), overruled on other grounds by *Cty. of Clark v. Doumani*, 114 Nev. 46, 952 P.2d 113 (1998).

h. The PR-OS designation and R-PD7 zoning of the 35-Acre Property are not inconsistent

The Developer contends that Ordinance 3636 adopting the PR-OS designation of the Badlands in the 1992 General Plan indicated that it did not modify or invalidate any preceding zoning designation. The Developer contends that the R-PD7 zoning designation, tentatively adopted for a part of the PRMP that included the Badlands in 1990, is both inconsistent with the PR-OS designation and prevails over the PR-OS designation. Therefore, the Developer argues, the PR-OS designation is meaningless. These contentions must be rejected.

The PR-OS designation and R-PD7 zoning are not inconsistent. The purpose of R-PD7 zoning ("Planned Development") is to determine which portions of the district will be open space and those portions that will be developed with housing. UDC 19.10.050A ("The R-PD District has been to provide for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, *efficient utilization of open space*. . . ."). UDC 19.10.050A (emphasis added). In 1990, to obtain tentative R-PD7 zoning for 614.24 acres in the PRMP, Peccole had to develop a 614.24-acre portion of the PRMP "in accordance with the [PRMP]." NRS 278.250(2); Ex. QQ at 948-50. Peccole was also required to set aside 211.6 acres of the 614.24 acres for a golf course and drainage. Ex. H at 159, 163-165, 167-168, 171-172, 187-188. Under R-PD7 zoning, the City has authority to determine not only if housing will be permitted in an R-PD7 zoning district, but it also determines where the housing and the open space are located, as the City did for the PRMP when it designated parts of the R-PD7 for medium density housing and part for the Badlands. Under this authority, the City designated the golf course and drainage part of the R-PD7 zone PR-OS in the General Plan and designated the housing portion ML (Medium-Low Density Residential) in the General Plan. *E.g.*, Ex. K at 257; Ex. L at 274. Thus, the statement in the ordinance approving the PR-OS designation of the Badlands that it did not repeal the R-PD7 designation cannot be construed to mean that the PR-OS designation conflicts with, or is inferior to, the zoning.

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i. Even if the zoning of the 35-Acre Property conflicted with the General Plan, the General Plan would control

The Developer argues that the PR-OS designation is meaningless because the R-PD7 zoning, which permits residential use, is superior to the General Plan designation that does not permit residential use. The Developer has it backwards. Even if the zoning and the General Plan designation conflict (they don't), the General Plan designation prevails and the zoning would yield. NRS 278.250(2); *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112; *Nova Horizon, Inc*, 105 Nev. at 96, 769 P.2d at 723. Nevada Revised Statutes 278.250(2) states: "The zoning regulations must be adopted in accordance with the master plan for land use and be designed . . . [t]o promote the conservation of open space . . . [and] [t]o provide for recreational needs. . . ." Las Vegas' UDC states:

> **Compliance with General Plan**
>
> Except as otherwise authorized by this Title, approval of all Maps, Vacations, Rezonings, Site Development Plan Reviews, Special Use Permits, Variances, Waivers, Exceptions, Deviations and Development Agreements shall be consistent with the spirit and intent of the General Plan.

UDC 19.16.010(A). The UDC further provides:

> It is the intent of the City Council that all regulatory decisions made pursuant to this Title be consistent with the General Plan. For purposes of this Section, "consistency with the General Plan" means not only consistency with the Plan's land use and density designations, but also consistency with all policies and programs of the General Plan, including those that promote compatibility of uses and densities, and orderly development consistent with available resources.

UDC 19.00.040. *See* also Ex. XXX at 1394.

j. The Nevada Supreme Court did not hold that zoning prevails over a General Plan designation in the 17-Acre case

The Developer further claims that the Nevada Supreme Court determined that the R-PD7 zoning solely governs the use of the 17-Acre Property and that the PR-OS designation is irrelevant. In the 17-Acre appeal, the sole issue before the Supreme Court was whether the City should have required the Developer to file an MMA before granting the Developer's applications to develop the 17-Acre Property. Ex. DDD at 1012. The Supreme Court agreed with the City that because the 17-Acre property "carries a zoning designation of residential planned development district" [R-PD] rather

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than "planned development district" [PD] and the City's UDC requires an MMA for a "planned development district" [PD] but not a "residential planned development district" [R-PD], no MMA was required. *Id.* at 1013. The Developer bases its claim that the Court held that the PR-OS designation is irrelevant on the fact that the Developer argued in the trial court and on appeal that an MMA was not required because the PR-OS designation was invalid, and, because the Supreme Court reversed Judge Crockett's Order, the Supreme Court must have agreed that the PR-OS designation was irrelevant. The Court, however, did not sustain the Developer's argument. The Court based its ruling solely on the plain language of the City's ordinances: PD zoning requires an MMA, R-PD does not.

Aside from its reliance on the distinction between PD and R-PD zoning, the Court did not make any rulings or statements regarding what R-PD zoning permits or whether an owner has rights under a zoning ordinance. The Court did not determine that the R-PD7 zoning of the 17-Acre Property "governs" irrespective of the General Plan designation. The zoning of the 17-Acre Property was not in dispute. Nor did the Court determine that the R-PD7 zoning prevails over the PR-OS General Plan designation. To the contrary, the Supreme Court confirmed that the Developer is required to obtain an amendment of the PR-OS designation to build housing in the Badlands: "The governing ordinances require the City to make specific findings *to approve a general plan amendment*, LVMC 19.16.030(1), a rezoning application, LVMC 19.16.090(L), and a site development plan amendment, LVMC 19.16.100(E)." *Id*. at 1014 (emphasis added). Rather than supporting the Developer's position, therefore the Nevada Supreme Court rejected it.

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.*, 124 Nev. at 1055, 194 P.3d at 713 (internal quotation omitted). Each of these elements is present here and thus the decision of the Nevada Supreme Court in the 17-Acre case that "[t]he governing ordinances require the City to make specific findings to approve a general plan amendment" to develop the 17-Acre Property with housing (Ex. DDD at 1014) binds the Developer in the instant case. The Supreme Court's finding that the Developer required an amendment to the PR-

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OS designation to build housing in the 17-Acre Property is inconsistent with the Developer's claim that it had a constitutionally protected right to build housing under the zoning.

k. NRS 278.349 is inapplicable

The Developer cites Nev. Op. Att'y Gen. 19 at 18-19 (1984) for the notion that zoning ordinances are superior to General Plan land use designations. First, Opinions of the Attorney General are not binding on this Court. *Univ. & Cmty. Coll. Sys. of Nevada v. DR Partners*, 117 Nev. 195, 203, 18 P.3d 1042, 1048 (2001). Second, the Opinion does not support the Developer's arguments. The Developer relies on a portion of the Opinion that interprets NRS 278.349(3)(e), a 1977 statute governing the approval of tentative maps, and concludes that an amended master plan does not invalidate existing zoning ordinances. The Opinion conflicts with NRS 278.250(2), which flatly states that "zoning regulations must be adopted *in accordance with* the master plan for land use." Third, the Nevada Supreme Court has held that cities have a legal obligation to reject development proposals that are not in conformance with a master plan adopted under NRS 278.150. *Serpa v. County of Washoe*, 111 Nev. 1081, 1084, 901 P.2d 690, 692 (1995). Fourth, even if NRS 278.250 does not supersede NRS 278.349, as demonstrated above at pp. 57-58, the R-PD7 zoning and PR-OS General Plan designation are not inconsistent. The determination of consistency is subject to the City Council's discretion. NRS. 278.249(3). The City Council has repeatedly designated the Badlands PR-OS, which at all relevant times has also been zoned R-PD7, indicating that the City Council believes them to be consistent. Accordingly, NRS 278.349(3)(e) regarding inconsistency of zoning with the General Plan does not apply.

3. The Court should deny the Motion to "Determine Take" because the R-PD7 zoning did not confer a property right on the Developer to construct housing on the 35-Acre Property, and even if it did, the PR-OS designation is superior to zoning

The Developer claims that the R-PD7 zoning of the 35-Acre Property grants to the Developer a property right or vested right (the Developer uses the terms interchangeably) to build housing on the 35-Acre Property, although it does not explain how much or what type. The Developer further contends that this "right" is both a constitutional right and absolute and, necessarily, that the PR-OS designation is irrelevant, invalid, and/or unenforceable. In its Motion to Determine Take, the

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Developer seems to allege that the City's denial of the 35-Acre Applications was a categorical and *Penn Central* "taking" of this "right," requiring the City to compensate the Developer to the tune of $54,000,000.[19] These contentions are utter nonsense and have no support in the law.

a. The Developer confuses property "rights" and property "interests"; property rights are meaningless in takings jurisprudence

As demonstrated above, the Developer's cannot show that the City's actions effected a wipe out or near wipe out of use and value of the 35-Acre Property or interfered with its objective investment-backed expectations. These are the only applicable regulatory taking tests for liability. Seeing the handwriting on the wall, the Developer concocts an unprecedented theory of takings liability – that the City has taken its property "right" conferred by zoning to build housing on the 35-Acre Property. Putting aside that zoning does nothing of the sort, there is no authority that a public agency can take a property "right." The City can only "take" a property "interest." The Developer's theory simply does not fit any regulatory taking case or the very concept of regulatory takings.

The regulatory takings doctrine provides that destruction of the use and value of property is the functional equivalent of eminent domain. Consistent with eminent domain law, after the government pays the owner the value of the property without the regulation, the government takes fee title to the property. The only property interest at issue is the Developer's fee simple title to the property. The Developer distorts the regulatory taking doctrine by requesting that the Court adjudicate the nature of the property "interest" the Developer holds (the Developer's motion was entitled "Motion to Determine Property Interest"), but then in its motion and proposed order, the Developer asks the Court to declare that it has a property "right" that has been "taken." If liable for a taking in either eminent domain or inverse condemnation, the City take fee title to the property after paying just compensation. Fee title is a property "interest," it is not a "right." Interests give rise to certain rights. If found liable for a taking under the Developer's theory, the City would be buying the Developer's "right to build housing," but the Developer would keep title to the property. This absurd result follows from the Developer's unprecedented theory of relief, and does not fit within the regulatory taking doctrine.

[19] The Developer does not appear to contend that its "property right in zoning" theory applies to its physical and nonregulatory taking claims, only to its categorical and *Penn Central* claims for excessive regulation of use.

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b. Nevada authority is unanimous that zoning does not confer property rights

Nevada authorities are unanimous that zoning limits the use of property and does not confer "rights," and certainly not constitutionally protected :property rights." *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60 (holding that because City's site development review process involved discretionary action by Council, the project proponent had no vested right to construct); *id*. ("[C]ompatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest.") *City of Reno v. Harris*, 111 Nev. 672, 679, 895 P.2d 663, 667 (1995) ("Once 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."); *Boulder City*, 110 Nev. at 246, 871 P.2d at 325 ("The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest."); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992) ("Although the land upon which Von Goerken intended to construct a tavern was zoned to accommodate such a commercial enterprise, it is clear that compatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *Nevada Contractors v. Washoe County*, 106 Nev. 310, 314, 792 P.2d 31 (1990) ("Because of the Board's particular expertise in zoning, the courts must defer to and not interfere with the Board's discretion if this discretion is not abused."); *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112 ("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 . . . "); *Bd. of Cty. 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."). The broad discretion granted to the City to limit the use of property cannot be reconciled with the notion that a property owner has a constitutionally protected "right" to build on their property. Judge Herndon agrees: "Because the right to use land for a particular purpose is not a fundamental constitutional right, courts generally defer to the decisions of legislates and administrative agencies charged with

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regulating land use." Ex. CCCC at 1496-97. Accordingly, the City should have summary judgment on the Developer's categorical and *Penn Central* taking claims and deny the Developer's motion for summary judgment.

c. This Court has already decided that the Developer has no property or vested right to the City's approval of its applications to develop the 35-Acre Property with housing under the R-PD7 zoning

This Court emphatically rejected the Developer's property rights claim, holding instead that "[t]he decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act." Ex. XXX at 1385-86 (citing *Enterprise Citizens Action Committee v. Clark County Bd. of Comm'rs*, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996); *Stratosphere Gaming*, 120 Nev. at 528, 96 P.3d at 760). The Court concluded that "[a] zoning designation does not give the developer a vested right to have its development applications approved." *Id.* (citing *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60. The court also held that the Developer's assertion "that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong," finding instead that the Council had the discretion to deny the applications "*no matter the zoning designation*." Ex. XXX at 1392-94 (emphasis added).

In addition to rejecting the notion that the zoning of the Badlands somehow conferred property or vested rights on property owners to build housing, this Court found that the Badlands are designated PR-OS in the City's General Plan, which prohibits housing development, and the General Plan designation is superior to zoning in determining the allowable uses of the property. *Id.* at 1392-94. The Court should again reject the Developer's property right claim. As shown above, the above authorities are based on Nevada property and land use law that is the dispositive substantive law in any cause of action, whether PJR or otherwise. Moreover, the *180 Land Co*. and *Boulder City* cases hold that zoning does not confer property rights in a constitutional challenge like the instant case. Judge Herndon did not mince words in rejecting the Developer's claim: "Because *the right to use land for a particular purpose is not a fundamental constitutional right*, courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use." Ex. CCCC at 1496-97 (emphasis added). Accordingly, these bedrock principles of property and land use law apply to both the Developer's PJR and taking claims.

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d. *Sisolak* does not support the Developer's claim that zoning confers property rights

The Developer relies on *McCarran Int'l Airport v. Sisolak* 137 P.3d 1110, to support its "property right in zoning" theory. As Judge Herndon correctly held, *Sisolak* is a physical taking case and has no relevance to the Developer's categorical and *Penn Central* claims, which allege excessive regulation of the Developer's *use* of the property, rather than the Developer's right to exclude others. Ex. CCCC at 1504. The Developer incorrectly portrays *Sisolak* as regulation-of-use case. In evaluating an owner's physical taking claim, the *Sisolak* Court stated: "The term 'property' includes all rights inherent in ownership, including the right to possess, use, and enjoy the property." 122 Nev. at 658, 137 P.3d at 1119. It is undisputed that property owners have the right to possess, use, and enjoy their property. But the *Sisolak* Court used the term "vesting" in the context of "ownership" of fee simple title. The Court meant that if title in the airspace of Sisolak's property "vests" in Sisolak, i.e., he is the owner of fee simple title to the property, he has the right to exclude others and thus to be free from a physical taking by government, among the other rights that come with ownership. The right to use property that inheres in ownership, however, is subject to significant limits imposed by zoning, General Plans, and other land use regulations. *See* NRS 278 150; NRS 278.250; *Stratosphere*; and other authorities cited above. There is no authority, in *Sisolak* or otherwise, that a property owner has a constitutional "property right" or constitutional "vested right" to approval of an application to develop property under the takings clause, only a right to be free from an economic wipeout or near wipeout or interference with reasonable investment-backed expectations. *State*, 131 Nev. at 419, 351 P.3d at 741; *Lingle*, 544 U.S. at 538; *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Penn Central*, 438 U.S. at 124. Even if the Developer had a "property right" to approval of an application to develop housing on the 35-Acre Property, and even if the City had disapproved an application, the City's hypothetical limit on use of the 35-Acre Property could not be a taking because the Developer cannot meet the test for a regulatory taking.

e. The Ninth Circuit's decision in 180 Land Co. rejecting the Developer's "property rights" theory of zoning binds this Court

The Ninth Circuit Court of Appeals has also rejected the Developer's contention that zoning

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confers a property or vested right to construct housing in the Badlands. In paragraph 49.d of its Complaint Pursuant to 42 U.S.C. § 1983 in *180 Land Co. LLC v. City of Las Vegas*, United States Court of Appeals for the Ninth Circuit Case No. 19-16114 (March 26, 2018) ("*180 Land Co*."), the Developer alleged that it has "vested zoning rights to develop residential units on the [Badlands]." Ex. HHH at 1037. The District Court dismissed this claim. In its reply brief on appeal to the Ninth Circuit, the Developer asserted that because the City denied the Developer's application to develop portions of the Badlands with housing, the Developer was deprived of "a protected property interest of the most basic kind." Ex. TTT at 1290. The Ninth Circuit rejected that claim, finding that under Nevada property law, the Developer had no such property right.

> "To have a constitutionally protected property interest in a government benefit, such as a land use permit, an independent source, such as state law, must give rise to a "legitimate claim of entitlement," that imposes significant limitations on the discretion of the decision maker. . . . We reject as without merit plaintiffs' contentions that certain rulings in Nevada state court litigation establish that plaintiffs were deprived of a constitutionally protected property interest . . . ."

Ex. III at 1125-26.

The Ninth Circuit's decision in *180 Land Co*. binds the parties in this action. 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.*, 124 Nev. at 1055, 194 P.3d at 713 (internal quotation omitted). Each of these elements is present here.

f. The Supreme Court's decision that the CC&Rs for part of the Badlands do not grant the homeowners rights to control the use of the Badlands has nothing to do with this case, which concerns government regulation of property

The Developer argues that *Peccole v. Fore Stars,* Case No. 72410 (Nev. 2018), an unpublished decision of the Nevada Supreme Court, held that the Developer has a property right to develop housing in the Badlands. Although the City was originally a party to this case, the City was dismissed before the trial court issued any relief to the parties. That case involved whether the CC&Rs for a development in the PRMP – a contract between private parties – precluded development of housing in

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the Badlands. The Nevada Supreme Court affirmed the decision of the trial court without deciding any issue regarding the City's regulatory powers or the Developer's rights vis a vis the City. *See Guar. Tr. Co. of New York v. Henwood*, 307 U.S. 247, 258-59 (1939) ("[C]ontracts between private parties cannot create vested rights which serve to restrict and limit an exercise of a constitutional power of Congress."). This decision does not help the Developer.

g. This Court has not ruled that the zoning of the 35-Acre Property granted a constitutionally protected property right to the Developer to build housing on the property

The Developer next contends that this Court ruled in the Developer's Motion to Determine Property Interest that "the zoning determines the property interest issue in an inverse condemnation case" and that the Court "Affirmed the Right to Develop in the 35 Acre Case," which "right" the Developer contends was conferred on the Developer by the R-PD7 zoning. Although the Developer requested that this Court find that the R-PD7 zoning conferred a property right or a vested right to develop housing in the Badlands, it did not grant that relief and instead ordered merely that the Badlands is zoned R-PD7 and that single-family and multi-family housing are permitted uses by right in an R-PD7 zone.[20] This Court did not rule that the City did not have discretion to approve or disapprove an application for housing in the Badlands. Such a decision would have defied unanimous Nevada Supreme Court authority *and this Court's own rulings to the contrary*, and now the Ninth Circuit, which ruled against the Developer on the identical claim.

h. The eminent domain cases cited by the Developer do not hold that zoning confers a constitutionally protected right to develop permitted uses in the zone

The Developer contends that inverse condemnation and eminent domain actions are "governed by the same rules" and that "[e]minent domain law unanimously holds that the underlying property interest in an eminent domain case is determined based on the hard zoning, unless it can be shown that a higher zoning could be achieved," citing *City of Las Vegas v. Bustos*, 119 Nev. 360, 360-62, 75 P.3d

[20] In signing the Developer's proposed order stating that "*the* permitted uses by right" in an R-PD7 zone are single and multi-family residential, the Developer led the Court into error. The R-PD7 zoning ordinance, UDC 19.10.050, permits, in addition to housing, Home Occupations, Child Care-Family Homes, Child Care-Group Homes, "enhanced residential amenities" that could take many forms, *and open space*.

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351, 352 (2003), which is an eminent domain case, and other eminent domain cases.[21] Each of these cases recognizes that zoning is a limitation on the use of property and that in valuing property in an eminent domain case, an appraiser may not give an opinion of value of the property assuming a use that is not permitted by the zoning unless there is a reasonable probability that the zoning will be changed. *E.g.*, *Bustos*, 119 Nev. at 362. On this basis, these cases stand for the opposite of the Developer's claim.

i. The "zoning letter" does not grant the Developer a property right

The Developer claims that a December 30, 2014 letter the City sent to the Developer grants the Developer a constitutional right to build housing in the Badlands. *See* Ex. 134 at 4406. The Court disagrees. The letter merely confirms that the Badlands is zoned R-PD7 and that any residential development cannot exceed seven units per acre. *Id*. The letter does not state that single and multi-family residential use of the Badlands is the only permitted use. To the contrary, the letter states that "A detailed listing of the permissible uses and all applicable requirements for the R-PD zone are located in Title 19 . . . of the Las Vegas Municipal Code." *Id*. (UDC 19.10.050, of course, permits several uses in an R-PD zone other than single or multi-family residential, including open space to support residential uses in the zone.) The letter then refers the Developer to the City's website for more information about R-PD zoning. *Id*. The Letter does not state that the Developer has any rights, constitutional or otherwise, or that the City is obligated to approve any use of the Badlands, residential or otherwise. The letter does not state that the Developer is not subject to the General Plan designation of the property or that zoning is superior to the General Plan designation. The letter does mention the General Plan.

[21] The instant case is an inverse condemnation case of the regulatory takings type. As Judge Herndon pointed out, there are crucial differences between eminent domain and inverse condemnation. Ex. CCCC at 1499 n.4. In eminent domain, liability of the public agency for payment of just compensation is established by the filing of the eminent domain action. The only controverted issue is the market value of the property taken. *Id*.; *see also* NRS 37.110. Accordingly, eminent domain is a one-phase proceeding. In contrast, inverse condemnation is a two-phase proceeding. The liability of the defendant agency for a regulatory taking is the primary issue in the case and is decided by the court in the first phase. Ex. CCCC at 1499 n.4. If the Court finds the agency liable, the just compensation for the taking is determined in the second phase. *Id*.

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j. "Permitted as a matter of right" in planning parlance does not mean constitutional rights

The Developer contends that because single and multi-family residential uses are "permitted uses" "as a matter of right" in an R-PD7 zoning district, the Developer has a constitutionally protected "property right" to construct housing on the 35-Acre Property that eliminates the City's discretion. In addition to contradicting unanimous caselaw and statutory authority, the Developer's assertion is undermined by the provisions of R-PD7 zoning. There is a significant difference between housing being a "permitted" use; *i.e*., the City can permit that use in the zoning district, and a requirement that the City approve any and all applications to build housing in the district, without any discretion, and without requiring consistency with the General Plan. UDC 19.10.050.A states: "The R-PD District has been to provide for *flexibility and innovation* in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space, ..." Accordingly, open space is one of the "supporting uses" under UDC 19.10.050.C.1. Finally, the definition of "Permitted Land Use" applicable to UDC 19.10.050.C in UDC 19.18.020 provides that a permitted use is "Any use allowed in a zoning district as a matter of right *if it is conducted in accordance with the restrictions applicable to that district*." Taken together, (a) NRS 278.250, which confers considerable discretion on cities in the application of zoning ordinances, (b) the intent of R-PD zoning to "provide for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space," (c) allowing the City to determine whether residential uses are "compatible with surrounding uses," (d) the definition of "permitted use" only "if it is conducted in accordance with the restrictions applicable to that district" leaves little doubt that the City retains a high degree of discretion in applying zoning ordinances. To harmonize with these statutes, "by right" cannot mean that every property owner in every zoning district has a constitutional right to build whatever uses are "permitted" in that zone free of any agency discretion. *See Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983) (court should read every sentence, word, and phrase of ordinance within context of the purpose of the legislation).

k. The Developer's "property rights" theory does not fit with the concept of zoning

The Developer's theory that it had a "property right" to build housing on the 65-Acre Property

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begs the question, "what exactly would it have the right to build"? The Developer's property rights theory would be impossible to apply, given how zoning functions in general and R-PD7 zoning functions in particular. Determining what the Developer could build would be particularly difficult here, where the Developer never filed an application for a specific project to develop the 65-Acre Property. To fit within the provisions of UDC 19.10.050 or the bedrock principle repeatedly reaffirmed by the Nevada Supreme Court that local agencies have broad discretion in applying zoning regulations, even under the Developer's theory the City would have to retain a degree of discretion.

But the Developer's simplistic theory does not explain where the City's discretion ends and the Developer's rights begin, and thus would be unworkable. The Court would have no guidance whether the City would have discretion to limit the Developer to one or two houses per acre, or would the City have no discretion to deny an application for seven units per acre? Could the City deny the application if it exercised "flexibility" and its "innovative powers" to require the Developer to site the houses on the property in a way that the Developer opposed? Would the City have any discretion to limit the height, bulk, and setbacks of the development? Would it have discretion to require and determine the design of buildings, open space, parking, access, drainage, landscaping, and amenities if the Developer disagrees? These unanswered and unanswerable questions sink the Developer's theory of the law.

The Developer's theory devolves into the claim that, because the Developer has a "property right," the City would have to approve *any* application the Developer files as long as it does not provide for more than seven houses per acre. That result would turn Nevada land use law upside down, shifting decision-making regarding land use from the people's elected government to property owners. It would wipe out the City's ability to protect neighborhoods, the environment, and other community values through land use regulation. A property owner could build virtually anything it chooses as long as it does not exceed the maximum density of the zoning ordinance, with no public oversight. Accordingly, the Developer's "property right" claim collapses under its own weight.

l. The Assessor's opinion of the land use controls applicable to the property is irrelevant

Without authority, the Developer contends that this Court should be bound by the opinion of the Clark County Assessor as to the how the City's zoning law and General Plan should be interpreted

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and applied. The Clark County Assessor values property in the City based on her appraisal, which is an opinion of value. The County Assessor has no authority to adopt or implement City law and her opinion is irrelevant. This Court already rejected the Developer's claim:

> The Clark County Assessor's assessment determinations regarding the Badlands Property did not usurp the Council's exclusive authority over land use decisions. . . . The Council alone and not the County Assessor, has the sole discretion to amend the open space designation for the Badlands Property. *See* NRS 278.020(1); Doumani, 114 Nev. at 53, 952 P. 2d at 17.

Ex. XXX at 1393.

Because the Developer had voluntarily shut down the golf course, under Nevada law the Developer could no longer qualify for a tax concession for maintaining a golf course. The Assessor was required to find that the legal land use of the 35-Acre Property was single family residential, and it assessed taxes on the property accordingly. Ex. 49 at 1172-73; Ex. 50. On September 25, 2017, after the Developer filed its first amended petition for judicial review in this case, which asserted claims for inverse condemnation, the Developer stipulated to the County assessor's determination that the Badlands did not qualify for assessment as open-space. *See* Ex. 120.

If the Developer disagreed with the tax assessor's opinion, the appropriate remedy was to have the opinion overturned by the State Board of Equalization, and if unsuccessful, then to file a petition for judicial review in district court. *See Montage Marketing, LLC v. Washoe County ex rel. Washoe County Bd. of Equalization*, 134 Nev. 294, 297, 419 P.3d 129, 131 (2018) (describing petition for judicial review in district court following a State Board of Equalization determination). However, after initially appealing to the State Board, the Developer stipulated with the Assessor's Office that the property did not qualify for open space assessment. Ex. 120. Thus, the Developer cannot now seek to remedy this decision by filing claims for inverse condemnation.

m. The Developer confuses zoning with property rights

The Developer's claim to a right of any kind under a zoning ordinance, which by law actually *limits* the use of property, defies Nevada law and the law of every state. Property rights are relative to other individuals and other property owners. They determine the owner's rights to use the property for legal purposes and to exclude others. *See* Black's Law Dictionary (11th ed. 2019) (defining "property rights" to "include the right to possess and use, the right to exclude, and the right to transfer"). These

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rights are determined as against other individuals or other property owners: each interest in the bundle of sticks that comprise property rights can have only one owner or set of owners. For example, the holder of property burdened with an easement in favor of another person cannot prevent the easement holder from using the property under the terms of the easement.

Zoning, however, is a completely different concept. Zoning defines the relationship between property owners and the government. By its very nature, zoning limits the use of property. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court upheld a city ordinance

> establishing a comprehensive zoning plan for *regulating and restricting* the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc. The entire area of the village is divided by the ordinance into six classes of use districts . . . . The use districts are classified in respect of the buildings which may be erected within their respective *limits* . . . .

272 U.S. at 369-80 (emphasis added). The *Euclid* Court went on to explain the purpose for zoning ordinances:

> Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional *restrictions* in respect of the use and occupation of private lands in urban communities.

Id. at 386-87 (emphasis added). Accordingly, zoning does not "grant" property "rights." The oddity of the Developer's claim is also evident from the logical extension of the claim: if property owners have a constitutionally protected property or vested right "granted" by the zoning of their property, *the government would be liable for a taking every time the government rezoned property*. The Developer's claim is absurd and collapses on its own weight.

n. The property right theory does not fit the context of takings law regarding damages

The Developer's claim that the taking of its vested right under zoning is also meaningless in the context of the law of damages for regulatory takings. A regulatory taking requires regulation that has an extreme economic effect on the property. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove*, 888 F.3d at

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451. If a government agency is found liable for a regulatory taking, the owner's damages are the difference in the value of the property before the regulation was imposed and the value after. *Id*. The values of the 35-Acre Property in the before and after condition are determined by what uses the owner could make of the property in each case. Here, the Developer claims that it had a constitutional right in the before condition to use the 35-Acre Property for housing, but that housing was precluded in the after condition housing by the City's denial of the 35-Acre Applications. But the Developer never explains the contours of the "right" it had to build housing in the before condition, and, therefore, what exactly was "taken." The Developer alleges only that it had a "right" to build "single family or multi-family residential." It does not, however, say at what density (housing units/acre), which makes *all the difference* in the value of the property in the before condition.

Accordingly, under the Developer's property rights theory, the Court would have to engage in speculation as to what density the Developer had a "right" to build in the before condition. The Court could decide that the City need only have approved one house in the 35-Acre Property. In that case, the Developer's damages would be vastly different than if the Court picked, say 200 housing units out of thin air as the Developer's "right." The Developer's torturing of property and land use law, therefore, self-destructs.

It is telling that in its "analysis" of its specific taking claims at the end of its MSJ, where the Developer attempts to apply the law to the facts, the Developer never mentions its "property right" to build housing in the Badlands. The reason is transparent – because its property right theory does not fit within the tests for liability or damages for a taking established by the Supreme Courts of the United States or Nevada, which are concerned only with whether the regulation deprives the owner of all or virtually all use or value or interferes with objective investment-backed expectations. Whether the agency has refused to allow a use that the zoning permits is not even remotely close to those tests. *See Lingle*, 544 U.S. at 538; *State*, 131 Nev. at 419, 351 P.3d at 741; *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35

G. Even if the PR-OS designation did not apply, the City approved substantial development in, and increased the value of, the parcel as a whole, negating a taking

The Developer claims that by denying the Developer's 35-Acre Applications, the City denied

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all use of, and destroyed the value of, the 35-Acre Property. This claim lacks merit as a matter of law and logic. The Developer bought an operating golf course and drainage for $4.5 million and the City never interfered with that use. Even if the City denied redevelopment of the golf course for housing, the Developer still had use of the property for golf course and drainage under the PR-OS designation and the property was still worth $4.5 million. In the end, this case is simple: because the City did nothing to interfere with the historic use of the property for golf course and drainage, the City cannot be liable for wiping out or virtually wiping out the use or value of the 35-Acre Property and, therefore, the City should have judgment on the categorical and *Penn Central* taking claims.

Even if the Court disagrees, the City should still have summary judgment because the Developer segmented the 35-Acre Property from the "parcel as a whole." Assuming that the City had prohibited all economic uses of the 35-Acre Property as the Developer maintains (it didn't), the City did not wipe out or nearly wipe out the use or value of the parcel as a whole. To the contrary, the City allowed substantial development of the parcel as a whole, and thus cannot be liable for a taking.

1. The Nevada Supreme Court requires that courts determine the "whole parcel" before determining if the parcel has been taken

To decide whether regulation wipes out or nearly wipes out the value of property and thereby causes a taking, the Court must first determine the scope of the relevant property. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017). Because takings analysis must "focus[] . . . on the nature and extent of the interference with rights in *the parcel as a whole*," *Penn Central*, 438 U.S. at 130-31 (emphasis added), a court must delineate the whole of the claimant's property to properly evaluate the effect of the challenged regulation. "Segmentation" is a real estate developer tactic to divide the whole parcel into segments and contend that the denial of development of any segment wipes out the value of the segment, even though the agency has approved development in another segment of the parcel as a whole. Taking claims based on this trick are routinely rejected by the courts. For example, in *Penn Central*, the Supreme Court rejected segmentation of the air rights from the existing structures on the property:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has

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> effected a taking, this Court focuses rather . . . on the nature and extent of the interference with rights in the parcel as a whole . . . .

Id. at 130-31.

In *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327, 331 (2002), the Supreme Court held that defining the relevant parcel required consideration of the "aggregate . . . in its entirety," rejecting the notion that takings analysis could be applied only to the portion of a larger property directly burdened by a regulation. "Of course, defining the property interest taken in terms of the very regulation being challenged is circular." *Id*. at 331. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe*, 508 U.S. at 644, quoted in *Tahoe-Sierra*, 535 U.S. at 331. Thus, where a regulation affects only a portion of contiguous property, the property cannot be defined solely as the regulated portion. Nevada also rejects the tactic of segmentation of the whole parcel to manufacture takings claims. *See Kelly*, 109 Nev. 638 at 641 & n.1, 651, 855 P.2d at 1029 & n.1, 1035 (rejecting developer's segmentation of seven lots affected by regulation from the remainder of 39-lot planned unit development).

The Supreme Court recently clarified the standard for defining the relevant property, identifying a three-factor test: (1) "the treatment of the land, in particular how it is bounded or divided, under state and local law"; (2) "the physical characteristics of the landowner's property"; and (3) "the value of the property under the challenged regulation," *Murr*, 137 S. Ct. at 1945-46. The Court emphasized that the goal is to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Id*. at 1945; *see also id*. at 1950 ("Courts must . . . define the parcel in a manner that reflects reasonable expectations about the property."). "Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly." *Id*. at 1952 (Roberts, C.J., dissenting). Here, the Developer has engaged in classic segmentation of the PRMP to fabricate a takings claim. Under the test for determining the whole parcel in *Murr*, the Developer has defined the relevant parcel too narrowly.

Regarding the first *Murr* factor, a reasonable restriction that predates a landowner's acquisition

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can be an objective consideration for most landowners in forming fair expectations about their property. *Id*. at 1945. Lot lines created under state law do not define the relevant parcel in every instance. *Id*. at 1947. Courts routinely consider separate lots as a single property for takings purposes, as the Supreme Court did in *Murr*. *See id.; see also*, *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1344, 1346 (Fed. Cir. 2004) (six leases in different parcels, acquired at different times, part of same property for takings purposes); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1362-63, 1365-66 (Fed. Cir. 1999) (two parcels purchased at different times capable of separate development considered part of the same property for takings purposes).

2. The PRMP is the parcel as a whole

Given that the PRMP has historically been treated as a single integrated project, it is unreasonable for the Developer to claim that only a fraction of the Badlands – itself just a fraction of the master planned area – is the relevant parcel for takings purposes. *See Forest Props.*, 177 F.3d at 1366; *see also Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991) (two parcels collectively considered the relevant property for takings purposes because plaintiff had viewed both parcels as an integrated unit for purposes of purchase and financing). In *Forest Properties*, the Federal Circuit rejected the assertion that parcels should be treated separately because they were acquired at different times and were capable of separate development, emphasizing the economic realities of the property. *Id*. at 1366. Because the entire parcel was acquired with the intent of integrated development, the regulated portion could not alone constitute the relevant parcel. *Id*. at 1365. This was the case even though a portion of the parcel had been sold off. *Id*. Several other courts have reached similar conclusions. *See*, *e.g.*, *Norman v. United States*, 63 Fed. Cl. 231, 260-61 (2004); *Cane Tenn., Inc., v. United States*, 60 Fed. Cl. 694, 705 (2004); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981). Similarly, in *Ciampitti* the court ruled that denial of a wetland fill permit did not effect a taking where the plaintiff had knowledge of the restrictions applicable to the property but nevertheless agreed to purchase restricted wetlands as part of a package deal that included developable uplands. 22 Cl. Ct. at 319.

Here, the entire PRMP began as a single master planned development under one owner who intended that the Badlands would provide recreation, open space, and drainage for the other,

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developed parts of the PRMP, and thus satisfy the City's open space set-aside requirement. Ex. H at 151, 153, 159 In the 25-years before the Developer purchased the Badlands, the master planned area was developed as a single economic unit under the PRMP approved in 1990. The City's approval of a casino and hotel in the PRMP was conditioned on Peccole providing an 18-hole golf course to serve that destination resort. Ex. G at 123-24; Ex. H at 183.

Under *Murr*'s second factor, physical characteristics of a parcel include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human environment. 137 S. Ct. at 1945. In *Murr* the Court held that contiguous lots under common ownership support treatment of property as a unified parcel. *Id*. at 1948; *see also Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (concluding that the relevant parcel consists of 100 contiguous acres owned by the claimant, including 60 undevelopable acres and 40 developable acres). In the instant case, Peccole and the City designated the Badlands as golf course and drainage due to its topography – a series of washes and hills that provided natural drainage for the remainder of the PRMP. Ex. H at 151, 153. Accordingly, the physical characteristics of the master planned area dictated that the Badlands open space and the surrounding residential and commercial developments be treated as a single, integrated unit.

As to the third *Murr* factor, the value of the property subject to the regulation, a determination of whether a regulatory taking has occurred requires a comparison of "the value that has been taken from property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). *Murr* holds that while "a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty." 137 S. Ct. at 1946. The value of using property as an integrated whole can outweigh a restriction to individual lot development. *Id*. Here, Peccole and the City intended that the Badlands would provide recreation, open space, and drainage, enhancing the quality and value of the entire master planned area, *including the housing and retail the Developer built in the PRMP*. Ex. H at 151, 153. Accordingly, application of the third factor of the *Murr* test, like the first two factors, dictates that the Court treat the entire master planned area as the parcel as a whole.

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This Court already made findings in this case that support treating the PRMP as the parcel as a whole. In denying the Developer's PJR, the Court stated:

> The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS) and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor. ¶ The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course.

Ex. XXX at 1392-94. Judge Herndon also made findings pointing to the PRMP is the parcel as a whole:

> In 1980, the City approved William Peccole's petition to annex 2,243 acres of undeveloped land to the City. . . Mr. Peccole's intent was to develop the entire parcel as a master planned development. . . . 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. CCCC at 1484. Thus, By focusing the Court on the Badlands alone, the Developer transparently segmented the parcel as a whole to pressure the City to allow more development. The Court should reject this segmentation and instead focus on the City's regulation of the use of the parcel as a whole.

3. The City not only did not wipe out virtually all value or use of the parcel as a whole, it increased its value

The Developer cannot show that the City destroyed virtually all economic value of the PRMP as a whole. First, it is undisputed that the City permitted Peccole, other developers, *and this Developer* to construct thousands of housing units, retail, a hotel, a casino, other buildings, and a golf course in the PRMP. Ex. UU at 959; Ex VV at 960; Ex. XX at 962. This substantial development conferred significant value on the parcel as a whole, *i.e.*, the PRMP master planned area. CLV218122. As a matter of law, therefore, the Developer cannot satisfy the test for a taking. *See Murr*, 137 S. Ct. at 1946.

In *Kelly*, the Nevada Supreme Court applied the parcel-as-a-whole doctrine to facts similar to the instant case. There, the developer argued that the agency had deprived the developer's property of all value by pointing to the impact of a regulation on seven lots out of the developer's 39-lot planned unit development. 109 Nev. at 641 & n.1, 651, 855 P2d at 1029 & n.1, 1035. The Court found that the developer had segmented the property to manufacture a takings claim:

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> Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of all economic use. . . . When viewed as a whole, we conclude that Kelly has not been deprived of all economic use; only the seven Hilltop lots have been affected by TRPA's regulations, not the entire Uppaway subdivision.

Id. at 651 (citing *Penn Central*, 438 U.S. at 130) (internal citation omitted). The Nevada Supreme Court rejected the regulatory takings claim because the developer had sold the 32 lots that were not subject to development restrictions, thus "yielding him a substantial profit." *Id*.

The same result follows from the City's approval of significant residential and commercial development covering *more than a thousand acres* of the PRMP, including the Developer's own luxury condominium project. It is undisputed that the City permitted development of 84% of the PRMP with commercial and residential development (250-acres = 16% of 1,569-acre PRMP). The City's actions thus allowed the Developer and its predecessor to realize great value from development of the PRMP. The City cannot be found liable for a taking of the 35-Acre Property because the PRMP is the parcel as a whole and the City permitted substantial development of that parcel.

Even if the Court disagrees that the whole parcel is the entire PRMP, at a minimum the Badlands is the parcel as a whole. At the time the Developer bought the Badlands, the entire Badlands had been in a use for golf course and drainage for at least 23 years. As Judge Herndon pointed out, the Developer bought the entire Badlands in a single transaction for a single price from a single seller. Ex. CCCC at 1490. Assuming that the Badlands is the whole parcel rather than the PRMP, the Developer's takings claims still fail. The City allowed Peccole to develop the Badlands as a golf course and later approved 435 luxury housing units on 17 acres of the Badlands. This extensive development creates considerable value in the whole parcel – $26,228,569, as found by Judge Herndon, according to the Developer's own evidence – even if it is limited to the Badlands, and thus defeats any claim that the City has taken the 35-Acre Property. *See Concrete Pipe*, 508 U.S. at 645; *Kelly*, 109 Nev. at 651, 855 P2d at 1035.

Judge Herndon found that, at a minimum, the Badlands is the parcel as a whole, which the Developer then segmented:

> In early 2015, Peccole owned the Badlands through a company known as Fore Stars Ltd ("Fore Stars"). . . At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf

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> course for a year and, then, in 2016, voluntarily closed the golf course and 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 ("Seventy Acres"), leaving Fore Stars with 2.13 acres. . . . Each of these entities is controlled by the Developer's EHB Companies LLC. . . . The Developer then 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*.

Ex. CCCC at 1490 (emphasis added).

The Developer denies segmenting the Badlands and denies its game-playing to enhance its chances of prevailing on a regulatory taking claim. Its claim that the city compelled the Developer to segment the property falls flat because there is absolutely no evidence to support it. The Developer also denies that its intent in carving up the Badlands into four parts was to manufacture taking claims, despite its professed intent to develop the entire Badlands. The fact that the Developer placed ownership of the four segments of the Badlands under four different entities controlled by the Developer belies the Developer's claim that it did not segment the Badlands in order to more easily show a taking if the City were to deny development on a single segment.

Accordingly, even if the Badlands is the relevant parcel instead of the PRMP, the City's approval of substantial development in the Badlands – providing the Developer with at least a 600 percent return on its investment in the entire 250-acre property – undercuts any claim that the 35-Acre Property has been taken.

H. Even if the 35-Acre Property is the parcel as a whole, the City's regulation merely maintained the status quo and thus did not decrease the value of the 35-Acre Property

Even if the Developer's categorical and *Penn Central* claims for a taking of the 35-Acre Property were ripe and the Court disregarded the parcel as a whole doctrine and focused only on the City's alleged regulation of the 35-Acre Property, the Developer's categorical and *Penn Central* claims still fail on the merits because the City, as a matter of logic, did not reduce the use or value of the 35-Acre Property. The Badlands have been designated PR-OS in the City's General Plan since 1992, and was so designated when the Developer acquired the property. Exs. I, L, N, O, P, Q. PR-OS does not permit residential use. *E.g.*, Ex. N at 290. Even if the City had declined to amend the General Plan to approve a housing project on the 35-Acre Property, that action could not wipe out the value of

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the 35-Acre Property: the 35-Acre Property would have the same use (golf course and drainage) and value (35 x $18,000/acre = $630,000) as it did when the Developer bought the property. The City's hypothetical action (not changing the law) would not only *not* wipe out the use or value of the 35-Acre Property, it would have *no* economic impact on the property. *See Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) ("[E]conomic impact is determined by comparing the total value of the affected property before and after the government action."). The use and value of the 35-Acre Property would be exactly the same before and after the City's alleged decision declining to lift the PR-OS designation. This Court agreed:

> The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS) and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor. ¶ The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course. ¶ It is up to the Council – through its discretionary decision making – to decide whether a change in the area or conditions justify the development sought by the Developer and how any such development might look. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723.

Ex. XXX at 1392-93. Accordingly, the Developer cannot meet the categorical taking or economic impact tests of *Penn Central* as a matter of law.

I. The City did not interfere with the Developer's reasonable investment-backed expectations

The City's hypothetical disapproval of two applications to develop the 35-Acre Property also could not have interfered with the Developer's investment-backed expectations, a core factor of the *Penn Central* taking test. The Developer's expectations must be objective. *See Bridge Aina Le'a, LLC v. Land Use Commission*, 950 F.3d 610, 633-34 (9th Cir. 2020) ("[W]e must 'use 'an objective analysis to determine the reasonable investment backed expectations of the owners.'"") (citation omitted). The Developer bought a golf course and drainage property designated PR-OS in the City's General Plan at the time of purchase, which information was publicly available. *See* https://files.lasvegasnevada.gov/planning/Land-Use-Rural-Neighborhoods-Preservation-Element.pdf at 68 (Badlands shown on General Plan map in green, for "PR-OS"). The Developer acknowledged that the Badlands was designated PR-OS in its sales literature in 2016, before it applied to develop

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property in the Badlands. Ex. Y at 420. The Developer was aware that it would be required to persuade the City to change the PR-OS designation to allow the Developer to build housing in the Badlands. As this Court declared: "The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS)." Ex. XXX at 1392.

In each of its applications to develop the 17, 35, and 133-Acre Properties, the Developer requested a change in the PR-OS designation to a designation allowing housing. Ex. Z at 446; Ex. HH at 644; Compl. in 133-Acre case filed 6/7/2018 ¶ 37. The Developer was also on notice that the City has discretion to amend the PR-OS designation. Because the Developer bought the Badlands subject to the PR-OS designation, the City cannot be liable for a taking were it to decline to change the law, thus permitting the property to continue in its historic use as a golf course and drainage. *See Penn Cent.*, 438 U.S. at 136 (New York City law did not interfere with property owner's "primary expectation concerning the use of the parcel" where the law did not interfere with "present uses" of the property); *Bridge Aina Le'a, LLC*, 950 F.3d at 634-35 (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, 1120-21 (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"); *Dodd v. Hood River Cty.*, 136 F.3d 1219, 1230 (9th Cir. 1998) (*Penn Central* claim rejected where owner had no reasonable investment-backed expectation to build housing in area designated exclusively for forest use at time owner purchased property).

The facts of *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 855 P.2d 1027, are close to the instant case, and *Kelly* is directly on point. There, the Nevada Supreme Court held:

> When considering the second [*Penn Central*] factor, Kelly's reasonable investment-backed expectations have been satisfied. At the time Kelly purchased Uppaway Estates in 1966, he had adequate notice that his development plans might be frustrated. At the time of the land purchase, the Lake Tahoe Regional Planning Commission had published the Report of the Lake Tahoe Joint Study Committee, and it discussed California and Nevada's concerns over rapid growth in the Lake Tahoe Basin and the need for land-use planning regulations. Moreover, Kelly's financial expectations have also been

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> met because he purchased the original estate for $500,000.00, lived in the main house for nearly twenty years and then sold the main house alone for $1,100,000.00. Kelly also developed and sold most, if not all, of the parcels, with the exception of the seven Hilltop lots, yielding him a substantial profit.

109 Nev. at 651, 855 P.2d at 1035. Because the Developer's categorical and *Penn Central* taking claims fail on the merits, the City should have summary judgment on these claims.

J. Because regulatory takings are concerned only with the economic impact of regulation on the 35-Acre Property, the reasons for the actions and statements of individual City officials are completely irrelevant.

The Developer misleads the Court with page after page of argument that two members of the City Council acted without reasonable justification with regard to the 35-Acre Property. Given the poverty of the Developer's taking claims on the merits, the Developer resorts to arguing that certain City officials were improperly influenced by neighbors of the Badlands to make erroneous decisions affecting the 35-Acre Property, and that these poor decisions somehow "took" the 35-Acre Property. (The Developer never explains how a statement or action of an individual City employee, rather than a law enacted by the City Council, could restrict the Developer's use of its property.) Although the reasons underlying official action may be relevant in a due process case, they are wholly irrelevant to regulatory takings, which are concerned exclusively with economic impact. Accordingly, the Developer's theory of the case – in essence a due process violation – should be rejected. Indeed, the Ninth Circuit already dismissed the Developer's due process claim.

1. Because the Taking Clause presumes the validity of the City Council's decision and focuses solely on economic impact, the reasons for that decision are irrelevant

The Taking Clause does not bar arbitrary or irrational regulations. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543-44 (2005). Rather, it requires compensation "in the event of *otherwise proper interference* amounting to a taking.'" *Id*. at 543 (emphasis in original) (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987)). Accordingly, the Taking Clause "presupposes that the government has acted in pursuit of a valid public purpose." *Id.* at 543. A proper taking analysis does not probe the underlying validity of the government action, but rather considers "the actual burden imposed on property rights." *Id.*

Contrary to this fundamental principle, the Developer bases its case for a taking on a challenge

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to the *validity* of the City Council's decision. According to this reasoning, if Councilmember Seroka had poor reasons for his vote, then the decision made by the City Council as a whole was irrational and arbitrary, and ergo the City has taken the 35-Acre Property.

However, as the Supreme Court made clear in *Lingle*, this line of inquiry—and the resulting conclusion—is irrelevant and improper, because it "tells us *nothing* about the actual burden imposed on" the Developer's property rights. *Lingle*, 544 U.S. at 543 (emphasis added). Indeed, an irrational regulation "may not significantly burden property rights at all." *Id.* "The notion that such a regulation nevertheless 'takes' private property for public use" by virtue of its invalidity is therefore "untenable." *Id.* In sum, a regulatory taking claim is not viable unless the regulation in question is valid. The claimant must show that the regulation imposes an extreme economic burden on the property. A challenge to the wisdom of the regulation by the Developer is a due process claim, not a taking claim.

The Developer may argue that *Sisolak* supports the Developer's inquiry into the reasons for Councilmember Seroka's decisions. In that case, the Nevada Supreme Court found that the challenged ordinances effected a taking because they required the property owner to allow airplanes to physically invade the owner's airspace. 122 Nev. at 666, 137 P.3d at 1124. The Developer asserts that the *Sisolak* takings determination turned on statements made by a county planner, who told the landowner "not to bother" asking for a variance. Ex. A at 9:6-20; 32:6-12. While the opinion references the statements of the planner as part of the case's background facts, the statements in no way assisted the court with its takings determination, which was limited to a facial analysis of what the ordinances themselves allowed or authorized. 122 Nev. at 653, 666-67, 137 P.3d at 1116, 1124-25.

Sisolak therefore provides *no* support for the Developer's contention that the basis of either Councilmember Seroka's statements or the City Council's decision are relevant to the takings analysis. The City's defense in no way depends on Councilmember Seroka's state of mind or the reasons for his decision. The City Council as a whole made the decisions at issue, and the Taking Clause presumes that the decision was both rational and proper. *Lingle*, 544 U.S. at 543-44. The Developer's claims, and the City's defenses, must therefore turn not on the reasons of individual legislators for making that decision, but on the decision's economic impact on the Developer's property. The Nevada Supreme Court agrees:

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> And although Ad America contends that exhaustion was futile because there was a de facto moratorium on developing property within Project Neon's path, the record does not support this contention. The opinion of Ad America's political consultant, which was based on alleged statements from only one of seven City Council members, is insufficient to establish the existence of such a moratorium."

State v. Eighth Jud. Dist. Ct., 131 Nev. at 419-20, 351 P.3d at 742

The Developer admits as much. The Developer cites *Sisolak* for the proposition that the City's liability for a regulatory taking is a question of law. *Sisolak*, 122 Nev. at 661, 137 P.3d at 1121. The Developer admits that liability for a taking must be established through official government action, not from the inner thoughts of individual City Council members:

> 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 in this action on 3/21/2019 at 2. The Court may not properly consider the basis for or validity of Councilmember Seroka's vote or the City Council's decision as part of its taking analysis. Accordingly, the Court should disregard pp. 14-26 of the Developer's MSJ.

2. Even if the basis of the City Council's decision was relevant, the subjective motivations of individual Councilmembers are not

The Developer attacks the reasoning and motivation of former Councilmembers Seroka and Coffin and then improperly attributes their statements and actions to the City. Even in the limited legal contexts in which the basis of an official government decision is relevant, courts have repeatedly held that evidence of the subjective considerations and motivations of individual decision makers is irrelevant and that evaluating decisions on the basis of such motivations would be a "hazardous task." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984).

Even if the Court could properly consider the basis or validity of the City Council's actions as part of its takings analysis, it may not consider a single decision maker's statement of opinion or motives to divine legislative intent. *A-NLV-Cab Co. v. State, Taxicab Auth.*, 108 Nev. 92, 95, 825 P.2d

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585, 587 (1992). "The relevant governmental interest is determined by objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *City of Las Vegas*, 747 F.2d at 1297; *see also In re Kelly*, 841 F.2d at 912 n.3 ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely."); *S.C. Educ. Ass'n*, 883 F.2d at 1262 ("[I]f motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant."). Accordingly, courts may only consider the "'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). Where a claim turns on motivation or purpose, the court's assessment must be based solely on "openly available data." *Id.* at 863. "[J]udicial psychoanalysis of a drafter's heart of hearts" is off limits. *Id.* at 862.

This is exactly what the Developer seeks to do: impugn the basis of Councilmembers Seroka and Coffin's votes, and then impute that allegedly flawed basis to the City Council as a whole. This is improper. Even if the basis of the City Council's action was relevant to the takings analysis—it isn't—the Court may not consider Councilmember Seroka or Coffin's statements as evidence of the City Council's motivations or reasoning. This Court agrees that statements and actions of individual Councilmembers are not actions of the City and are not relevant:

> The statements of individual council members are not indicative of any arbitrary or capricious decision making. The action that the Court is tasked with reviewing is the decision of the governing body, not statements made by individual council members leading up to that decision. See NRS 278.3195(4); *Nevada Contractors*, 106 Nev. at 313, 792 P.2d at 33; *see also Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. Adv. Op. 40, 419 P.3d 140, 142 (2018) (discussing when action by board is required); *City of Corpus Christi v. Bayfront Assocs., Ltd.*, 814 S.W.2d 98, 105 (Tex. Ct. App. 1991) ("A city can act by and through its governing body; statements of individual council members are not binding on the city."). "The test is not what was said before or after, but what was done at the time of the voting." *Lopez v. Imperial Cty. Sheriff's Office*, 80 Cal. Rptr. 3d 557, 560 (Cal. Ct. App. 2008). The Council's action to deny the Applications occurred with its vote, not with the prior statements made by individual council members. NRS 241.0355(1).

Ex. XXX at 1391. A regulatory taking can be effected only by regulation (a) having the force of law

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and (b) that imposes an extreme economic burden on the property. Individual Councilmembers' statements and the reasoning behind those statements are irrelevant. The Court should not be distracted from the test for liability for a taking by the Developer's attempt to turn a takings case into a due process case.

II. The City is not liable for a physical regulatory taking

In its third cause of action for a "per se regulatory taking," which is in essence a physical taking, the Developer asserts: "The City's actions exclude the Landowners from using the 65 Acres and, instead, permanently reserve the 35 Acres for a public use and the public is using the 35 Acres and that use is expected to continue into the future." Compl. ¶ 199. The Developer's attempt to state a physical takings claim is unavailing.

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. *Loretto*, 458 U.S. at 426, 436 ("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.*, 535 U.S. at 321-22 ("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."); *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122 ("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). Here, the Developer does not assert and has no evidence to show that the City has physically occupied the 35-Acre Property. *See Loretto*, 458 U.S. at 426, 436.

Lacking any evidence that the City has physically occupied the 35-Acre Property, the Developer misrepresents that Bill 2018-24, adopted in November 2018 and repealed in January 2020,

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effected a physical taking of the 35-Acre Property similar to the physical taking in *Sisolak*. The Developer alleges that Bill 2018-24 "expressly states the Landowners **must** allow "ongoing public access" and "plans to ensure that such [public] access is maintained." Dev. MSJ at 39 (emphasis original). This is pure fiction; Bill 2018-24 does nothing of the sort.

The Developer's claim to a physical taking relies primarily on the City's adoption of Bill 2018-24. The Developer contends that Bill 2018-24, enacted in November 2018 and repealed in January 2020 (Exs. LLL, MMM at 1138-50), is similar to the ordinances requiring owners to submit to public occupation of their airspace in *Sisolak*, an ordinance in *Knick v. Township of Scott, Pa.*, 139 S.Ct. 2162 (2019), and a state agency regulation in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). There is no resemblance, however, between Bill 2018-24 and the ordinances in *Sisolak*, *Knick*, and *Cedar Point*. In *Sisolak*, the ordinance automatically exacted an easement for commercial airlines flights from all property owners owning airspace within the flight path of airport runways. 122 Nev. at 665-67, 137 P.3d at 1124-25. In *Knick*, the ordinance automatically exacted an easement in favor of the public from all owners of property containing human remains. 139 S. Ct. at 2168-69. In *Cedar Point*, the regulation automatically exacted and easement in favor of labor union organizers to enter the private property of certain businesses. 141 S.Ct. at 2073, 2077. The easements in *Sisolak*, *Knick*, and *Cedar Point* were exacted the moment the ordinances/regulation were enacted. *See*, *e.g.*, *Cedar Point*, 141 S.Ct. at 2079-80. However, Bill 2018-24 (a) did not exact an easement from golf course owners, (b) imposed requirements only if certain conditions were met, and (c) did not require owners to submit to public occupation of their property, even if the conditions were met.

Bill 2018-24 did not require anything of golf course owners unless they "proposed" a re-use of a golf course. By November 2018, the Developer had filed applications to develop the 17, 35, and 133-Acre Properties, all of which the City had acted on and were no longer pending "proposals." The Developer then filed four lawsuits for takings against the City for the four development sites segmented from the Badlands. Because the Developer submitted no *proposals* to the City to re-use the Badlands during the 15-month period Bill 2018-24 was in effect, the Bill did not apply to the Badlands. Ex. DDDD at 1519-520. Even assuming that the Developer had submitted a proposal, the

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provision of Bill 2018-24 that the Developer claims required the Developer to submit to "ongoing public access" applied *only if* the City gave notice to the owner that it must submit a maintenance plan while its proposal was pending. *Id*. at 1562-63. It is undisputed that the City never gave the Developer the notice, and the Developer never submitted a maintenance plan, so the ordinance also did not apply to the Developer's property on that basis. Ex. DDDD at 1519-20.

Bill 2018-24 actually provides that an owner must merely "[p]rovide *documentation* regarding ongoing public access, access to utility easements, and plans to ensure that such access is maintained . . . . Ex. DDDD at 1563-64 (emphasis added). Bill 2018-24, therefore, did not require owners of closed golf courses to allow public access. If the owner had no plans to maintain public access, it would not have to document any public access. Moreover, the owner would not be required to document public access if the access was not "ongoing." As Judge Herndon found, the Developer voluntarily shut down the golf course in 2016, so there was no "ongoing public access" to maintain while Bill 2018-24 was in effect. Accordingly, Bill 2018-24 exacted no easement from the Developer and cannot be equated to the ordinances/regulation in *Sisolak*, *Knick*, and *Cedar Point*.

The Developer's contention that members of the public trespassed on the 35-Acre Property as a result of the enactment of Bill 2018-24 is also frivolous where the Developer's own evidence shows that members of the public trespassed on the Badlands before and after enactment of Bill 2018-24. Ex. 150 at 4669.

The Developer contends that even though the Developer never presented a proposal to redevelop the Badlands golf course while Bill 2018-24 was in effect, and the City never gave notice to the Developer that it would have to comply with the ordinance, the ordinance applied nonetheless because City staff stated that the ordinance was "retroactive." Even assuming that statements of staff are relevant to this Court's construction of legislation, Bill 2018-24, by its plain language, applies only to proposals made after the ordinance was enacted. *See Segovia v. Eighth Judicial District Court in and for County of Clark*, 133 Nev. 910, 915, 407 P.3d 783, 787 (2017) ("statutes are otherwise presumed to operate prospectively 'unless they are so strong, clear and imperative that they can have no other meaning or unless the intent of the [L]egislature cannot be otherwise satisfied.").

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Furthermore, even if Bill 2018-24 was "retroactive," the City never gave the Developer notice that it must submit a maintenance plan, whether for a past or future proposal, and the ordinance did not require the Developer to submit to public access, whether for past or future proposals. Accordingly, the Bill did not apply to the Developer, and the retroactivity argument fails.

The Developer also contends that *the City* is liable to the Developer for a physical taking because an individual member of the City Council, acting in his individual capacity, allegedly told members of the public that they could trespass on the Badlands. There is no evidence that an individual City Councilmember has the authority to permit anyone to occupy private property. The Developer has cited no authority that the City is liable for trespassers on the Badlands, regardless of what a Councilmember may have said. If the Developer was concerned about the public trespassing on its property, it had, and still has, legal remedies against the trespassers.

Failing to prove that any City regulation allowed the public to physically occupy the Badlands, the Developer argues that the City effected a physical taking by preserving the Badlands as a "viewshed" for the surrounding community. This claim is nonsense. First, the City designated the Badlands PR-OS – Parks, Recreation, and Open Space – in the General Plan in 1992 and maintained that designation through the date the Developer acquired the Badlands and up to the present (except for the 17-Acre Property, which is now designated for medium density residential). The very purpose of the PR-OS designation, like all designated open space everywhere, is to preserve land for recreation, light, air, and views *for the surrounding community*. As this Court held, the City was fully within its rights to decline an amendment to the PR-OS designation and retain the status quo. Maintaining a regulation that historically was intended to, and did, provide a viewshed for the surrounding community is not a taking under any taking test.

More to the point of the Developer's phony physical taking claim, a regulation does not effect a physical taking unless it permits the government or the public to *physically occupy* the owner's property. Simply limiting the *use* of property to protect community interests is not, by law or logic, a physical taking. *Loretto*, 458 U.S. at 426, 436; *Tahoe-Sierra*, 535 U.S. at 321; *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122.

The Developer has failed to provide any evidence to support its claim for a per se regulatory

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[physical] taking. The City is entitled to judgment on this claim.

III. The City did not effect a non-regulatory taking of the 35-Acre Property

The Developer's fourth cause of action asserts a "non-regulatory taking" under Nevada caselaw, claiming that the City's actions were "oppressive," "unreasonable," and aimed at precluding *any use* of the 17-Acre Property. Compl. ¶¶ 97- 99 (emphasis added). 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*.'" *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 421, 351 P.3d 736, 743 (2015) (alteration in original; emphasis added) (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) a physical taking or (b) unreasonable actions that interfere with use or diminish the value of property after the agency has officially announced an intent to condemn the property. *Id.* For example, in describing the limited circumstances in which a non-regulatory taking claim might be possible, the Nevada Supreme Court relied on *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), a case involving extreme and unreasonable actions, including repeatedly flooding property before a planned condemnation of that property. *State*, 131 Nev. at 421, 351 P.3d at 743. The Court in *State* ultimately concluded that the alleged agency actions taken in advance of a planned condemnation in that case did not rise to the "extreme" level shown in *Richmond Elks* as required for a non-regulatory taking claim. *Id.* at 422.

There is not a scintilla of evidence that the City rendered the 35-Acre Property "useless or valueless to the owner," either through regulation or nonregulatory action. The Developer cites no evidence that the City did anything to prevent the Developer from using the 35-Acre Property for its historic use for golf course and drainage or rendered the 35-Acre Property valueless, or even diminished its value. As shown above, the City did not physically invade any part of the Badlands, nor did a City-owned improvement flood or cause physical damage to the 35-Acre Property. Finally, there is no evidence that the City condemned the 35-Acre Property or made an official announcement of an

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intent to condemn which could give rise to a nonregulatory taking claim.[22]

Indeed, there is a major disconnect between the Developer's claim that the City effected a non-regulatory taking and the City's actions that allegedly caused the nonregulatory taking. By its very name, a "nonregulatory" taking cannot be a "regulatory" taking where the government accomplishes the same ends as eminent domain through excessive regulation. The City has demonstrated above that it did not cause a regulatory taking of the 35-Acre Property. Yet the Developer's allegations purporting to support its nonregulatory taking claim are exactly the same as its regulatory taking claims. The Developer alleges:

> Nevada's nonregulatory / de facto taking standard is met here. Although the Landowners have the "right" to develop residential units, **the City has denied 100%** of the Landowners' repeated attempts to *use* the 35 Acre Property for that purpose. The City has taken action to preserve the 35 Acre Property for use by the surrounding property owners.

Dev. MSJ at 42 (bold emphasis original; italics emphasis added). Denying the Developer's "attempts to *use* the 35 Acre Property" for development would be a regulatory taking. Preserving the 35 Acre Property "for use by the surrounding property owners" as a "viewshed" by prohibiting development (a use of the property) even if a taking (it's not), would be a regulatory taking, not a nonregulatory taking.

In support of its nonregulatory taking claim, the Developer claims that "the City has mandated that the Landowners pay $205,227.22 per year in real estate taxes." Dev. MSJ at 42. Taxes obviously do not render property useless or valueless and are not a taking. *See* text, *supra*, at pp. 70-71. Moreover, if the Developer contends that its property taxes are excessive, its sole remedy is a PJR. The Developer settled with the Assessor and did not appealed its tax assessment. *Id*.

IV. The City cannot be liable for a temporary taking

The Developer's fifth cause of action for a temporary taking does not state a separate cause of

[22] The Developer claims that "the City even identified $15 million to purchase the 250 Acres for these surrounding property owners. LO Appx., Ex. 144." Dev. MSJ at 40. This evidence does not demonstrate a nonregulatory taking. The Developer's Exhibit 144 is informal notes of an unidentified person, likely former City Councilmember Seroka. One note suggests that $15 million of City funds money may be available to purchase the Badlands to preserve it for permanent open space. The note of an individual City Councilmember is not remotely the official policy of the City Council and could not possibly constitute the extreme interference with the use or value of the Badlands required for a nonregulatory taking.

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action. A temporary taking occurs when a court finds that a regulation effects a permanent taking under *Lucas*, 505 U.S. at 1014 or *Penn Central*, and the public agency thereafter rescinds the regulation to avoid paying compensation for a permanent taking. *First English*, 482 U.S. at 318-19, 321. In such a scenario, the agency must pay compensation for the period where the regulation temporarily prevented all use of the property. *Id.* at 321. 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.* For the reasons outlined above, the City is not liable for a permanent regulatory taking, so the temporary takings claim fails as a matter of law.

CONCLUSION

The City's Motion for Summary Judgment should be granted. The Developer's Motion to Determine Take and for Summary judgment should be denied.

DATED this 25th day of August 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 25th day of August, 2020, I caused a true and correct copy of the foregoing **CITY'S OPPOSITION TO DEVELOPER'S MOTION TO DETERMINE TAKE AND MOTION FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF AND COUNTER-MOTION FOR SUMMARY JUDGMENT** 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.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

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