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. 84

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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, 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 **PLAINTIFFS LANDOWNERS' MOTION IN LIMINE NO. 2: TO EXCLUDE SOURCE OF FUNDS** ***Hearing Requested***

COMES NOW Plaintiffs Landowners, 180 land Co., LLC and Fore Stars Ltd. (hereinafter "Landowners"), by and through their attorneys, the Law Offices of Kermitt L. Waters, and hereby moves this Court for an Order excluding all evidence of the source of funds which would be used

Case Number: A-17-758528-J

to pay any verdict of just compensation as it is not proper in this proceeding. This Motion is based upon the Memorandum of Points and Authorities cited herein.[1]

I. INTRODUCTION

This is a constitutional proceeding (inverse condemnation action) commenced by the Landowners on or about September 7, 2017, for the City's taking of the Landowners' undeveloped 35-acre property located on the southeast corner of Hualapai Way and Alta Dr. in the City of Las Vegas ("Subject Property" or "35 Acres"). A jury trial has been set for October 25, 2021, to determine the constitutionally mandated just compensation to which the Landowners are entitled.

It is anticipated that the City and or its counsel may attempt to introduce evidence, argument or make a presentation at trial of the source of funds, i.e., taxpayer funds, from which any amount of just compensation will be paid to the Landowners. The sole purpose of this would be to prejudice the Jury, as taxpayers, to pay less than market value for the taken property. It is well established in eminent domain and inverse condemnation law that evidence of the source of funds used to pay the verdict is highly prejudicial and irrelevant. Therefore, any attempt to introduce evidence, argument or make any presentation at trial that the taxpayers are the ones who are paying the verdict in this proceeding is an impermissible attempt to prejudice the Jury and deny payment of just compensation.

II. STATEMENT OF FACTS

The fact that the funds used to pay the just compensation in this constitutional inverse condemnation case may come from taxpayer dollars is irrelevant, prejudicial and inadmissible. The City has routinely argued throughout this, and the three other companion cases, that it is the

[1] The EDCR 2.47 Declaration of Counsel has been filed concurrently herewith as separate document related to all Landowners' Motions in Limine.

taxpayers who should not have to pay for the Landowners' claims. Quite inappropriately, the City's counsel has repeatedly stated:

- "So there's no way that the ***taxpayers* should have to pay** the developed -- this developer anything." Exhibit 1 at 27: portions of Transcript of Proceedings, case no. A-18-780184-C. Emphasis added.

- "And for the developer here **to be paid damages by the *taxpayers***? I can't think of anything that would be more unjust." Id. at 70. Emphasis added.

- "What this -- these cases are, **they're weaponizing the courts to try to shake down the *taxpayers*.** I mean, that's pretty harsh language, but that's exactly what's going on here." Exhibit 2 at 31: portions of Transcript of Proceedings, case no. A-18-773268-C. Emphasis added.

Moreover, in this very case, to support its recent Summary Judgment pleading filed on 8.25.21, the City stated no less than seven (7) times that the taxpayers will pay the just compensation in this case. Showing that the City fully intends to present the source of funds used for the payment of just compensation in this case, the City has improperly asserted:

- "For its taking claim, the Developer demands that this Court **compel the *taxpayers* to pay it $386 million in damages**, an 8,500 percent profit." Exhibit 3 at 1-2: Excerpts of City's Opp. 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. Emphasis added.

- "The Developer has made it clear that it only wants a $386 million **gift from the *taxpayers***, for doing nothing other than applying for development and then suing the City" Id. at 3-4. Emphasis added.

- "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***." Id. at 14. Emphasis added.

- "…the Developer does not want to build anything in the Badlands; **its sole objective is to extort more than $300 million from the *taxpayers***." Id. at 19 fn 8. Emphasis added.

- "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." Id. at 41. Emphasis added.

- "**The Developer wants the *taxpayers* not only to bail it out of its $4.5 million investment**, …. and a cynical appeal to the courts to help it **extort hundreds of millions of dollars from the *taxpayers***." Id. at 45. Emphasis added.

Additionally, the City has plainly argued to this Court that "… "we know where the damages are going to come from. They're going to come from City coffers. City coffers come from taxpayers. It's that simple." Exhibit 4 at 21.

Finally, this Court has largely already ruled on this matter. As this Court will recall, on January 8, 2021, the Landowners filed a Motion to Compel the City to Answer Interrogatories. One of the Interrogatories (Interrogatory No. 6) at issue requested:

> "Please provide the amount of funds available as of July 18, 2017 and September 7, 2017, from all sources, which could be used for the acquisition of private land for parks and open space. This Interrogatory specifically includes, but is not limited, to all funds available through the Southern Nevada Public Lands Management Act (SNPLMA), the State of Nevada, and/or the City of Las Vegas for purposes of acquiring private property for parks and open space."

In denying the request on relevance grounds (Exhibit 4 at 38-39), this Court stated "as a trial judge I would never let into evidence in front of a jury or an argument that say…. the taxpayers are going to be on the hook for this and as a result we shouldn't award monies for the civil rights violation." Exhibit 4 at 34-35. This is correct and given the City's repeated arguments to the contrary, the Landowners now request this Court enter an order excluding any evidence, argument or presentation at trial regarding the taxpayers being responsible for the payment of any verdict in this case or anything that would suggest that the taxpayers would pay the just compensation in this case.

III. LEGAL ARGUMENT

A. The Source of Funds and/or Taxpayers' Dollars Used to Pay the Verdict is Not Admissible.

Well established eminent domain law provides that the source of funds used to pay an eminent domain verdict is entirely irrelevant in the determination of just compensation and should, therefore, be excluded. City of Sioux Falls v. Kelley, 17871, 1994 WL 56585 (S.D. 1994)("As a general rule, argument or evidence of the source of funds to pay the award is improper.") *See also*, 19 A.L.R.3d 694 (Originally published in 1968). Nevada law is clear, "[i]nverse condemnation

proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." Clark County v. Alper, 100 Nev. 382, 391, 685 P.2d 943, 949 (1984). Thus, the source of funds used to pay the just compensation in this inverse condemnation case is inadmissible.

Furthermore, NRS 48.025 provides that evidence which is not relevant is not admissible. NRS 48.035 further provides that even if evidence is relevant, it is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Here, the only issue for the Jury to decide is the just compensation to which the Landowners are entitled for the taking of their land. This is based on the "value" of the Subject Property as of the "Date of Valuation." NRS. 37.009(6) and NRS 37.120(1). The source of funds used to pay this verdict or that the verdict would be paid by the taxpayers is not even collaterally relevant to this determination of just compensation. McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006)("any financial burden that the County must bear as a result of having to pay just compensation is irrelevant to the inquiry under the United States and Nevada Constitutions…"). Such evidence serves only to prejudice the Landowners, confuse the issues at hand, and mislead the jury.

Mentioning the source of funds to be used to pay an eminent domain verdict is similar to mentioning "insurance" in a personal injury action. As is the case in eminent domain proceedings, any reference to taxpayer funding is also impermissibly prejudicial. Some statements made during eminent domain cases regarding source of funds which have resulted in the need for a new trial are as follows:

- "Any payment that is made to the respondents in this case will come out of your own [the jurors] pockets" Denver Joint Stock Land Bank v. Board of County Com'rs of Elbert County, 105 Colo. 366 368, 98 P.2d 283, 285 (1940).

- "I agree that they [defendants] ought to make a profit, but should it really be at the taxpayers' expense to give them a big profit; after all, really, you know who pays for this stuff? You and I." Department of Public Works and Building v. Sun Oil Company, 66 Ill. App.3d 64 68, 383 N.E.2d 634, 637 (1978).

- "I don't want the people of the County of Wayne to get hurt any worse than they have to, I just wonder if you would consider taking over the airport, you know call it even...But in all candor, your Honor, I think $10 million, I might as well give them the airport" Board of County Road Commissioners of the County of Wayne v. GLS LeasCO, Inc., 394 Mich. 126 135, 299 N. W.2d 797, 802 (1975).

Here, the City has continuously made repeated remarks stating that taxpayers will fund the payment of just compensation in this case or that the Landowners by adjudicating their constitutional rights are, according to the City's counsel, somehow taking advantage of taxpayers. In fact, the City's statements regarding taxpayers in this case are much more direct and egregious than those which required mis-trials in other cases. The City has expressly stated that the Landowners "**seek cash from the *taxpayers***," are trying to "**extort money from the *taxpayers***" want a "**gift from the *taxpayers***" and most offensively are trying to "**weaponiz[e] the courts to try to shake down the *taxpayers*.**" These statements are clearly irrelevant to the sole determination in this case -- the value of the Subject Property on the Date of Valuation. And, if admitted, these types of statements would unfairly and impermissibly prejudice the Jury leading to a denial of just compensation for the City's taking and require a mistrial. In such event, the Landowners would be entitled to all their attorney's fees and costs.

Therefore, this Order is required to prevent the City and its counsel from making impermissible statements regarding the taxpayers paying the verdict in this case to avoid a clear mistrial.

IV. CONCLUSION

The sole issue for the Jury in this case is the amount of just compensation that must be paid for the taking of the Subject Property. Where the just compensation comes from is irrelevant and prejudicial. For the foregoing reasons, it is respectfully requested that the City and its counsel be

prevented from presenting to the Jury any information (testimony, argument, and/or evidence) regarding the source of funds used to pay the verdict in this case. This explicitly includes that the City and its counsel be prevented from presenting to the Jury in any manner that taxpayer funds would be used to pay the verdict in this case.

Respectfully submitted this 7th day of September, 2021.

LAW OFFICES OF KERMITT L. WATERS

BY: /s/ *Michael A. Schneider*
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AUTUMN WATERS, ESQ.
Nevada Bar No. 8917

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 7th day of September, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of **PLAINTIFFS LANDOWNERS' MOTION IN LIMINE NO. 2: TO EXCLUDE SOURCE OF FUNDS** was served on the below via the 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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Exhibit 1

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

180 LAND COMPANY, LLC, Plaintiff, vs. LAS VEGAS CITY OF, Defendant. AND RELATED PARTIES	)	CASE NO. A-18-780184-C DEPT NO. III **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE DOUGLAS W. HERNDON, DISTRICT COURT JUDGE

WEDNESDAY, DECEMBER 16, 2020

CITY OF LAS VEGAS'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

PLAINTIFF LANDOWNERS' OPPOSITION TO THE CITY'S MOTION FOR SUMMARY JUDGMENT AND COUNTERMOTIONS TO DETERMINE THE TWO INVERSE CONDEMNATION SUB-INQUIRIES IN THE PROPER ORDER

APPEARANCES (VIA BLUEJEANS AND TELEPHONE):

FOR THE PLAINTIFFS:	JAMES J. LEAVITT, ESQ. ELIZABETH M. GHANEM HAM, ESQ. AUTUMN L. WATERS, ESQ.
FOR THE DEFENDANT:	GEORGE F. OGILVIE, III, ESQ. PHILIP R. BYRNES, ESQ. ANDREW W. SCHWARTZ, ESQ.
ALSO PRESENT:	LISA RASMUSSEN, ESQ.

RECORDED BY: STACEY RAY, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

the property, approving the developer's application, that by the developer's own evidence, the 17-acre property is now worth about $28 million.

So we have a situation here where the developer bought the property for seven and a half million. He now -- the property now owned is worth -- you know, 17 acres of that property is worth four times that much, and the developer still has 233 acres left.

So what occurred here is just the very opposite of a taking. You don't -- Your Honor, you don't need to know a lot about the law of takings to see that the developer hasn't been harmed. In fact, it's already quadrupled its investment on only 17 acres out of 250 acres. So there's no way that the taxpayers should have to pay the developed -- this developer anything.

You know, the law of takings, Your Honor, is sensible. You know, it's based on the separation of powers. Under separation of powers, the City, a local agency, has very broad powers to regulate the use of land. And the ability of an owner, a landowner to develop their property is not a fundamental constitutional right like freedom of speech or freedom of association.

The United States Supreme Court and the Nevada Supreme Court have been absolutely clear about what constitutes a taking, that because local agencies have these broad police

as to what the property would be worth if it could be developed or what the developer paid for the property. That would be 386 million.

So that's a -- I think a 5,000 percent profit on what they bought -- when they invested in the property for the less than seven-and-a-half million.

It goes to show you how we're in a different universe with this claim. Not only is there no authority, Nevada or federal authority, that supports any of their claims, but the City did the developer a favor. It's already enhanced the developer's asset many times. And for the developer here to be paid damages by the taxpayers? I can't think of anything that would be more unjust.

Thank you.

THE COURT: I didn't want to interrupt you, Mr. Schwartz, but I will say that I have read a number of the orders in the other cases, primarily, to get some context to the issues that the Supreme Court ruled upon and kind of understand what, if any, rulings the Supreme Court made on issues that kind of transfer amongst the various cases.

So I did look at Judge Williams's order, I looked at Judge Crockett's order, primarily since that's the one that went up and had the Supreme Court's order of reversal that addressed some of these things.

All right. Before we move onto argument on behalf of

fine.

I've got two weeks before I'm gone, but I just wanted to make sure you all had time to get everything to me, and I'll wait to receive that before I sit down and start parceling through it. Okay?

MR. LEAVITT: Okay.

THE COURT: All right. Hey, thank you all very much. I appreciate your patience today. I appreciate you getting this done not too far after 5:00 o'clock so that I can let my staff all go home before we come back at 8:00 o'clock tomorrow morning. All right.

COUNSEL IN UNISON: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings concluded at 5:18 p.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case.

Dana L. Williams
Transcriber

Exhibit 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD, SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, vs. CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entities I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendants.	CASE#: A-18-773268-C DEPT. XXIX

BEFORE THE HONORABLE DAVID M. JONES, DISTRICT COURT JUDGE

FRIDAY, AUGUST 13, 2021

Case Number: A-18-773268-C

RECORDER'S TRANSCRIPT OF HEARING
PLAINTIFF LANDOWNERS' MOTION TO DETERMINE "PROPERTY INTEREST" AND CITY'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

For the Plaintiffs:	KERMITT L. WATERS, ESQ. JAMES J. LEAVITT, ESQ. ELIZABETH GHANEM, ESQ. MICHAEL A. SCHNEIDER, ESQ (via BlueJeans)
For the Defendant: (City of Las Vegas)	GEORGE F., OGILVIE, III, ESQ. ANDREW W. SCHWARTZ, ESQ. PHILIP R. BYRNES, ESQ. REBECCA L. WOLFSON, ESQ. J. CHRISTOPHER MOLINA, ESQ.

RECORDED BY: ANGELICA MICHAUX, COURT RECORDER

Honor, that the purchase and sale agreement that's in your materials. That would be Tab 30.

So that's the purchase and sale agreement by which the developer bought the entire Badlands. And the purchase price for the land is $7 and a half million.

MR. LEAVITT: Your Honor, if I could just object here?

MR. SCHWARTZ: Yeah, Your Honor?

THE COURT: Hold on, counsel, hold on.

MR. SCHWARTZ: Yes.

THE COURT: We have an objection. We don't talk over top of an objection. What's the objection, counsel?

MR. LEAVITT: The objection, Your Honor, this is a document that doesn't provide the complete, and we know it doesn't provide the complete story for the entire purchase price of the other elements. So it's a partial fact. It doesn't include the entire evidence on the purchase price.

THE COURT: Counsel, if you bring that up during your rebuttal, you can bring that up.

MR. LEAVITT: All right, thank you, Your Honor.

THE COURT: Go ahead, counsel, continue.

MR. SCHWARTZ: Thank you, Your Honor. In the documents that we finally -- the developer finally produced in response to our motion to compel after trying to get them for a year, year and a half, we learned that the developer really only paid 4 and a half million for the property, that $3 million of that, 7 and half million was consideration for another

interest.

And that's explained in the declaration of Christopher Molina, which is Tab 31. We don't attach all of the records that we received from the developer or from the seller of the Badlands for that declaration just for expediency, but that's a fact. They pay $4 and a half million for the property.

Now they're asking for $386 million in damages for this place. They paid $4 and a half million for the Badlands. The City approved 435 houses on part of the property.

What this -- these cases are, they're weaponizing the courts to try to shake down the taxpayers. I mean, that's pretty harsh language, but that's exactly what's going on here.

Paid $4 and a half million. They want $386 million in damages. That's about a million -- they paid 4 and a half million. That's 18,000 an acre.

That's what you pay for a golf course property that's designated PR-OS in the General Plan, which doesn't permit residential development.

They want 386 million. It's based on a 1,000,005 per acre. It's in our papers. This case is absurd. So what? Why are they making this argument?

Because if they admit that they had the right to build 435 luxury housing units on a 17-Acre property, and as Judge Herndon found, they've already increased their -- the value of their investment based on the developer's own evidence, own evidence.

MR. SCHWARTZ: Yes, our Tab 38 is our proposed findings of fact, conclusions of law.

THE COURT: And I saw it.

MR. SCHWARTZ: But it is on our Motion for Summary Judgment and this motion. We will resubmit an order that just addresses this motion.

THE COURT: And that's fine.

MR. LEAVITT: Thank you, Your Honor.

THE COURT: Great. Thank you. Thank you, everyone. Please stay safe.

MR. SCHWARTZ: Thank you, Your Honor.

MR. LEAVITT: Thank you, Your Honor. You, too.

THE COURT: Have a great weekend.

UNIDENTIFIED SPEAKER: You as well.

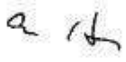
THE COURT: I think know what I'm going to spend mine on.

MR. LEAVITT: Have a good one, Judge.

[Proceedings concluded at 1:34 p.m.]

* * * * * * *

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



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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X,

Defendants.

Case No. A-17-758528-J

Dept. No. XVI

CITY'S OPPOSITION TO 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

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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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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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

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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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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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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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.

McDONALD CARANO LLP

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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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Exhibit 4

CASE NO. A-17-758528-J

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

180 LAND COMPANY LLC,

Plaintiff,

vs.

LAS VEGAS CITY OF,

Defendant.

REPORTER'S TRANSCRIPT
OF
HEARING
(TELEPHONIC HEARING)

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED TUESDAY, FEBRUARY 16, 2021

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

11:18:29 case are relevant.

Your Honor, we'd like to -- we -- there is one of two things that the City could do is just provide us the facts that we're asking for in

11:18:38 Interrogatories No. 1, 2, or 3, or simply abandon that defense. The City is going to make a defense. We're entitled to find out all of the basis for that defense.

And then Interrogatory No. 6, your Honor, requests the source of funds to buy properties for open

11:18:53 space or park as of the relevant dates that these actions were occurring. Your Honor, there's two reasons that that's relevant.

First is the City continually makes what is clearly an improper argument in an inverse condemnation

11:19:06 case. The City in all of their briefs says, taxpayers should not be required to pay a verdict in this case.

Taxpayers shouldn't have to bear the burden of what's going to be paid here. That's similar to yelling an insurance company's name in a personal

11:19:21 injury case. The insurance company is going to end up paying this verdict. Clearly inappropriate. And there is Nevada -- or there is significant case law stating that the government is not entitled to come into an inverse condemnation case at any stage of the

11:19:33 proceeding and say that the taxpayers are required to

pay the verdict here.

So we want to know what funds and the source of those funds that are available to purchase property for open space and parks. And one of those funds that is available to the City of Las Vegas are the SNPLMA funds, the Southern Nevada Public Lands Management Act funds. And that becomes relevant for two reasons.

Number one, that is not Nevada taxpayers. Those are federal funds.

And number two, under -- when a governmental entity gets SNPLMA funds, your Honor, they're required to negotiate with the landowner. They can only use those properties in a willing-buyer, willing-seller context.

So it would be very relevant to find out if those funds were obtained. We can then make further research and see if those funds were obtained for this specific property. And that would, again, elevate the taking issue in this case if the City had, indeed, acquired funds to purchase this property.

That would show that the City -- for the purposes for which the City was denying the landowner's application was so that it could later purchase the property for a lesser value.

And finally, your Honor, that taxpayer

argument was made several times in the Sisolak case. And the Nevada Supreme Court at Footnote 88, we cited this in our reply, stated several reasons why that argument was entirely irrelevant. And one of them was that one of the McCarran Airport representatives acknowledged that the -- that ultimately the airlines would pay a judgment on the eminent domain proceedings and not taxpayers.

So in the Sisolak case that source of funds was available. It was found out through discovery. And the Nevada Supreme Court actually cited to it in rebutting the government's argument that taxpayers would be on the hook for the verdict.

So your Honor, we -- these are straightforward requests. I don't believe they're outside the bounds. We're not making a fishing expedition. We are simply inquiring about a defense the City is making and statements made by one of the high ranking city officials.

And we believe that these interrogatories are appropriate, your Honor. That the City should be compelled to respond. They just haven't responded yet, your Honor. They just objected and said here's our objections. We'd like a response on each of these interrogatories, your Honor.

11:35:41 private property for parks and open space."

That has absolutely nothing to do with the two inquiries relative to an inverse condemnation action. Whether there was a taking, and if there was, what are 11:35:56 the damages for that taking? We all know that if the Court determines that there was a taking and there were -- that the developer incurred damages as a result of that taking, we know where the damages are going to come from. They're going to come from City coffers. 11:36:15 City coffers come from taxpayers. It's that simple.

We don't have to make the personal or emotional argument that, Oh, Judge, you can't find the City liable because you're -- what you're doing is impacting the poor taxpayer, taxpayers. It's not a for 11:36:37 profit operation that the City runs. It operates solely on the backs of the taxpayers. That argument isn't being made. We all know where the damages would be paid from if the -- if the Court finds against the City.

11:36:55 So the inquiry as to what sources or what funds existed in 2017 for the acquisition of private land for parks and open space, I don't even understand how that -- the argument submitted by the developer today passes the smell test on justifying that inquiry.

11:37:24 So, and citing the Sisolak, again, it's -- it

11:37:31 is a strawman argument that the developer is making. The comments by someone in Sisolak that -- again, I believe we've made this argument again and again and again. Sisolak was a physical takings case.

11:37:53 What's before the Court is a regulatory takings case. There is a dramatic difference between the two. Nonetheless, in Sisolak, I'll indicate what the Court or what the Sisolak court said:

"In a scenario where a public agency has physically taken part of the property"...

11:38:18

Again, distinguishing it from a regulatory taking:

"...the Court noted that the agency's ability to pay for that property is not relevant to whether there was a physical taking."

11:38:29

So even in the case that the developer cites again and again and again to support its positions relative to this case, which is not a physical takings case, even in that -- in that Sisolak case, the court recognized that the agency's ability to pay for the property is not relevant to whether there was a physical taking.

11:38:48

The discovery sought by the developer will not support any claim for and it won't defeat any

11:39:06

Sisolak's air space was actually, quote, "inconsequential" end quote. It was the act of authorizing the public to use that property.

So Sisolak is right on point. And we've alleged the per se regulatory taking case. The facts set forth in Sisolak are right on point. The fact that the Nevada Supreme Court relied on statements by a planner to assist with finding the taking is very pointed and very relevant to this matter where the statements are made, not only by a planner, but by the highest ranking city official in regards to a specific defense being made by the government.

So, your Honor, we request that the government answer these interrogatories, after they answer them -- and that's all we're asking for is an answer. After they answer them, we can review that. See if those are adequate or not. We may be able to just move on. But we're entitled to have at least an answer on issues very pertinent and relevant to their defenses, your Honor.

And with that, your Honor, I'll submit my reply.

THE COURT: Yeah. And first going to Interrogatory No. 6.

MR. LEAVITT: Yes.

11:50:25 THE COURT: Where landowner requests the amount or sources of funds which could be used by the City to acquire properties for parks and/or open spaces. Why would that be relevant and/or permissible 11:50:39 for the purposes of this case, the sources of funding?

MR. LEAVITT: Your Honor, I tend to agree with Mr. Ogilvie, your Honor. I tend to agree that that's an irrelevant inquiry.

The problem is is like in many of these other 11:50:51 cases, the government continually argues. They argue to you. They've put it in pleadings. They're certainly not going to argue it to the jury because we're going to have a jury instruction on this I believe. But they keep saying that taxpayers are going 11:51:03 to have to pay for this property.

And the Sisolak case discovery was allowed. And it was found that that was an incorrect statement. Instead the airlines were going to pay the taking in that case through airline fees.

11:51:16 So the landowner in that case was allowed to inquire to determine whether that repeated statement by the government was a true statement or not. So that is the first thing.

The second thing, your Honor, when you're 11:51:26 talking about Southern Nevada Land Management Act

11:51:30 funds, the SNPLMA funds, under that standard, if those
funds do exist, the government is required to make that
willing-buyer, willing-seller negotiation. And if
they, indeed, did identify a specific fund to purchase
11:51:48 this property, that entirely negates the government's
argument that they were denying these applications for
some altruistic purpose.
There is certain case law. There is a case --
I can't remember the state, your Honor, but there's a
11:52:02 case where the government denied a landowner his liquor
application. And it was later discovered that the
government denied that liquor application because they
had targeted the property for condemnation, and they
didn't want to pay the value of the property with the
11:52:14 higher value.
So that's what that -- those funds would show.
Would show if they've, number one, identified funds for
purchase of parks and open space property. Then we
would want to take the next step and find out whether
11:52:25 that was specifically -- funds were specifically
identified for the taking of the property in this case.
THE COURT: So I want to make sure I
understand that. And, I mean, when I first looked at
the interrogatory, I was thinking of other types of
11:52:43 cases where potentially if the government is required

to pay, for example, in a 1983 action in a violation of someone's civil rights, or actions by a police officer and the like, as a trial judge I would never let into evidence in front of a jury or an argument that would say, ultimately this is going to -- this 1983 violation, the taxpayers are going to be on the hook for this, and as a result we shouldn't award monies for the civil rights violation.

And that's how I was looking at it. But if there's something more than that, I need to know. Because it's not clear to me --

MR. LEAVITT: Well --

THE COURT: Because I was thinking --

MR. LEAVITT: Sorry.

THE COURT: Go ahead, sir. No, no, go ahead.

MR. LEAVITT: James Leavitt again. You're totally on track, your Honor. You're totally correct. In fact there is case law that says source of funds is irrelevant. Is irrelevant for -- in a jury verdict.

But we're not at the jury yet. We're still at the liability phase. And if, again, if through discovery we find that there were funds that were identified for the purchase of this property, which -- and to tell you this, your Honor. We have already, through a FOIA request, we obtained a document through

a FOIA request where the government was listing what they were going to do with certain funds. And one of those line items said: $15 million, purchase the Badlands property.

So that indicates that the City wanted to purchase the property. And $15 million isn't even anywhere close to the true value of the property according to the landowner.

And so that shows an intent of the City to deny applications so that it could acquire the property for significantly less than the true value of the property.

So that --

THE COURT: Well --

MR. LEAVITT: That is what -- go ahead, your Honor.

THE COURT: And I get that. For example, for Interrogatory No. 6, the landowner's requested the amount and/or sources of funds which would be used by the City to acquire property for parks and open space. It seems to me that potentially, a more pointed interrogatory might be appropriate as to whether or not there were funds set aside by the City. Something like that. I mean, I don't know. But just asking the source in and of itself would be irrelevant.

11:55:08 If there's a set at issue or a budget issue, that's another issue I think. Am I --

MR. LEAVITT: Solid point. Oh, sorry, your Honor.

11:55:18 THE COURT: No, no. But that's just an observation of mine. That's all.

MR. LEAVITT: And that's a valid point. And, your Honor, I mean, we'd be willing to narrow that to any source of funds from any -- or any funds from any

11:55:31 source that were identified for the purchase of the property.

THE COURT: That's a different -- that's a slightly different -- let me see here.

MR. LEAVITT: And that's what it was getting

11:55:44 at, your Honor, obviously, was private land for parks and open space.

THE COURT: Yes.

MR. LEAVITT: And then, of course, once we obtain that, and then the SNPLMA funds would identify

11:55:55 what the -- the SNPLMA funds typically identify, in fact, I think they -- I'm also positive they do. They identify the specific properties which have been identified for purchase with those SNPLMA funds.

THE COURT: Okay. I understand. I'm just

11:56:11 looking at it one more time before I rule.

11:56:14 MR. LEAVITT: Sure.

THE COURT: All right. This is what I'm going to do. Regarding the motion to compel at this time I'm going to grant it in part; deny in part.

11:56:27 And understand this, and I think it's important to point out, I realize the comments potentially of a -- no. I'll say it differently.

Clearly the City cannot act just based upon the comments of a city councilman. I get that.

11:56:47 Notwithstanding that, he did make some public statements. And I would anticipate in all probability -- and I don't know if it was puffery. I don't know if it was based upon true investigation. But I can see potentially where at least for the

11:57:04 purposes of discovery, the statements of the City councilman would be discoverable. I'm not saying they're admissible for the purposes of trial.

And so regarding Interrogatory 1, 2, and 3, I'm going to grant the motion to compel.

11:57:18 Regarding Interrogatory No. 6, I'm going to deny. And for the reasons set forth in our prior discussion. The amount and/or sources of funds which would be used by the City to acquire property for the parks and open spaces, I just don't see where that

11:57:34 would be relevant in and of itself based upon the call

of the question.

And so that will be my decision.

Mr. Leavitt, what you can do, sir, is you can prepare an order. Make sure you run it by Mr. Ogilvie. I don't think this has been a problem in this case. In fact, it's been my impression that based upon the last few status checks that -- the rolling status checks have had -- have served a purpose and the case has been moving along much more expeditiously I think. Probably the best way to say it. But that's what we'll do. And that will be my decision on that issue.

And so --

MR. LEAVITT: I appreciate that.

THE COURT: All right. We'll go ahead, and we'll just go ahead, and I don't think there's any other issue is there? Let me look at the calendar here.

We don't have any pending status checks coming up, do we?

MR. LEAVITT: I don't think so.

George, do you know? I think we're -- I think we're caught up.

MR. OGILVIE: That's correct, your Honor. There are no --

THE COURT: All right. I was just checking to

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

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

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

_____
PEGGY ISOM, RMR, CCR 541

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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 **PLAINTIFFS LANDOWNERS' MOTION IN LIMINE NO. 3: TO PRECLUDE CITY'S ARGUMENTS THAT LAND WAS DEDICATED AS OPEN SPACE/CITY'S PRMP AND PROS ARGUMENT** ***Hearing Requested***

COMES NOW Plaintiffs Landowners, 180 land Co., LLC and Fore Stars Ltd. (hereinafter "Landowners"), by and through their attorneys, the Law Offices of Kermitt L. Waters, and hereby move this Court for an Order precluding the City of Las Vegas (hereinafter "the City") from presenting arguments that the Landowners dedicated the 250 acres of Land as the "20%

requirement for the Peccole Ranch Master Plan approval. This Motion is based upon the Memorandum of Points and Authorities cited herein.[1]

I. INTRODUCTION

This is a Fifth Amendment constitutional proceeding with a jury trial set on this Court's October 25, 2021, five week stack. At trial, the jury will decide **only one** issue – the constitutional mandated just compensation to which the Landowners are entitled for the taking of their 35 Acre Property, which includes the value of the taken property and other appropriate damages. NRS 37.110. Just compensation is based on the "value" of the taken 35 Acre Property as of September 14, 2017, the date of the first service of summons in this matter. NRS 37.009 ("Value means the highest price, on the date of valuation"); NRS 37.120 (date of value is the date of first service of summons or date of trial if there is a delay of more than two years and the delay is caused primarily by the government or congestion in the court calendar); County of Clark v. Alper, 100 Nev. 382 (1984) (applying NRS 37.120 to eminent domain and inverse condemnation cases, because "Inverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." Id., at 391).[2]

The motion in limine is brought to prohibit the City from continuing to argue that the 250 Acre Land (of which the 35 Acre Property is a part) was set aside as Parks Recreation and Open Space ("PROS") in the Peccole Ranch Conceptual Master Plan ("PRMP"). It is necessary to bring this motion before the Court because regardless of the law, the evidence, City records showing otherwise, the 10 orders rejecting the "PROS/PRMP 20% argument", including this Courts

[1] The EDCR 2.47 Declaration of Counsel has been filed concurrently herewith as separate document related to all Landowners' Motions in Limine.

[2] Depending upon the outcome of the hearing on the Landowners' Motion to Determine Take, set for September 23 and 24, this date of valuation may change to the date of trial.

multiple orders, the City continues to argue that the 250 Acre Land was set aside and the PROS land use designation is superior to zoning and, therefore, according to the City, the Land has little to no value.[3] The City should be prevented from rearguing these issues in front of a jury as this is not the law and the City has been unable and outright refused to produce any evidence supporting this position. As such, these statements are highly prejudicial, misleading and will assuredly cause confusion to the jury. This motion is based on the orders of this Court, the law as it relates to zoning and inverse condemnation, the Order Determining Property Interest (attached hereto as Exhibit 1), and the City's refusal to produce Court ordered discovery relating to this very argument. *See Exhibit 2, Court ordering discovery.*

This motion in limine is brought to provide a clear record, avoid lengthy interruptions and misleading statements during the jury trial and to request that this Court exercise its gatekeeping function to exclude such prejudicial and false statements to a jury. Banque Hypothecaire du Danton de Geneve v. Union Mines, Inc., 652 F.Supp. 1400 (D. Md. 1987) ("the office of a motion in limine . . . is to aid the trial process by enabling the Court to rule in advance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of trial." Id., at 1401).

II. BACKGROUND AND COURT RULINGS

On October 12, 2020, after a lengthy hearing, this Court determined the first sub-inquiry required by the Nevada Supreme Court, to wit: what property rights the Landowners possess in their

[3] Continuing to thumb its nose at this Court's rulings, California counsel for the City has repeatedly argued to other Courts that this Court and Judge Williams did not reject the PROS argument or that Judge Williams was mislead by the Developer. *See* Exhibit 4, hearing transcript, 17 Acre Case, August 13, 2021, 61:19; 63:5-6 and Exhibit 5, hearing transcript, 65 Acre Case, May 27, 2021, 139:17-21, 153:11-23, 181:1-11. And in its most recent filing to this Court, the City continues to argue that the PROS designation trumps zoning and thus, the Landowners have no property rights regardless of this Court's ruling to the contrary. *See* Opp to Motion to Determine Take and MSJ. Assuredly, the City will present this false and prejudicial position to a jury.

35 Acre property prior to the City actions to take their property. During that hearing the City argued ad nauseum that the land was governed by the land use designation of PROS, and that the land was dedicated or "set aside" as a condition of approval of the Peccole Ranch Master Plan. This Court rejected that argument in its entirety holding: 1) the property interest issue must be based on eminent domain law; 2) eminent domain law relies on zoning to determine the property interest issue; 3) the zoning is R-PD7; 4) the "legally permissible uses" of R-PD7 property is single family and multi-family uses; and, 5) the Landowners have the "right" to use the property for single family and multi-family uses. *See Exhibit 1, Findings of Fact and Conclusions of Law Regarding Plaintiff Landowners' Motion to Determine "Property Interest."*

On May 13, 2021, after two hearings on the matter, the Court ordered the City to respond to interrogatories as to what City code or ordinance required a "20 percent" open space dedication and to provide the name and location of every development in the City that had this 20 percent open space dedication requirement imposed on it by the City. *Exhibit 2, Court ordering discovery.*

The City has ignored both of these Court rulings continuing to argue contrary to the Court's property interest determination and utterly failing to respond to the above referenced interrogatories. Accordingly, this Court should preclude any presentation to a jury that the 35 Acres was "set aside" as open space based on any alleged "20 percent" requirement.

III. THIS COURT SHOULD PROHIBIT THE CITY FROM PRESENTING THE 20 PERCENT DEDICATION, PROS/PRMP ARGUMENT TO A JURY

In an attempt to confuse the issues and mislead the Courts the City has repeatedly argued with no evidence that it was the Landowner that set aside the 250 acres for recreation and open space and since this PROS designation trumps zoning, there is little to no value in the Land. As this argument belies this Court's Orders, the law that zoning determines a landowners property interest, and the City's own representations to the Landowners and the public that zoning is the law, the City will assuredly attempt to present this to a jury in order to prejudice, mislead and confuse the jury.

Accordingly, it is requested that this Court provide a specific order prohibiting the City from presenting or arguing this to a jury.

As this Court is well aware, as a defense to denying development, the City continues to argue that it had a right to do so because the Land was set aside as a dedication requirement to the Peccole Ranch Master Plan. Not only has the City failed and refused to produce any evidence supporting this contention, it has failed and refused to respond to interrogatories asking where in the code or law this requirement exist (Interrogatory No. 2) and to provide a list of all properties in the City upon which this 20 percent dedication requirement was imposed (Interrogatory No. 3) once again thumbing its nose at a court order to respond. *See Exhibit 2, Court ordering discovery.* On June 7th, after two Court orders and months of waiting for a response, the City requested a two week extension to respond, claiming Interrogatory No. 3 was time consuming. Although the extension was granted, the City simply failed to produce an answer, completely ignoring counsel's request.[4] *See Exhibit 3, email to Mr. Ogilvie regarding failure to respond.*

NRCP 37 addresses failures to make disclosures or to cooperate in discovery providing for sanctions for failure to comply with Court orders. NRCP 37 b(1) provides "if a party . . .fails to obey an order to provide or permit discovery, . . . the court may issue further just orders that may include the following: (B) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence." *See* NRCP 37 b(1)B. Here, as stated above, the City provided no meaningful answer to Interrogatory No. 2 and no answer whatsoever to Interrogatory No. 3, although ordered to do so by this Court. Accordingly, this Court should prohibit the City from continuing to ignore the rules and court orders by preventing the City from presenting its PROS/PRMP 20 percent dedication argument to a jury. To continue to allow

[4] Response to Interrogatory No. 2 was vague, ambiguous and failed to substantively respond, confirming that no such requirement exists.

the City to disregard Court orders is prejudicial to the Landowner and betrays the very purpose of the discovery rules in the judicial process.

IV. CONCLUSION

For the foregoing reasons, the Landowners request this Court specifically preclude the City from presenting to a jury its 20 percent dedication PROS/PRMP argument.

Respectfully submitted this 7th day of September, 2021.

LAW OFFICES OF KERMITT L. WATERS

BY: */s/ James J. Leavitt, Esq.*
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Attorneys for Plaintiffs Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 7th day of September, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of **PLAINTIFFS LANDOWNERS' MOTION IN LIMINE NO. 3: TO PRECLUDE CITY'S ARGUMENTS THAT LAND WAS DEDICATED AS OPEN SPACE/CITY'S PRMP AND PROS ARGUMENT** was served on the below via the 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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Exhibit 1

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DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, and FORE STARS, Ltd., DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING PLAINTIFF LANDOWNERS' MOTION TO DETERMINE "PROPERTY INTEREST"** Hearing Date: September 17, 2020 Hearing Time: 9:00 a.m.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs, 180 LAND COMPANY, LLC and FORE STARS, Ltd (hereinafter Landowners), brought Plaintiff Landowners' Motion to Determine Property Interest before the Court on September 17, 2020, with James Jack Leavitt, Esq of the Law Offices of Kermitt L. Waters, appearing for and on behalf of the Landowners along with the Landowners' corporate counsel, Elizabeth Ghanem Ham, Esq., and George F. Ogilve III Esq. and Andrew Schwartz, Esq. appearing for and on behalf

of the Defendant, City of Las Vegas (hereinafter the City). Having reviewed all pleadings and attached exhibits filed in this matter and having heard extensive oral arguments on September 17, 2020, in regards to Plaintiff Landowners' Motion to Determine Property Interest, the Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff 180 Land Company, LLC is the owner of an approximately 35 acre parcel of property generally located near the southeast corner of Hualapai Way and Alta Drive within the geographic boundaries of the City of Las Vegas, more particularly described as Clark County Assessor Parcel 138-31-201-005 (hereinafter 35 Acre Property).

2. The Landowners' Motion to Determine Property Interest requests this Court enter an order that: 1) the 35 Acre Property is hard zoned R-PD7 as of the relevant September 14, 2017, date of valuation; and, 2) that the permitted uses by right under the R-PD7 zoning are single-family and multi-family residential.

3. In their submitted briefs, the Landowners and the City presented evidence that the 35 Acre Property has been zoned R-PD7 since at least 1990, including: 1) Z-17-90, Resolution of Intent to Rezone the 35 Acre Property to R-PD7, dated March 8, 1990 (Exhibit H to City's Opposition, Vol. 1:00193); and, Ordinance 5353, passed by the City of Las Vegas City Council in 2001, which hard zoned the 35 Acre Property to R-PD7 and repealed anything in conflict (Exhibit 10 to Landowners' Motion).

4. In response to the Landowners' inquiry regarding zoning prior to purchasing the 35 Acre Property, on December 30, 2014, the City of Las Vegas Planning & Development Department provided the Landowners a Zoning Verification Letter, stating, in part: 1) the 35 Acre Property is "zoned R-PD7 (Residential Planned Development District - 7 unites per acre);" 2) "[t]he density allowed in the R-PD District shall be reflected by a numerical designation for that district. (Example, R-PD4 allows up to four units per gross acre.); and 3) "A detailed listing of the permissible uses and all applicable requirements for the R-PD Zone are located in Title 19 ("Las Vegas Zoning Code") of the Las Vegas Municipal Code." Exhibit 3 to Landowners' Motion.

5. The City stated in its opposition to the Landowners' motion that the R-PD7 zoning on the 35 Acre Property "is not disputed." City's Opposition to Motion to Determine Property Interest, 10:17-18.

6. As stated in the City Zoning Verification Letter provided to the Landowners on December 30, 2014, the legally permitted uses of property zoned R-PD7 are include in the Las Vegas Municipal Code (hereinafter LVMC), Title 19.

7. LVMC 19.10.050 is entitled "R-PD Residential Planned Development District" and is the applicable section of the LVMC used to determine those permitted uses on R-PD7 zoned properties in the City of Las Vegas. Exhibit 5 to Landowners' Motion.

8. LVMC 19.10.050 (C) lists as "Permitted Land Uses" on R-PD zoned properties "[s]ingle-family and multi-family residential." Id.

9. LVMC 19.10.050 (A) also provides that "the types of development permitted within the R-PD District can be more consistently achieved using the standard residential districts." Id. The standard residential districts are listed on the City Land Use Table, LVMC 19.12.010. Exhibit 6 to Landowners' Motion. The R-2 residential district listed on the City Land Use Table is the standard residential district most comparable to the R-PD7 zoning, because R-PD7 allows up to 7 units per acre[1] and R-2 allows 6-12 units per acre.[2] The "permitted" uses under the R-2 zoning on the City Land Use Table include "Single Family, Attached" and "Single-Family, Detached" residential uses. LVMC 19.12.010, Exhibit 6 to Landowners' Motion.

10. Table 1 to the City Land Use Table provides that if a use is "permitted" in a certain zoning district then "the use is permitted as a principle use in that zoning district by right." Id.

11. "Permitted Use" is also defined at LVMC 19.18.020 as "[a]ny use allowed in a zoning district as a matter of right." Exhibit 8 to Landowners' Motion.

12. The Landowners have alleged that the City of Las Vegas has taken the 35 Acre Property by inverse condemnation, asserting five (5) separate inverse condemnation claims for relief, a

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[1] *See* City Zoning Verification Letter, Exhibit 3 to Landowners' Motion and LVMC 19.10.050 (A), Exhibit 5 to Landowners' Motion.

[2] *See* LVMC 19.06.100, Exhibit 7 to Landowners' Motion.

Categorical Taking, a Penn Central Regulatory Taking, a Regulatory Per Se Taking, a Non-regulatory Taking, and a Temporary Taking.

CONCLUSIONS OF LAW

13. The Nevada Supreme Court has held that in an inverse condemnation, such as this, the District Court Judge is required to make two distinct sub inquiries, which are mixed questions of fact and law. ASAP Storage, Inc., v. City of Sparks, 123 Nev. 639 (2008); McCarran Int'l Airport v. Sisolak, 122 Nev. 645 (2006). First, the District Court Judge must determine the "property interest" owned by the landowner or, stated another way, the bundle of sticks owned by the landowner prior to any alleged taking actions by the government. *Id.* Second, the District Court Judge must determine whether the government actions alleged by the landowner constitute a taking of the landowners property. *Id.*

14. The Landowners' Motion to Determine Property Interest narrowly addresses this first sub inquiry and, accordingly, this Court will only determine the first sub inquiry.

15. In addressing this first sub inquiry, this Court has previously held that: 1) "it would be improper to apply the Court's ruling from the Landowners' petition for judicial review to the Landowners' inverse condemnation claims;"[3] and, 2) "[a]ny determination of whether the Landowners have a 'property interest' or the vested right to use the 35 Acre Property must be based on eminent domain law, rather than the land use law."[4]

16. Therefore, the Court bases its property interest decision on eminent domain law.

17. Nevada eminent domain law provides that zoning must be relied upon to determine a landowners' property interest in an eminent domain case. City of Las Vegas v. C. Bustos, 119 Nev. 360 (2003); Clark County v. Alper, 100 Nev. 382 (1984).

18. The Court concludes that the 35 Acre Property has been hard zoned R-PD7 since at least 1990.

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[3] Exhibit 18 to Landowners' Reply, App. at 0026 / 23:7-8

[4] Exhibit 18 to Landowners' Reply, App. at 0010 / 7:26-27

19. The Court further concludes that the Las Vegas Municipal Code Section LVMC 19.10.050 lists single family and multi family residential as the legally permissible uses on R-PD7 zoned properties.

20. Therefore, the Landowners' Motion to Determine Property Interest is **GRANTED** in its entirety and it is hereby **ORDERED** that:

1) the 35 Acre Property is hard zoned R-PD7 at all relevant times herein; and,

2) the permitted uses by right of the 35 Acre Property are single-family and multi-family residential.

DATED this 9th day of October, 2020.

DISTRICT COURT JUDGE ZJ

Respectfully Submitted By:

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Exhibit 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, 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*
Kermitt L. Waters, ESQ., NBN 2571
James Jack Leavitt, ESQ., NBN 6032
Michael A. Schneider. ESQ., NBN 8887
Autumn Waters, ESQ., NBN 8917
704 S. 9th Street
Las Vegas, NV 89101
Attorneys for Plaintiff Landowners

CSERV

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

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Granting Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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Lauren Tarpey	LTarpey@smwlaw.com
David Weibel	weibel@smwlaw.com
Rebecca Wolfson	rwolfson@lasvegasnevada.gov

Exhibit 3

From: Elizabeth Ham (EHB Companies)
To: George F. Ogilvie III
Cc: James Leavitt; Autumn Waters; Jennifer Knighton (EHB Companies)
Subject: RE: 35-acre case
Date: Wednesday, June 23, 2021 2:23:44 PM

Dear Mr. Ogilvie,

Based on your request below, we granted you an extension to respond to interrogatory no. 3. That extension expired yesterday. As you know, close of discovery is fast approaching and the City's delay in providing this response is prejudicial. Should I not receive the response by end of day today, I will have no choice, but to seek court intervention yet again.

Thank you for your immediate attention to this matter.

Best,

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

From: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Sent: Tuesday, June 8, 2021 5:31 PM
To: Elizabeth Ham (EHB Companies) <eham@ehbcompanies.com>
Cc: James Leavitt <jim@kermittwaters.com>; Autumn Waters <autumn@kermittwaters.com>; Jennifer Knighton (EHB Companies) <jknighton@ehbcompanies.com>
Subject: RE: 35-acre case

Thank you. For clarification, a two-week extension would be through June 22. With respect to the other two interrogatories, I have forwarded the City's response for verification. We should have the verification and serve tomorrow.

George F. Ogilvie III | Partner
McDONALD CARANO
P: 702.873.4100 | **E:** gogilvie@mcdonaldcarano.com

From: Elizabeth Ham (EHB Companies) <eham@ehbcompanies.com>
Sent: Tuesday, June 8, 2021 11:43 AM
To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Cc: James Leavitt <jim@kermittwaters.com>; Autumn Waters <autumn@kermittwaters.com>; Jennifer Knighton (EHB Companies) <jknighton@ehbccompanies.com>
Subject: RE: 35-acre case

Dear Mr. Ogilvie,

A two-week extension for interrogatory no. 3 only is acceptable making that response due on June 15th. All other responses are expected today.

Best,

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

From: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Sent: Monday, June 7, 2021 5:58 PM
To: James Leavitt <jim@kermittwaters.com>
Cc: Autumn Waters <autumn@kermittwaters.com>; Michael Schneider <michael@kermittwaters.com>; Elizabeth Ham (EHB Companies) <eham@ehbcompanies.com>
Subject: 35-acre case

Jim,

We need a two-week extension to answer the interrogatories. Interrogatory No. 3 requires our office to examine the zoning data for thousands of R-PD parcels. Is a two-week extension acceptable?

George

George F. Ogilvie III | Partner

McDONALD CARANO

2300 West Sahara Avenue | Suite 1200
Las Vegas, NV 89102

P: 702.873.4100 | **F:** 702.873.9966

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Exhibit 4

Electronically Filed
8/24/2021 9:18 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD, SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, vs. CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entities I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendants.	CASE#: A-18-773268-C DEPT. XXIX

BEFORE THE HONORABLE DAVID M. JONES, DISTRICT COURT JUDGE

FRIDAY, AUGUST 13, 2021

RECORDER'S TRANSCRIPT OF HEARING
PLAINTIFF LANDOWNERS' MOTION TO DETERMINE "PROPERTY INTEREST" AND CITY'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

For the Plaintiffs:	KERMITT L. WATERS, ESQ. JAMES J. LEAVITT, ESQ. ELIZABETH GHANEM, ESQ. MICHAEL A. SCHNEIDER, ESQ (via BlueJeans)
For the Defendant: (City of Las Vegas)	GEORGE F., OGILVIE, III, ESQ. ANDREW W. SCHWARTZ, ESQ. PHILIP R. BYRNES, ESQ. REBECCA L. WOLFSON, ESQ. J. CHRISTOPHER MOLINA, ESQ.

RECORDED BY: ANGELICA MICHAUX, COURT RECORDER

discretion to restrict uses. They don't grant uses. I'm quoting here on slide 32 from 278.250, discretion, that says discretion.

This is from Section 4, 278.250, Subsection 4. This says discretion and it says broad discretion. And I read from some of A through O, Subsection A through O of 278.250.

Okay, now I want to go through some of the developer's complaints.

THE COURT: Counsel, let me for -- just do a quick break because my staff been going at it for a long time. So let's just take a quick break. We'll see you guys back here at 20 minutes after the hour.

MR. SCHWARTZ: Thank you.

[Recess taken at 10:10 a.m.]

[Proceedings resumed at 10:21 a.m.]

THE CLERK: Court is back in session.

THE COURT: Continue, counsel.

MR. SCHWARTZ: Thank you, Your Honor. This is Andrew Schwartz for the City.

I've already addressed the Sisolak case on this page of counsel's spiral binder here, which states that Sisolak's property was zoned for the development of a hotel, casino, or apartments.

Counsel said that means that the Nevada Supreme Court found that Sisolak had a constitutionally-protected right to build a hotel or casino or apartment in the property. And that's a fabrication.

Now in, you know, Your Honor, how credible can counsel be when they ignore Stratosphere, Boulder City, Tighe, and a slew -- all

those cases, all unanimous directly on point?

Instead, they cite Sisolak, a physical takings case that has nothing to do with regulations of use. And they torture the language in Sisolak. It doesn't say what they say it says.

Then, they cite to a number of eminent domain cases. And Tab 4 is Judge Herndon's findings of fact and conclusions of law. On page 19 of that findings of fact and conclusions of law in footnote 4, Judge Herndon points out that eminent domain is different from inverse condemnation.

And he explains it pretty clearly. In inverse condemnation, that's the regulatory agency, oh, let's start with eminent domain. Eminent domain, the government agency files a complaint to condemn the property. It's admitting liability. The only issue is what's the fair market value of the property?

In contrast, in regulatory takings, the whole case is really -- it's about liability. That's the note -- that's the part of the litigation is, is the agency liability for a taking?

Then, if it's found to be liable by the Court, then a Court or a jury, a judge or a jury, decides what the value of the property is for damages.

Yeah, the way you calculate damages, which is the fair market value of the property is done -- is similar to eminent domain and the regulatory takings case, but it has nothing to do with this case where we're talking about liability for a regulatory case.

So counsel cites the Alper case for the principle that zoning

gives an owner rights. Alper doesn't say that. Of course, it doesn't say that. Alper is about value. It's an valuation phase of an eminent domain case.

In fact, Alper may have been an inverse case, but counsel's citing Alper, where the appraisers considered the zoning of the property on the issue of value on the issue of damages, not for purposes of liability.

And so, Alper, like Buckwalter, Andrews, Bustos, they're eminent domain cases. The issue is what's the market value of the property? And of course you need to consider zoning in determining fair market value.

The principle is that an appraiser has to value the property for a use that it's zoned for. It can't value it for a use it's not zoned for, but that doesn't mean that property owners have constitutional rights to build what zoning says. They're completely different concepts.

This is a big disconnect here. So an appraiser determines well, property zoned let's take this case R-PD7. What can you do in an R-PD7 zone? Well, that determines value if the developer can get the project approved.

Is there -- the developer considers is there a reasonable likelihood that the government agency and the regulatory agency would change the zoning?

Okay, then you might consider if you can make a case that there's a reasonable probability it will approve, it'll exercise its discretion to approve a change in zoning, then you can use that other zoning.

These cases do not remotely say that zoning infers properties. Of course you have to consider zoning when you value property. That's all they say.

So, again, they're citing cases that don't have any relevance to liability for inverse condemnation. And they're torturing the language in -- of those cases -- they're -- it's going beyond torture. It's murder.

And then, they're completely ignoring all the cases directly on point, again, that are unanimous and demolish their property rights claim.

The assessor, I mean, we're getting from the sublime to the ridiculous. The assessor doesn't make land use laws. The assessor doesn't apply land use laws.

The assessor values property using the assessor's opinion. Yes, of course, the assessor looks at the zoning of the property and develops an opinion about the value of the property based on that zoning. That's the assessor's opinion. It doesn't bind the City. It's -- the assessor's not a regulator. He's the tax --

THE COURT: So I don't have to pay my property taxes tomorrow.

MR. SCHWARTZ: Oh, no, you do.

THE COURT: Is that what you're saying, counsel?

MR. SCHWARTZ: No, I'm saying that the assessor doesn't regulate the use of property. He values property and charges people taxes.

So the assessor's opinion is completely irrelevant about what

the law provides for the property owner's rights or the City's rights to limit the use of property. It has nothing to do with it.

And in this case, the assessor, because the developer voluntary shut down of golf course, the assessor by state law was required to lift the tax break that the developer got from using that property for a golf course.

Under state law, it's now you revert to the zoning and that's the value of the property. If the developer -- and that's not a taking, Your Honor. Taxes are not a taking. The law is absolutely clear.

This is a regulatory takings case. The taxes are not regulation. If the developer thought that that tax burden, that that tax value was unfair, they have a remedy. There's an administrative process to challenge an assessment.

They didn't challenge that assessment and get a final decision. I think the challenge -- I think they withdrew their challenge. That's their remedy. It's not a taking. Again, taxes, assessments have nothing to do with regulatory takings.

And whether the assessor thought that the PR-OS designation on the property restricted the use or not is irrelevant. It's not the assessor's job to do that. They have no authority.

The developer contends that the City claims that zoning's irrelevant. That's ridiculous. The City doesn't claim zoning's irrelevant. You have to consider the zoning and the General Plan designation. And I'll talk in a minute about the interplay between those two.

Of course, you consider zoning in regulation of the property.

The developer contends the City claims it has discretion to deny any use or value of property.

Again, straw man argument. We don't make that argument. Of course, if the City regulates property to wipe out its value or use, then it could be liable for compensation for a taking.

So, no, the City doesn't have absolute discretion. That's not what we're arguing. We're arguing the City has broad discretion to limit uses under very clear law, but not that it has discretion to wipe out property value or use.

And of course, in this case, not relevant, does the City approve the 435 housing units? So what's the problem with the assessor assessing the property for residential development?

That's what they've got. And according to Judge Herndon, if you looked at page 15 of Judge Herndon's position, Tab 4, paragraph 34, Judge Herndon said using the developer's own evidence of the approval of the 435 housing units increased the value of the 17-Acre property to $26,228,569, thereby quadrupling.

Now Judge Herndon was laboring under the impression that the developer paid 7 and half million for the property because that's the only record we had at the time. We later learned it was $4.5 million.

But he said quadrupling the developer's property purchase investment and the offer still has 232 acres. So there can't possibly be a taking here.

Your Honor, this -- the whole notion of profit of zoning conferring property rights just doesn't fit. You have property interests.

And those can be taken. You can -- like in Loretto or Sisolak, you can deprive someone of the right to exclude evidence.

You're depriving them of a property interest for which compensation would be contained. You're deprived of property interest to make some economic use of your property if the regulation won't accept your property.

But the developer expresses their rights in terms -- their claim in terms of rights of a property right. You don't take property rights. You can deny them or allow them.

In this case, it was allowed. That's why this case should be thrown out. There's no taking.

But if you're talking about a property right, which is what they claim they have, of course they don't have it, then your remedy is equitable.

It's a petition for judicial review to get the courts to tell the government you've denied that right on invalidating your action. They have that right.

This whole property rights notion is not appropriate at all for an inverse condemnation case like this. This whole property rights and zoning concept collapses under its own weight.

So the developer's always been quite vague about what rights it actually has. So R-PD7 zoning allows up to seven units per acre and we've seen from all this authority I've cited to the Court the government has discretion.

So or they have a right to build. They have a right to build one

house in 17 acres, 10 houses, 100 houses. Do they have a right to build 100 foot-tall buildings, 200 foot-tall buildings? It just -- we don't know.

And so, it just doesn't fit with the concept of zoning, which limit rights. If zoning permitted, you know, if zoning gave property under constitutionally permitted -- constitutionally-protected right to do something, they can't say exactly what they were allowed to do by the zoning.

All they're saying is we get to build residential single family, multifamily. That's all we have the right to do.

Again, in this case, they were not denied that right, so the Court should throw it out, but assuming that we indulge this argument, we don't know what rights they have because it just doesn't fit with zoning. The zoning and its uses, it doesn't grant rights.

Now in the order in Judge Williams' order that they cited to the Court, first of all, they inserted language -- the developer inserted language in that order -- not in the order, but in the findings about eminent domain laws somehow being used to determine rights under zoning.

That -- they led Judge Williams into error. That's false. I explained to the Court that those are eminent domain cases don't say anything about zoning conferring rights.

All they say is what opinion of value can or should consider the zoning of the property in determining what the property's worth, not whether they're constitutional rights. So they inserted that in the order. I think, again, that's not correct.

But then in Judge Williams order itself, he said that the 35-Acre property zoned R-PD7, notice never has been a dispute about that. Of course, it's zoned R-PD7.

And then, he said that single family and multifamily are the permitted uses by right in an R-PD zone. Now the developer again led Judge Williams into error here because single family and multifamily are not the permitted uses in a resident -- in a R-PD7 zone. They are some R-PD uses permitted in a residential zone.

And so, Judge Williams' statement is correct. But what's important about this is that in that motion, the developer asked Judge Williams to say that they had a constitutionally protected property right to build single family and multifamily housing in the 35-Acre property.

That would have been directly contrary to what Judge Williams had decided in denying the [indiscernible] directly contrary. Judge Williams would have looked like he was just reversing himself.

And judge -- so Judge Williams didn't do what they claim he did. All he said is single family and multifamily are permitted uses in an R-PD zone.

Now what does permitted mean? Permitted's defined in the Code as a use that's allowed by as a matter of right in that zone.

In planning parlance, it means it's not not permitted. So that the Planning Commission or the City Council cannot allow a -- they can allow a single family and multifamily use in that zone. They can not allow commercial use in that zone if it's not a permitted use in the statute.

So Judge Williams carefully avoided saying that they had a constitutionally-protected property right because he's already held 10 ways from Sunday that they don't.

And he, again, the word the is troublesome. It's -- that's not accurate. I think the developer inserted that, so that's error.

But the rest of this judgment, Williams' statement is correct. There's no dispute. The single family and multifamily are permitted uses in an R-PD7 zone. That means they're permitted as a matter of regulation, not that the owner has rights. Zoning doesn't confer rights.

So let's look at the zoning ordinance in question here. And that's Las Vegas Municipality Code 19.10.050. This part of the Las Vegas Municipal Code, Your Honor, is also called the Uniform Development Code, which I think we treat it as UDC.

And this is set forth in Tab 16. I mean, it's, Your Honor, it is -- it's just piling absurdity on absurdity in this case that the developer claims they had a constitutionally-protected right under the R-PD7 zoning to build residential.

Not only did the City allow them to do that, so it couldn't have taken any of the -- if they have it, but it upzoned the property to R-3, which is much greater density. It's upzoned it, so they're now allowed to build 25 units per acre. And it lifted the PR-OS designation.

The City gives the developer everything they wanted. It even changes the law to benefit the developer. And they get sued [indiscernible].

You know, I like this author Tom Wolf. You know, he wrote a

MR. SCHWARTZ: Yes, our Tab 38 is our proposed findings of fact, conclusions of law.

THE COURT: And I saw it.

MR. SCHWARTZ: But it is on our Motion for Summary Judgment and this motion. We will resubmit an order that just addresses this motion.

THE COURT: And that's fine.

MR. LEAVITT: Thank you, Your Honor.

THE COURT: Great. Thank you. Thank you, everyone. Please stay safe.

MR. SCHWARTZ: Thank you, Your Honor.

MR. LEAVITT: Thank you, Your Honor. You, too.

THE COURT: Have a great weekend.

UNIDENTIFIED SPEAKER: You as well.

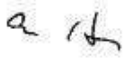
THE COURT: I think know what I'm going to spend mine on.

MR. LEAVITT: Have a good one, Judge.

[Proceedings concluded at 1:34 p.m.]

* * * * * * *

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



_____

Chris Hwang
Transcriber

Exhibit 5

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

180 LAND COMPANY, FORE STARS, LTD., SEVENTY ACRES, Plaintiffs, vs. CITY OF LAS VEGAS, Defendant.	)	CASE NO. A-18-780184-C
	)	DEPT. NO. III
	)	**Transcript of Proceedings**

BEFORE THE HONORABLE MONICA TRUJILLO, DISTRICT COURT JUDGE

EVIDENTIARY HEARING

THURSDAY, MAY 27, 2021

APPEARANCES:

SEE APPEARANCES ON PAGE 2

RECORDED BY: REBECA GOMEZ, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript produced by transcription service.

APPEARANCES:

For the Plaintiffs:	JAMES LEAVITT, ESQ. AUTUMN WATERS, ESQ. KERMITT WATERS, ESQ. ELIZABETH GHANEM, ESQ.
For the City:	ANDREW SCHWARTZ, ESQ. LAUREN TARPEY, ESQ. GEORGE F. OGILVIE, III, ESQ. CHRISTOPHER J. MOLINA, ESQ. PHILIP R. BYRNES, ESQ. REBECCA WOLFSON, ESQ.

And you'll see in that legislation -- again, this is a duly enacted law of the City of Las Vegas. You'll see that the designation of parks, recreation, and open space is on page 0269 and the definition of that open space. And --

[Pause in proceedings]

MR. SCHWARTZ: So, that definition is carried forward in that legislation.

Now, Exhibit MM -- or, Exhibit M. These are the land use maps from the southwest sector for the City of Nevada [sic] land use plan.

And counsel's argument that because the maps say that this map is for reference purposes only doesn't mean it's -- means it's not the law of the City of Las Vegas, it's binding on property owners, is completely out in left field and completely without merit. Because the City is approving changes in land use designations all the time, a map is static. It's only -- applies at the time it was adopted. So, this is a notice that this map may have changed since the date on the map. But it doesn't mean this isn't the masterplan of the City of Las Vegas. And it's -- the masterplan is posted on the City's website. It's the law. And anyone can find it.

If -- Your Honor, if you look at Exhibit N, N as in Nancy, this is Ordinance 5787. This ordinance adopts

the land use element for the 2020 masterplan and the attached maps. And you can see on the last page of that exhibit, down at the lower left at that figure with, like, an octopus with the fingers, that's the Badlands. And it's designated PROS.

So, this is -- this legislation is from 2005. Now, counsel says: Oh, well, in 2001 when the City made the zoning of the Badlands permanent, it repealed all prior zoning ordinances. Well, the masterplan is not a zoning ordinance, it's a masterplan under Nevada law. It's under -- it's a separate regulation. And that legislation in 2001 didn't repeal the general plan, nor would it. Plus, as I'll explain later, the general plan is not -- the PROS designation is not inconsistent with the R-PD7 zoning. And I've got to explain that.

Exhibit O. So, in 2005, you've got a PROS designation. This is 10 years before the developer bought the property. So, you've got a PROS designation now, up to 2005, on the Badlands. Exhibit O is Ordinance 6056. This also adopts the map that's attached, the last page of Exhibit O. And you can see the Badlands, PROS. And the definition of PROS is:

> Parks, recreation, open space. Allows large public parks and recreation areas such as public and private golf courses, trails, easements, drainage ways,

detention basins, and any other large areas or permanent open land.

So, it does not allow residential or community -- commercial development.

Then, with Exhibit P, Exhibit P is Ordinance 6152. That's from 2011. This is the last map adopted before the developer bought the property. So, this map was in effect when the developer bought the property. It's the last page of Exhibit P. And you can see then entire Badlands, the 250 acres, designated PROS.

So, when the developer was looking to buy this property, this is a sophisticated developer, they have lots of lawyers, you go and look at the law. And, in Nevada, you look at the zoning law and the general plan. They are different things. They perform different functions. This law was in effect when they bought the property. This law says you can't put residential on the property. So, they bought a golf course. And if that golf course -- if they can't make any money from the golf course, they shouldn't have bought the golf course, or they should have paid zero for it because the City didn't have to change this. This was the law. And if the City doesn't change it, there's no taking. They still have what -- exactly what they bought. That's what this case is about.

All right. So, Exhibit Q. Exhibit Q is Ordinance

6622. This was adopted after the developer bought the property. And, if you look at the last page of this exhibit, it's the same map, the Badlands, designated PROS in the general plan.

So, counsel for the developer has represented that the general plan designation of the property is M. Well, that's the zoning designation back in 1981. It has nothing to do with this case. Counsel represented that there is no law that says between 1981 and the present, that this property is designated PROS. And I've just been through six, seven ordinances where the City Council says this is the law.

So, tab 15, this is a developer brochure. Last page says:

Property's land use, PROS designation.

This is the brochure that the developer was using to publicize its plans to develop -- redevelop the Badlands with housing. It's got the general plan. It's got the PROS designation. It says:

Parks, recreation, open space.

So, you know, whether the developer actually knew about the PROS designation is not relevant. They're responsible for knowing what the law is. Just because they claim they didn't know about it doesn't excuse them from complying with the law. So, it couldn't be simpler. It

couldn't be simpler that the developer is subject to this PROS designation.

Now, Judge Herndon, -- you know, all of these arguments except for this latest -- this argument about this Exhibit 15, this they made for the first time in their Reply brief with the hope that we wouldn't have time to respond to this. They haven't made this before and it's a nutty, nutty, crazy argument that has no basis in the law.

But all the other arguments they made about why the PROS designation doesn't apply, or it's invalid, or they have these property rights under zoning and it doesn't matter what the PROS designation says, they can build whatever they want as long as it doesn't exceed the seven units per acre of R-PD7 zoning. That's not correct and Judge Herndon -- we've been through this, Your Honor. Judge Herndon rejected all that.

On page 4 of his Findings of Fact and Conclusions of Law, and this is tab 33, he said:

> 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 masterplanned development. After the annexation, the City approved an integrated plan to develop the land with a variety of uses called Peccole Property Land Use Plan. In 1986, Mr. Peccole requested

approval of an amended masterplan featuring two 18-hole golf courses.

Reading on: In 1988, the Peccole Partnership submitted a revised masterplan and an Application to Rezone the property for the first phase of the development. In 1989, the City approved the PRMP.

So, the City approved the Peccole Ranch Masterplan. Mr. Leavitt says: Well, it didn't exist. There are hundreds, if not thousands, of documents that say that it does. And Judge Herndon, again, went through this and found it does exist.

And approved the phase one rezoning application after Peccole agreed to limit the overall density of phase one and reserve 207 acres for a golf course and drainage in the second phase of the development.

So, you've got the City saying: Look, if you're going to develop this, you've got to put aside some open space and some parks and recreation for all the people that are going to be drawn to this development. That's sound land use planning.

All right. In 1989, this is Judge Herndon again:

The City included Peccole Ranch in a gaming enterprise district, which allowed Peccole to develop a resort hotel in the PRMP -- that's the Peccole Ranch Masterplan -- so long as Peccole provided a

recreational amenity such as an 18-hole golf course. Peccole reserved 207 acres for a golf course to satisfy this requirement.

And that was later expanded to the 250 acres.

In 1990, Peccole applied to amend the PRMP for phase two. The Revised PRMP highlighted an extensive 253-acre golf course and linear open space system winding through the community that provides a positive focal point while creating a mechanism to handle drainage flows. The City approved the phase two rezoning application under a resolution of intent, subject to all conditions of approval for the revised PRMP.

So, what's going on here? You've got a city that's engaging in sound land use planning and requiring developers to provide open space when they develop this large masterplanned area.

Then Judge Herndon goes on to say, in paragraph 5 of his Findings of Fact, at page 5:

Since 1992 -- and this is why everything you heard this morning from developer's counsel is wrong and, as I said, if the Court finds that a categorical taking claim is not ripe, irrelevant. But here's what Judge Herndon said:

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.

So, that's since 1992, up to when Judge Herndon wrote this in December of 2020. I mean, it's based on plain ordinances. Ordinance after ordinance, duly adopted ordinance of the City that says it's designated PROS. You know, we're kind of in a fantasy world here when you deny the law that's staring you right in the face.

Judge Herndon says: On April 1, 1992 -- and that's Exhibit I -- the City Council adopted a new Las Vegas general plan, including revisions approved by the Planning Commission. The 1992 general plan included maps showing the existing land uses and proposed future land uses. The future land use map for the southwest sector designated the area set aside by Peccole for an 18-hole golf course as parks, schools, recreation, open space. That designation allowed large public parks and recreation areas, such as public and private golf courses, trails, and easements, drainageways and detention basins, and any other large areas of permanent open land.

Then Judge Herndon goes onto say: From 1992 to 1996, Peccole developed the 18-hole golf course and then later the 9-hole golf course. The 9-hole course was also designated P, for parks, in the City's general

plan, as early as 1998. The Badlands 18-hole and 9-hole golf courses, totaling 250 acres, remain in the same configuration today. When the City Council adopted a new general plan in 2000 to project growth over the following 20 years, it retained the parks, recreation, and open space, PROS, designation.

Beginning in 2002, the City's general plan maps show the entire Badlands designated as PROS. In 2005, the City Council incorporated an updated land use element in the 2020 masterplan. This 2005 land use element designated all 27 holes of the Badlands golf course as PROS, for parks, recreation, open space. 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 PROS. And the description of the PROS land use designation has remained unchanged.

And Judge Herndon cites to all the ordinances I just cited to the Court.

So, you know, in conclusion, the only thing I can do is put the law before the Judge, the law plain on its face. Judge Herndon found that the PROS designation applies. He was right, based on all the same argument and evidence, except for this other argument, this -- the -- this latest argument.

So, I mean, this case is this simple, Your Honor. I mean, counsel has thrown so much mud against the wall. Again, I invited the Court to make this all irrelevant so you don't have to go through all of this if the finding is that the categorical claim is unripe. But I'm going to have to go through -- for each of the statements that counsel told, which is -- they are all wrong. All of them are wrong. It's going to take a little time to explain them. There's -- again, there's a lot of mud on the wall and I've got to deal with it.

Let's talk about the zoning, R-PD7 zoning. That's tab 16. In -- the City rezoned the phase two of the Peccole Ranch Masterplan to a tentative zoning of R-PD7, that the City's practice was to give tentative zoning to a property and then when the property had been built out in accordance with that zoning, assuming that it was consistent with that zoning, then it would make it permanent. And counsel refers to the ordinance 5353, adopted in 2001, that made the R-PD7 zoning permanent.

Counsel has said I don't know how many times in this hearing that the City admits that the property is zoned R-PD7, as if that's some, you know, -- that's a victory. Of course the property is zoned R-PD7. It says that in all the ordinances. We've always admitted that. The dispute is: What does that mean? Does it limit uses

or does it grant rights? Of course it doesn't grant rights. Zoning never grants rights. It limits uses. But, again, we'll get more into that in a minute.

So, Judge Herndon found that the City established the R-PD7 zoning district in 1972. It means residential planned unit development. It's not just residential. It's planned unit development, which means there's some planning going on. It's -- you have an allotment in a residential zone. There's basically one use you can make, you put a house on it. In a R-PD7 zone, you've got a larger property, a larger acreage that allows the City to designate where certain uses are going to go for a well planned community.

Now, in -- if you look at Exhibit 16, Your Honor, that is the ordinance, the R-PD7 ordinance for the City. And counsel never once told you what that ordinance provides because it's not consistent with what the developer's counsel has represented to you.

Judge Herndon quoted from the R-PD7 ordinance which says that the R-PD district in the -- I'm on page 6 of his findings:

The R-PD district in Las Vegas Uniform Development Code was intended, quote:

To promote an enhancement of residential amenities by means of an efficient consolidation and utilization

of open space.

Open space in an R-PD7 zone? Yes.

Separation of pedestrian and vehicular traffic and homogeneity if -- of use patterns. As an R-PD7 residential planned development, density may be concentrated in some areas.

Density, meaning development, like houses or offices.

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.

General plan designations. So, I'm going to back to Exhibit 6 -- tab 16, which is the City's Exhibit U and this is the R-PD7 zoning statute. In -- it's Uniform Development Code, also called Las Vegas Municipal Code 19.10.050. And, in subsection A, it says:

The R-PD district has been to provide for flexibility and innovation in residential development.

What's that telling you? Flexibility. We're talking about discretion. You're not granting rights to property owners.

With emphasis on enhanced residential amenities.

What are amenities? Well, open space is certainly one of them.

Efficient utilization of open space.

So, that's one of the amenities they're talking about.

The separation of pedestrian and vehicular traffic and homogeneity of land use patterns.

Okay. So, the R-PD7 zoning not only says that this is an area where the City is going to be creative, it's going to be innovative. It's gonna, you know, cluster density in certain places and leave other places open for open space because you don't want to have just wall-to-wall buildings, at least if the City Council decides it's not in the best interest of the community. You have open space to serve the community.

So, the -- in subsection C of R -- the R-PD7 section, which is -- this is tab 16. It says:

> Permitted land uses. In an R-PD7 zone, single-family and multi-family residential and supported uses are permitted in the R-PD district. To the extent they are determined by the director -- that's the Director of Planning -- 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.

And the definition of permitted uses in the code also provides that a use is permitted if it's consistent with other standards. So, you've got a zoning ordinance there that not only does not confer rights, but it's just -- it's just infused with discretion.

Now, back to Judge Herndon who -- again, Judge Herndon has been through every one of these arguments except for one.

During the 1990s, the City approved rezoning requests by a resolution of intent, meaning that a rezoning was provisional until the rezoned property was developed. Once rezoned property was developed, the City would adopt an ordinance amending the official Zoning Atlas to make the rezoning permanent.

In 1990, the City adopted a resolution of intent to rezone the 996 acres in phase two in accordance with the PRMP.

Remember, phase two is 1,539 acres, but this was a 996-acre portion that the City is rezoning.

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.

Of course, that was eventually extended -- expanded to 250 acres.

In 2001, the City amended the Zoning Map to rezone the R-PD7. The phase two property previously approved for R-PD7 zoning under the resolution of intent.

Okay. In 2011, the City discontinued the R-PD zoning district but it remained on the Badlands property.

That's not really significant.

So, what we have is two sets of regulations. We've got a zoning ordinance that lists permitted uses and says that the City has discretion as to where to move the different pieces around in that area. Now we have a general plan designation of parks and recreation and open space, PROS, that does not allow residentially commercial development.

So, what did the City do? And if the Court can turn to tab 4? Your Honor, if you look at tab 4 and the aerial there, it shows the golf course and housing around the golf course. And that area, a large part of that area, was this area that was rezoned to R-PD7. So, because R-PD7 allows, in fact, encourages open space as an amenity, as an important community benefit, the City, in 1992, designated the residential portion of that R-PD7 zone, a residential density in the general plan. And PRO -- and it designated the Badlands Golf Course PROS in the general plan. So, you've got a zoned area, R-PD7, and just like the R-PD7

zone -- zoning ordinance contemplates, you've got a portion in the general plan that's designated residential and a portion that's designated open space. They're both -- that masterplan is binding.

Let me tell you a little bit about the general plan. The general plan is like a Constitution. Zoning ordinances implement the general plan. Everything, everything that the developer's counsel told you about the relationship between zoning and general plans is wrong.

[Pause in proceedings - colloquy between City's counsel]

Again, Your Honor, I again want to step back and say none of this is relevant if this -- if the claim isn't ripe because, you know, they could be correct. The developer could be correct on everything, but you don't know whether the City would give them everything that they say they're entitled to until they actually apply.

What's the relationship between general plan and zoning? Again, the general plan is the constitution -- equivalent to a constitution, and the zoning are equivalent to statutes. They implement those constitutional policies.

So, the pyramid that counsel referred you to, where they represented -- their second pyramid, they represented that to be part of the City's masterplan. That was something that they made up that they submitted to the Planning Commission, and they tried to pass that off as the

general plan. That's not in the general plan. The general plan is that pyramid. It doesn't say that zoning -- that general plan is not applicable when property is zoned. That's absolute nonsense. It doesn't say that. The general plan says zoning must be consistent with the general plan. State law says zoning must be consistent with the general plan.

The Nevada Revised Statues 278.250, section 2, says:

> The zoning regulations must be adopted in accordance with the masterplan for land use and be designed, period.

That's the State Legislature saying zoning has to be consistent with master -- the general plan, not the other way around. So, everything that counsel told you was dead wrong.

Then, we have the City's general plan. You know, they showed you the pyramid and they did not show you the text of the general plan, which states that under UDC, the Uniform Development Code of the City of Las Vegas, zoning must be consistent with the general plan. That's section 19.00.040. That's the law. And they say that that is required by Nevada Revised Statutes 278.2502. That says zoning subordinate to must be consistent with the general plan. The City's general plan says that. Every general

plan says that.

And counsel referred the Court to a Nevada Revised Statutes 278.349 concerning tentative maps. Well, that section is -- only concerns tentative maps. It is superseded by this general statement that zoning has to be consistent with the general plan. It doesn't apply in this situation at all.

We've cited in our papers the *American West Development* case, 111 Nevada at page 807, 898 P.2d at 112, and the *Nova Horizon* case, 105 Nevada at 96, 769 P.2d at 723. These -- this is the Nevada Supreme Court saying zoning is subordinate to general plans. That's what those cases say.

So, again, Mr. Leavitt talked for over two hours and he basically cited one case, *Sisolak.* He didn't cite a Nevada Supreme Court case that supports their position.

One thing that counsel did say was that Judge Williams has ruled in their favor on this issue, that they have -- they -- that they have some right under zoning. That is false. That is absolutely false, as is it false that there are 10 court decisions that have agreed with them. That's false, 10 court decisions that said you only -- you can only consider zoning. You don't consider the general plan or zoning is superior to the general plan. None of those cases say that and, unfortunately, I'm going

go there. He had ample evidence as to that -- that there was no final decision and it's not futile. And I'll get into that in a minute.

But if they've got -- they've got to kill the PROS designation. They've got to persuade you that it doesn't exist or that it's inapplicable because, if they don't, you know, they lose. They bought a golf course, a worthless golf course that couldn't be used for anything else and now they want the City to buy -- bail them out for 300 and some million dollars.

So, Judge Williams did not decide that there's an ordinance. I went through all those ordinances with you. He didn't decide those ordinances don't exist. He did not decide that they don't have the effect they have. He did not decide that for purposes of takings, a zoning ordinance prevails over a general plan designation. He didn't. He didn't decide any of that stuff, nor could he. That would be ridiculous that there are fact -- you know, I've used -- that, well, he said in this case cows can't fly. Cows can't fly. But in regulatory takings, yeah, cows can fly. I mean, it's an absurd argument and they're going to make it. They're going to tell you that everything that Judge Williams said that I just read to you is wrong.

The issue here is that their relationship between zoning and the PROS and the importance of the PROS is if --

Thirty-five-acre property interest motion, Judge Williams denied PROS.

That's false. On the 35-acre Property Interest Motion, where the developer said, Judge, tell me I've got a property right to build residential under R-PD7 zoning, Judge Williams did not do that and he did not say that the PROS designation is invalid or doesn't control in this situation. He did not say that. In fact, I read the Court, Judge Williams's decision, earlier decision, where he said the opposite and he said it -- he repeated it many times.

Next, the developer says: To dismiss 35-acre inverse condemnation case, Judge Williams denied PROS as grounds for dismissal.

Okay. So, like a lot of these decisions, it's a denial of a Motion to Dismiss or judgment on the pleadings. It's just a -- you know, that says nothing about the merits. It says: Okay. I want more evidence on this. I want to go to summary judgment. I want to go trial. I want to see if there's a triable issue of fact. It's not a ruling on the merits.

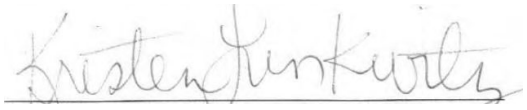
The Supreme Court denied the rehearing. No. The Supreme Court denied a Writ. The Writ they're talking about, the Supreme Court said: It's another case. Not this case. We're not going to get involved. We deny the

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



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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 **PLAINTIFFS LANDOWNERS' REPLY IN SUPPORT OF MOTION TO DETERMINE TAKE AND MOTION FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF AND OPPOSITION TO THE CITY'S COUNTER-MOTION FOR SUMMARY JUDGMENT** **Hearing Date: September 23, 2021** **Hearing Time: 1:30 p.m.**

The Plaintiffs, 180 Land Co LLC and Fore Stars, Ltd. (hereinafter referred to as "Landowners") hereby Reply in Support of their Motion to Determine Take and Motion for Summary Judgment on the First, Third and Fourth Claims for Relief which also Opposes the City's Counter-Motion for Summary Judgment as follows:

I. INTRODUCTION

As explained in the Landowners' opening motion, this Court already decided the necessary first sub-inquiry – what property rights the Landowners had in the 35 Acre Property prior to any City interference with that property rights – and, therefore, this motion **only** addresses the second sub-inquiry – whether that property right has been taken. This second sub-inquiry vindicates the Landowners' constitutional rights, yet, instead of addressing the **only** issue before the Court, the City floods this Court with re-arguments that have been rejected time and time again, by this Court, by other Courts in the Eighth Judicial District, by the Nevada Supreme Court and by the United States Supreme Court.

A. 24-Pages of the City's 92-Page Opposition Argue an Issue Already Decided by this Court.

The City has filed a 92-page document in Opposition to the Landowners' Motion to Determine Take, of which, 24 pages (pages 47-71) contain arguments which have already been argued to and rejected by this Court. This Court's October 12, 2020 Order titled Findings of Fact and Conclusions of Law Regarding Plaintiff Landowners' Motion to Determine "Property Interest" concluded that: "1) the 35 Acre Property is hard zoned R-PD7 at all relevant times herein; and, 2) the permitted uses by right of the 35 Acre Property are single-family and multi-family residential." *Landowners' Appendix ("LO Appx.") Ex. 1, October 12, 2020 FFCL Regarding Property Interest*. In Opposition to the Landowners' Motion to Determine "Property Interest" the City made the ***exact same*** PR-OS[1], PRMP, General Plan argument that it now makes in pages 47-71 and this Court rejected those arguments. City's Opp. filed August 18, 2020. The City did not file a motion to reconsider and there has been

[1] Continuing to argue that the City's 2020 Master Plan, aka General Plan, aka land use designation (PROS) is superior to zoning when the City attorneys have repeatedly stated to the Landowners and to the Courts that zoning is superior to the general plan, is a more than a litigation tactic, it is a violation of SCR rule 3.3 Candor to the Tribunal. This knowingly false argument to the Courts has caused the Landowners hundreds of thousands of dollars in litigation.

absolutely no new evidence that would suggest this Court's prior ruling should be revisited. In fact, this Court is not alone in its ruling as every other Court that has heard the City's PR-OS, PRMP and General Plan arguments which take up 24 pages (47-71) of the City's Opposition have also rejected the arguments. Accordingly, the City's PR-OS, PRMP, and General Plan arguments must be rejected "as the permitted uses by right of the 35 Acre Property are single family and multi-family residential."

B. 13 of the City's 92 Page Opposition Argue An Issue Already Decided by the Nevada Supreme Court and the United States Supreme Court.

The City's exhausting effort to meld a *per se categorical* taking claim into a Penn Central taking claim has also been resoundingly rejected by the Nevada Supreme Court and most recently the United States Supreme Court, yet the City still spends 13 pages (pages 31-45) arguing otherwise. The City admits that Lucas v. South Carolina Coastal Council, 500 U.S. 1003 (1992) is a categorical takings case. City Opp. at 32:15-18, 32:26-27. However, the City completely ignores Nevada law in arguing for the application of the Penn Central ripeness requirement to the Landowners' categorical taking claim. That is because in Nevada, a Lucas taking (or "per se" categorical taking) does not have a ripeness requirement. This is made clear in Justice Maupin's dissent in McCarran Intl. Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006). "While I disagree with the majority that a regulatory per se taking has occurred in this instance, **I do agree that *Loretto* and *Lucas* takings, like per se physical takings, do not require exhaustion of administrative remedies**." Sisolak at 684, emphasis added. *See also* Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724, 732 (2007)("[d]ue to the "per se" nature of this taking, we further conclude that the landowners were not required to apply for a variance or otherwise exhaust their administrative remedies prior to bringing suit."). A "per se" categorical taking is a taking because it deprives the owner of all economical beneficial use of her property and is therefore more akin to a per se physical invasion. Sisolak at 662, 1122 (2006). The Nevada Supreme Court uses the term *per se* in addressing a categorical taking. Sisolak at 662, 1122. *Per se* means "of, in, or by itself; standing alone, without reference to additional facts." Black's Law

Dictionary 1162 (Bryan A. Garner ed., 7th ed., West 1999). Accordingly, in a "per se" taking, the government actions, in and of themselves, amount to a taking requiring the payment of just compensation. There is no prerequisite, such as filing an application (let alone two as the City contends) to ripen the claim. The United States Supreme Court has additionally rejected the City's efforts to shove every taking caused by a regulation into a Penn Central taking. In Cedar Point Nursery v. Hassid, 141 S.Ct 2063, 2072 (2021), the Court very recently explained that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." The Court reasoned that:

> "[t]he essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means… Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, **and *Penn Central* has no place."** Cedar Point at 2072. *Internal citations omitted. Emphasis added.*

Accordingly, the City's entire effort to analyze the Landowners' per se *categorical* taking claim under any part of Penn Central must be rejected.

C. Another 13 Pages of the City's 92 Page Opposition is the Verbatim Language (SINGLE SPACED) From an Order Which Has Been Set Aside as Having Factual and Legal Error and Expressly Does Not Apply to this Case.

The City has the audacity to utilize 13 *single spaced* pages[2] to type in the verbatim dicta contained in an order from a parallel court which is: 1) ***not on the merits***, as the order on its face is self limiting to avoid "preclusive effect in other pending matters"; 2) ***not on the merits***, as the order is based on ripeness, meaning no other issues were considered, because the court concluded the matter on jurisdictional grounds; and, 3) has been ***set aside*** and therefore is of no force and effect as Judge Trujillo granted the Landowners' Motion for New Trial because the order never addressed the mandatory two sub-inquiries applicable in all inverse condemnation cases. The City should not be

[2] City Opp. at 15-20, 26-33, 37-39, 43, 44, 79.

permitted to present rulings which have been ***set aside*** as containing legal and factual errors to this Court, let alone burden this Court with 13 single spaced pages.

D. 3 ½ Pages of the City's 92 Page Opposition Quote This Court's PJR Ruling Which this Court has Told the City ad Nauseam is Not Appliable in This Inverse Condemnation Action.

Despite this Court having advised the City, *time and time again*, that this Court's PJR rulings should not be used in this inverse condemnation action, the City still spends a total of 3½ pages quoting this Court's PJR order to this Court. City Opp. at 4,7,8,51,58,63,70,77, 80,81, 85.

To follow are just a few of the occasions when this Court has informed the City that any ruling from the PJR will not be used in the inverse condemnation actions because the standards and law are different:

> "Furthermore, the law is also ***very different*** in an inverse condemnation case than in a petition for judicial review. Under inverse condemnation law, if the City exercises discretion to render a property valueless or useless, there is a taking. (internal citation omitted). ***In an inverse condemnation case, every landowner in the state of Nevada has the vested right to possess, use, and enjoy their property*** and if this right is taken, just compensation must be paid. Sisolak. And, the Court must consider the "aggregate" of all government action and the evidence considered is not limited to the record before the City Council. (internal citation omitted). ***On the other hand, in petitions for judicial review, the City has discretion to deny a land use application as long as valid zoning laws are applied, there is no vested right to have a land use application granted, and the record is limited to the record before the City Council***." *LO Appx. Ex 8* at 22:13-27

> "[B]oth the facts and the law are different between the petition for judicial review and the inverse condemnation claims. The City itself made this argument when it moved to have the Landowners' inverse condemnation claims dismissed from the petition for judicial review earlier in this litigation. Calling them 'two disparate sets of claims' ..." *LO Appx. Ex 8 at 21:15-20.*

> "The evidence and burden of proof are significantly different in a petition for judicial review than in civil litigation. And, as further recognized by the City, there will be additional facts in the inverse condemnation case that must be considered which were not permitted to be considered in the petition for judicial review. . . . As an example, if the Court determined in a petition for judicial review that there was substantial evidence in the record to support the findings of a workers' compensation hearing officer's decision, that would certainly not be grounds to dismiss a civil tort action brought by the alleged injured individual, as there are different facts, different legal standards and different burdens of proof*." Id., 22:1-11*.

> "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." *Id., 8:25 – 9:2.*
>
> "For these reasons, it would be improper to apply the Court's ruling from the Landowners' petition for judicial review to the Landowners' inverse condemnation claims." *LO Appx. Ex 8, 23:7-8. See also Ex 7, 11:20-22, May 7, 2019, Order*
>
> "This is an inverse condemnation case. It's not a petition for judicial review. There's clearly a difference in distinction there." *LO Appx. Ex. 198, 5.13.21 hearing transcript at 39:7-9.*
>
> "And we've had a very rigorous discussion in the past in this case, and I think we have a pretty good record on how I viewed the petition for judicial review and whether or not that rises to a level of issue preclusion or claims preclusion vis-à-vis the inverse case. And I've ruled on that: right?" *LO Appx. Ex. 198, 5.13.21 hearing transcript at 41:6-12.*
>
> "But you're not listening to me. I understand all that. I don't see any need to replow this ground." *LO Appx. Ex. 198, 5.13.21 hearing transcript at 43:24-44:1*
>
> "Wait. Wait. Wait. Wait…the law as it relates to petitions for judicial review are much different than a civil litigation seeking compensation for inverse condemnation, sir…the standards are different. I mean, for example, they got to meet their burden by a preponderance of the evidence. It's substantial---I mean, it's a totally different – it's an administrative process versus a full-blown jury trial in this case. It's different completely." *LO Appx. Ex. 198, 5.13.21 hearing transcript at 69:20-70:7.*

Further, the Nevada Supreme Court recently recognized that "civil actions and judicial review proceedings are **fundamentally different**" and should not be comingled. City of Henderson v. Eighth Judicial District Court, 137 Nev., Adv. Op. 26 at 2 (Jun. 24, 2021). Accordingly, the City's entire effort to yet again, bring any ruling from the PJR into this inverse condemnation proceeding must be rejected.

As discussed above, approximately 60% of the City's 92-page Opposition (nearly 54 pages) is simply re-arguments that have been rejected time and time again, by this Court, by other Courts in the Eighth Judicial District, by the Nevada Supreme Court and by the United States Supreme Court. The Landowners will not waste this Court's precious time any further with these City arguments. The remainder of this Reply will address the **only** issue before this Court – whether the City engaged in actions to take the Landowners' 35 Acre Property.

II. REBUTTAL OF THE CITY'S ARGUMENTS

The City has piled an avalanche of unrelated federal cases on this Court trying to escape liability for its clear taking of the Landowners' Property. This is improper as Nevada has elected to provide greater protections to its citizens in the context of inverse condemnation proceedings. Therefore, the Landowners submit that this Court need only read five Nevada cases to find a taking in this matter:

McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (Nev. 2006)
Tien Fu Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724 (2007)
Schwartz v. State, 111 Nev. 998, 900 P.2d 939 (1995)
State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015)
Sloat v. Turner, 93 Nev. 263, 563 P.2d 86 (1977)

The Landowners would also respectfully caution the Court that the City's avalanche of unrelated cases is an intentional tactic by the City to create a situation where the Landowners are deprived of their Constitutional rights. The City's counsel was the attorney of record for the government in a case that became known for creating unconstitutional "traps" to deprive landowners of constitutional rights. San Remo Hotel, v. City of County of San Francisco, 545 U.S. 323, 325, 125, S.Ct. 2491,2494 (2005). The positions advanced in San Remo had to be reversed by the United States Supreme Court as it ***deprived countless citizens of their constitutional rights***. Referring to the same as the "*San Remo* preclusion trap" which put takings plaintiffs in a "Catch-22," San Remo was overturned recently by Knick v Township of Scott, Pennsylvania, 139 S.Ct. 2162, 2167 (2019). The City is trying to create similar traps here. However, in Nevada, once the government's actions have worked a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321(1987), *see also,* Knick at 2172 (2019) ("A bank robber might give the loot back, but he still robbed the bank" referring to the Government's attempt to avoid takings liability by not implementing the offending legislation).

A. Discretion and Separation of Powers Do Not Shield the City from Inverse Condemnation Liability.

The City spends a significant amount of its brief trying to convince this Court that the separation of powers gives it free reign to take private property without payment of just compensation. City Opp. 21-27. The City is neither the first, nor will it be the last government agency to try and get private property for free. Justice Ginsberg notoriously wrote:

> "Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. (internal citation omitted). We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases." Arkansas Game and Fish Com'n v. U.S., 568 U.S. 23, 36-37, 133 S.Ct. 511, 521 (2021).

Clark County even tried to legislate around the Just Compensation Clause in the Constitution in the airspace ordinances. *See*, Sisolak and Hsu. In County height restriction Ordinance 728 the County wrote: "that the preservation of these obstructions should be accomplished to the extent legally possible by the exercise of the police power without compensation." *LO Appx., Ex 188, Clark County Ordinance 728 p. 2§C, 005378*. The airspace ordinances were later determined by the Nevada Supreme Court to be takings requiring the payment of just compensation, regardless of what was written in Ordinance 728.

It is the function of the judiciary to ensure that private property is not taken without payment of just compensation. Monogahela Nav. Co. v. U.S., 148 U.S. 312, 325, 13 S.Ct. 622 (1893). This means the judiciary must determine what is a taking and also the payment of just compensation. The City's argument that separation of powers gives it free reign in all but the "most extreme" situations (City Opp at 26:8-9, 27, 28, 71, 83, 86, 90, 91) is not only false, but a complete misstatement of constitutional rights generally. Under the City's argument, illegal searches and seizures would be permitted, except under "the most extreme" situation. The law is just the opposite.

> "[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in the sound than in the substance. **It is the duty of courts to be watchful** for the constitutional rights of citizens, and against any stealthy encroachment thereon." Monogahela Nav. Co. at 325.

Accordingly, the City's argument that it somehow gets a pass due to the separation of powers must be rejected.

The City asserts it has total "discretion" to deny any and all land uses in the City of Las Vegas and separation of powers precludes this Court from interfering with that City discretion unless the City totally wipes out the value of property or there is a "most extreme" interference with property. City Opp. at 21-29. The City even claims it can wipe out 95% of a property's value and there is nothing this Court or private owners can do about it. City Opp. at 30, 33. This is outrageous and untrue. To arrive at this unconstitutional conclusion, the City improperly conflates judicial review/land use law with eminent domain law and cites unrelated federal cases. This Court is well aware of the difference between PJR/land use law and eminent domain law and therefore the same does not need to be addressed again here. The City's efforts to escape liability for its taking of the Landowners' Property through its claimed discretion and separations of power, must be rejected. Simply, as the U.S. Supreme Court has recently held, "physical appropriations constitute the 'clearest sort of taking,' and we assess them using a simple, *per se* rule: The government must pay for what it takes." Cedar Point at 2071.

B. Rebuttal of the City's Baseless Argument that the Landowners' Taking Claims are Not Valid.

The City repeatedly, and incorrectly, claims that the Landowners' first, third, and fourth claims for relief are not valid; that these are not recognized inverse condemnation claims in the State of Nevada. First, the Landowners have cited ***directly*** from Nevada inverse condemnation law to support each claim. Second, this Court already ruled on this issue, holding "[e]ach of these claims [are] a valid claim[s] in the State of Nevada." *LO Appx., Ex. 8, May 15, 2019 Order Denying the City's Motion for Judgment on the Pleadings, 4:6-24*. Third, the Supreme Court confirmed this Court's order denying

the City's Motion for Judgment on the Pleadings when it rejected the City's Writ. *LO Appx., Ex. 12, 13, 14*. Accordingly, these are all valid claims and as shown in the Landowners' Motion to Determine Take, the facts establish that the City has taken the Landowners' Property under these three separate takings claims.

C. Rebuttal of the City's Erroneous Taking Standard.

Rather than follow Nevada inverse condemnation law, the City proposes an abstract that cites to a series of non-inverse condemnation, petition for judicial review and separation of powers law, pulls quotes from those cases, and asserts that: 1) the City has discretion to do whatever it wants to a Nevada landowners' property; 2) this Court has no power to interfere with the City's discretion; and, 3) the only time this Court can intervene and find a taking is where there is a "total wipe out" of value. First, as set forth above, this Court already ruled that this City cited non-inverse condemnation petition for judicial review law is inapplicable and, instead, the above cited Nevada inverse condemnation law must apply. Second, even if there is a more restrictive taking standard (adopted by another state or the federal courts), each individual State may expand federal takings law and adopt their own taking standards. Kelo v. City of New London, Conn., 545 U.S. 469, 489 (2005) (emphasizing "that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."). Nevada has provided greater protections for its landowners than is provided by federal law, which was delineated in Sisolak where the Court defined what constitutes a taking more broadly than the United States Constitution. *See e.g.* Vacation Village v. Clark County, 497 F.3d 902 (2007) ("Thus, the Nevada Supreme Court clearly found that the Nevada Constitution defines takings ***more broadly*** than the United States Constitution and that Ordinance 1221 is a per se regulatory taking under the Nevada Constitution." Id., at 916. Emphasis added). Finally, Nevada has never adopted the City's erroneous taking standard evidenced by the City's failure to cite any relevant Nevada takings law.

D. Rebuttal of the City's Penn Central Argument.

The City also repeatedly argues that, if the Court does not accept the City's erroneous taking standard, then the Court must ***only*** apply a Penn Central taking analysis, which weighs three guideposts,[3] to determine a taking. This exact argument was made by the County of Clark in the airspace taking cases and the Nevada Supreme Court rejected it. In Sisolak, the Court overturned a lengthy unpublished opinion wherein, just two years earlier, the Court had, upon the County's urging, applied ***only*** the Penn Central regulatory taking analysis to the facts found in Sisolak. *See* Hsu at 628. In overturning the lengthy unpublished opinion, the Nevada Supreme Court recognized that there are "two categories of regulatory action that generally will be deemed ***per se takings*** for Fifth Amendment purposes" and that in those situations, it is ***improper*** to apply the Penn Central three guidepost standard. Sisolak at 662. See also Cedar Point at 2072. Instead, the Court held that the categorical standard must apply when "a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property [the Landowners' Third Claim for Relief] or (2) completely deprives an owner of all economical beneficial use of her property [the Landowners' First Claim for relief]." Sisolak at 662. The Court concluded the opinion by summarily stating, "the *Penn Central* – type takings analysis does not govern this action." Sisolak at 1130. This was confirmed recently by the U.S. Supreme Court holding that "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." Cedar Point at 2072. Accordingly, it would be improper to apply a Penn Central standard to the Landowners' three claims for which summary judgment is currently requested by the Landowners.

E. Rebuttal of the City's Temporary Interference Argument.

Finally, the City has claimed that its actions are only temporary and, therefore, there can be no taking where a taking is only temporary. City Opp. at 91. First, the City's taking actions are ongoing;

[3] (1) the regulation's [government action] economic impact on the property owner, (2) the regulation's [government action] interference with investment-backed expectations, and (3) the character of the government action. Penn Central, supra.

there is nothing temporary about what the City has done to the 35 Acre Property. Second, the United States Supreme Court rejected this very argument. Arkansas Game & Fish Comm'n at 33 (once the government's actions have worked a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."); Knick at 2172 (2019) ("A bank robber might give the loot back, but he still robbed the bank.").

III. THE LANDOWNERS HAVE ESTABLISHED A TAKING

A. The Landowners Have Established Their First Claim for Relief – A Categorical Taking.

As detailed in the Landowners' Motion to Determine Take at pages 37-38, the Nevada Supreme Court holds that a "per se" categorical taking occurs where government action "completely deprives an owner of all economical beneficial use of her property," and, in these circumstances, just compensation is automatically warranted, meaning there are no defenses to the taking. Sisolak, supra, at 662.

1. Nevada Law is Clear, the Landowners' First Claim for Relief - A Categorical Taking, Does NOT Require the Landowners to File Any Applications with the City to Ripen Their Claim, but Even if it Did, the Landowners Filed Two Application with the City and Both were Denied.

The City does not contest that the Landowners' Third Claim for Relief (per se regulatory taking) and Fourth Claim for Relief (non-regulatory/de facto taking) are ripe. Instead, the City tries to convince this Court that a "per se" categorical taking (the Landowners' First Claim for Relief) and a Penn Central taking (the Landowners' Second Claim for Relief) are the same and both have a ripeness requirement that the Landowners file an application with the City. City Opp. 29-47. The City is wrong.[4]

[4] The City wildly overreaches and claims there is a requirement that the Landowners file at least two applications. City Opp. At 8:26, 31-38, 80. The Landowners do not even need to file one, let alone two (yet they did and both were denied). This is just another example of the City's abusive litigation strategy.

The City admits that Lucas, 500 U.S. 1003 (1992) is the primary categorical takings case. City Opp. at 27:14. A "per se" categorical taking is a taking because it deprives the owner of all economical beneficial use of her property and is therefore more akin to a per se physical invasion. Sisolak, at 662, 1122. The City completely ignores Nevada law in arguing for the application of the Penn Central ripeness requirement to the Landowners' categorical taking claim. This is because, in Nevada, a Lucas taking (or "per se" categorical taking) does not have a ripeness requirement. As discussed above, this is made clear in Justice Maupin's dissent in Sisolak. "While I disagree with the majority that a regulatory per se taking has occurred in this instance, **I do agree that *Loretto* and *Lucas* takings, like per se physical takings, do not require exhaustion of administrative remedies**." Sisolak at 684, emphasis added. *See also* Hsu, 173 P.3d at 732 (2007)("[d]ue to the "per se" nature of this taking, we further conclude that the landowners were not required to apply for a variance or otherwise exhaust their administrative remedies prior to bringing suit."). Accordingly, in a "per se" taking, the government actions, in and of themselves, amount to a taking requiring the payment of just compensation. There is no prerequisite, such as filing an application, to ripen the claim. To the extent this is in conflict with federal takings jurisprudence, "…states may expand the individual rights of their citizens under state law beyond those provided under the Federal Constitution. Similarly, the United States Supreme Court has emphasized that a state may place stricter standards on its exercise of the takings power through its state constitution or state eminent domain statutes." Sisolak at 669. Accordingly, under the laws of the State of Nevada, which this Court is bound by, an owner is not required to file any application with the land use authority to ripen a Lucas type "*per se"* categorical taking claim.[5]

[5] Under a Penn Central claim, an owner is required to file at least one meaningful application, unless doing so would be futile. The "Ripeness Doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted uses." Palazzolo v. Rhode Island, 533 U.S. 606, 622, 121 S.Ct. 2448 (2001). State v. Eighth Judicial Dist. Court of Nev., 351 P.3d 736, 742 (Nev.

However, erven if there were a Nevada two-application ripeness requirement, it is met by a country mile in this case. As fully briefed in the Landowners' Motion to Determine Take at 14-33, the Landowners filed the ***only*** applications the City would accept to develop the 35 Acre Property and the City rejected them both. The City insisted that **the *only* application it would accept to develop any part of the 35 Acre Property was a Master Development Agreement ("MDA") covering the entire 250 Acres under one development plan** and, in fact, the City denied the individual applications to develop the 35 Acre Property because it was not an MDA. *LO Appx., Ex. 34, Decl. Lowie (1); Ex. 48 Decl. Kaempfer.* "Mayor Goodman informed [the Landowners during a December 16, 2015, meeting] that due to neighbors' concerns the City would not allow 'piecemeal development' of the Land and that one application for the entirety of the 250 Acre Residential Zoned Land was necessary by way of a MDA and that during the MDA process, "the City continued to make it clear to [the Landowners] that it would not allow development of individual parcels, but demanded that development only occur by way of the MDA." *LO Appx. Ex. 34, Decl. Lowie, at 00538, para. 19, at 00539, para. 24:25-27.* The Landowners' land use attorney, Chris Kaempfer, states: 1) that he had "no less than seventeen (17) meetings with the [City] Planning Department" regarding the "creation of a Development Agreement" which were necessitated by "public and private comments made to me by both elected and non-elected officials that they wanted to see a plan – via a Development Agreement – for the development of the entire Badlands and not just portions of it;" and, 2) the City advised him that "[the Landowners] either get an approved Development Agreement for the entirety of the Badlands ***or we***

2015). In Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed. 2d 882 (1999) "[a]fter five years, five formal decisions, and 19 different site plans, [internal citation omitted] Del Monte Dunes decided the city would not permit development of the property under any circumstances." Id., at 698. "After reviewing at some length the history of attempts to develop the property, the court found that to require additional proposals would implicate the concerns about repetitive and unfair procedures expressed in MacDonld, Sommer & Frates v. Yolo County, (internal citation omitted) and that the city's decision was sufficiently final to render Del Monte Dunes' claim ripe for review." Del Monte Dunes, at 698.

get nothing." *LO Appx., Ex 48, Decl. Kaempfer, paras 11-13.* Emphasis Added. And, when the Landowners filed the applications to develop the 35 Acre Property as a stand-alone property, the City Council made it abundantly clear that the application was being denied, because it was not the MDA - 1) "I have to oppose this, because it's piecemeal approach (Councilman Coffin);" 2) "I don't like this piecemeal stuff. I don't think it works (Councilwoman Tarkanian); and, 3) "I made a commitment that I didn't want piecemeal," there is a need to move forward, "but not on a piecemeal level. I said that from the onset," "Out of total respect, I did say that I did not want to move forward piecemeal." (Mayor Goodman). *LO Appx. Ex. 33, at 000702:2618, 000708:2781-2782, 000722:3161, 000653:1305, 000696:2460-2461.* ***Shockingly absent from the City's volumes of exhibits is any evidence denying this fact***. Instead, the City relies on arguments of counsel which are not evidence. The uncontested evidence here is that the Landowners submitted **two applications** for the 35 Acres, and the City denied them both.

As a final note on this issue, the MDA was written by City Staff and complied with every requirement the City has for development, with City Staff recommending approval as follows:

> The proposed Development Agreement conforms to the requirements of NRS 278 regarding the content of development agreements. The proposed density and intensity of development conforms to the existing zoning district requirements for each specified development area. Through additional development and design controls, the proposed development demonstrates sensitivity to and compatibility with the existing single-family uses on the adjacent parcels. Furthermore, the development as proposed would be ***consistent with goals, objectives and policies of the Las Vegas 2020 Master Plan*** **t**hat call for walkable communities, access to transit options, access to recreational opportunities and dense urban hubs at the intersection of primary roads. Staff therefore recommends approval of the proposed Development Agreement. (*LO Appx., Ex. 77 at 002671 emphasis added*)

Yet, the City officially denied the MDA that its own staff prepared and recommended as conforming in all respects. Accordingly, the uncontested evidence in this case is that the Landowners have filed every application the City would consider to develop the 35 Acre Property. The uncontested evidence is that the City considered the applications, made no suggested revisions and, instead, denied the single application as it was not an MDA and then denied the MDA so the Property would remain vacant for

the benefit of the surrounding neighbors, i.e., the public. The City has been given every opportunity to consider what development it would allow on the 35 Acre Property and it will allow ***no development***. These are the uncontested facts.

2. The Uncontested Evidence is That the City's Actions Have Taken All Economically Beneficial Use of the Landowners' Property.

a. The City Will Allow No Development on the Property.

As fully briefed in the Landowners' Motion to Determine Take at 15-33, the City will allow **no development** on the Property because it is preserving the same for the surrounding neighbors' use and enjoyment. The City even adopted legislation by way of Bill Nos. 2018-5 and 2018-24 to make development on the 250 Acre Property impossible. The City advances three contradictory arguments in opposition thereof, none of which are supported by anything other than arguments of counsel.

First, the City suggests that it was not given a sufficient opportunity to deny the Landowners' application to develop on the 35 Acre Property because the Landowners did not file two applications with the City limited solely to the 35 Acre Property. City Opp. 36-43. This is a Hail Mary argument by the City. It denied the Landowners' application to develop the 35 Acre Property as it was not the MDA, then it denied the MDA so that the Property is preserved in an undeveloped state for the surrounding neighbors' use (viewshed, open space, recreation and "***ongoing public access.***") Therefore, because Nevada case law concludes that the Landowners need not file an application with the City to ripen a *per se* categorical taking claim, and because the uncontested evidence is that the City denied both applications submitted by the Landowners, the City's argument should be rejected as contrary to both fact and law.

Next, the City argues it has a right to deny all economic use of the Property because of the illegal PR-OS coloring on its General Plan and the invalid PRCP. These arguments are void of any factual support or reasoning and are contrary to the prior rulings by this Court that:

"1) the 35 Acre Property is hard zoned R-PD7 at all relevant times herein; and,

2) the permitted uses by right of the 35 Acre Property are single-family and multi-family residential." *LO Appx. Ex. 1 at 5*.

Furthermore, it must be noted that, under its sovereign powers, the City can prevent all economic use of the Property, but when it does (as it has here) it must pay just compensation.

Finally, the City argues that it cannot be liable for denying the Landowners all economic use of their Property because the City "did nothing to interfere with the historic use of the property." (City Opp at 73:5-8). This is a shocking argument in this town. Las Vegas has been the fastest growing city for decades. Historically, the entire town was desert. Governor Sisolak's property was vacant desert land when the County enacted regulations that did nothing to interfere with the historic use of his property, yet the Nevada Supreme Court determined it was a taking. Sisolak, supra. The City argument has no validity, is not the law and therefore should be rejected.

b. The City Argues it Will Allow A Non-Economic Illegal Use of the Property and Therefore No Taking Has Occurred.

The City next argues it will allow a golf course and drainage on the Landowners' Property. City Opp at 73:3-5. This is because the City is preserving the Landowners' Property for the surrounding neighbors' use and enjoyment. Motion to Determine Take 15-33. The uncontested evidence is that a golf course is not an economic use of the Property. *LO Appx., Exs. 45, 46, 47*.[6] The actual operators of the golf course shuttered operations because it was not economic even on a rent-free basis. Id. Additionally, Mr. DiFederico, the only expert appraiser in this matter, completed an appraisal of the 35 Acre Property and determined that the City's actions have taken all value from the 35 Acre Property. *LO Appx. Ex. 183, TDG Report, 005314.* Mr. DiFederico further opined, based on his own research and a report by a golf course financial feasibility expert, that the golf course on the 250 Acre Property was not financially feasible. Id. The City chose not to provide expert reports in this case, so the City

[6] A golf course is also an illegal use. *See* LVMC 19.12.010 (showing a golf course use prohibited on any residential zoned land).

has no testimony regarding the value of the Property in either the before or after condition. The City shockingly claims that the Landowners cite no evidence that the City diminished the value of the Property. City Opp at 90:21-24. This is completely false. *LO Appx., Exs. 45, 46, 47, and 183.* The uncontested evidence before this Court is that the City's actions have left the 35 Acre Property with no economic use and no value. This satisfies the elements of a *per se* categorical taking. It is the City that has no evidence to counter these facts or to in anyway establish that a golf course use of the Property would be economic as the City chose not to do any expert reports in this case. Unfounded statements by the City's counsel are not evidence. Accordingly, the Landowners are entitled to a determination of a taking on their First Claim for Relief, a categorical taking.

c. The City's Segmentation Argument fails as it is Factually Incorrect and the Nevada Supreme Court Has Rejected this Argument.

The City claims the Landowners segmented their property as a "transparent ploy" (City Opp. at 2:20-22) to "fabricate a takings claim" (City Opp. 74:25-26). The City has no allegiance to the truth. It is an uncontested fact that the City told the Landowners to redraw the boundaries of the various parcels that comprised the 250 Acre Property. *LO Appx. Ex. 34 at 736 ¶ 13*. If this were false, the City would have obtained an affidavit from City staff stating that it did not advise the Landowners to redraw the boundaries of their various parcels. No such affidavit was provided. So, for the City's counsel to perpetrate a falsehood and claim this redrawing of the parcels was a "transparent ploy" "to fabricate a taking" is remarkable[7].

In this same connection, the City claims that the 35 Acre Property was not taken or damaged because the 17 Acre Property was approved. City Opp. at 72-77. The City is wrong. The Nevada Supreme Court has held that these properties must be considered separately in an inverse condemnation proceeding:

[7] This is another violation of the SCR 3.3 Candor to the Tribunal.

> "A question often arises as to how to determine what areas are portions of the parcel being condemned, and what areas constitute separate and independent parcels? Typically, the legal units into which land has been legally divided control the issue. That is, each legal unit (typically a tax parcel) is treated as a separate parcel...." City of North Las Vegas v. Eighth Judicial Dist. Court, 133 Nev. 995, *2, 401 P.3d 211 (table)(May 17, 2017) 2017 WL 2210130 (unpublished disposition), *citing* 4A Julius L. Sackman, *Nichols on Eminent Domain* § 14B.01 (3d ed. 2016).

It is impermissible to conclude that Owner A is not damaged, because the government approved a development on an entirely separate parcel owned by Owner B. Yet, that is what the City is arguing, that the alleged approvals on the 17 Acre Property negate damages on the 35 Acre property – a separate taxed parcel. The factual premise behind the City's segmentation argument is also false as the City clawed back the 17 Acre approvals, denying them with the MDA denial, and refused to even acknowledge them stating the approvals were "vacated, set aside and shall be void." (*LO Appx., Ex. 189, 1.7.19 email between Summerfield and Pankratz*).

Nevada's per se categorical taking standard is met here. The City has **denied 100%** of the Landowners' attempts to use the 35 Acre Property - the City denied the 35 Acre stand-alone applications because it was not the MDA, then the City denied the MDA application leaving the Landowners with no legal way to use the property. The City also denied the access application, and denied the fence application. The City then adopted Bills to make it impossible to use the Property for any purpose for the benefit of the surrounding neighbors. *LO Appx., Ex. 107, 108, 48, 136, 150*. As a result, the Property lies vacant and useless,[8] all while the Landowners are paying $205,227.22 per year in real estate taxes along with significant other carrying costs. Not only have the City actions "completely deprive[d] [the Landowners] of all economical beneficial use of [their] property," the

[8] A golf course use is one "that is not allowed," in any residential zoned land, such as the 250 Acres. *See LVMC 19.12.010 (showing a golf course use prohibited on any residential zoned land).* While only an interim use, the golf course was shuttered years ago, because it was a financial failure, even when the Landowners offered to lease the land for ***free*** to the golf course operator. *LO Appx., Ex. 45, Golf Course Closure, September, 2015 & May, 2016, Par 4 Letter to Fore Star; Ex. 46, Golf Course Closure, December 1, 2016, Elite Golf Letter to Yohan Lowie; Ex. 47, Golf Course Closure, Keith Flatt Depo, Fore Stars v. Nel.*

actions have caused a negative value. *LO Appx., Exs. 183 at 5314 and 185 at 005352, TDG Appraisal Report and Declaration of DiFederico*. Therefore, a determination of a taking should be granted on the Landowners' First Claim for Relief – Per Se Categorical Taking.

d. The City's Sham Purchase Price.

In an attempt to avoid liability, the City has created a sham purchase price for the Property and then attached an affidavit from its own attorney (Chris Molina) attesting to the same, claiming personal knowledge even though he has only been licensed in the state of Nevada since 2016. His affidavit is simply arguments of counsel and must be rejected by this Court.[9] City Exhibit FFFF. As detailed in the Plaintiffs Landowners' Motion In Limine No. 1: To Exclude 2005 Purchase Price (filed on September 7, 2021) the terms for the Landowners' acquisition of the Subject Property were extremely complicated and included values up to $100 million. And, the acquisition occurred many years ago. So not only is Mr. Molina biased, but he simply incorrect and unable to understand the details of the complicated agreements. Accordingly, Mr. Molina's affidavit should be stricken from the record or, at a minimum, given no weight.

The City claims that the Landowners only paid $4,500,000 for the entire 250 Acre Property and that there was no other consideration. City Opp. at 16. This is not true as set forth in detail in the Landowners' Motion In Limine No. 1. The city's sham price is also unreasonable, unbelievable and irrational. It is well known that there are very affluent individuals that own homes around the 250 Acre Property. It is also well known that these individuals were opposed to development on the 250 Acre Property. It is also well known that these affluent individuals could pool together $4,500,000, with relative ease. Accordingly, if the purchase price for the 250 Acres was only $4,500,000 it is simply irrational to think that the surrounding owners would not have purchased the property themselves. This

[9] https://nvbar.org/for-the-public/find-a-lawyer/?usearch=molina

Court is not required to accept baseless and irrational arguments from the City. The City's sham purchase price argument should be soundly rejected as unsupported, factually inaccurate, and irrational.

The purchase price is also irrelevant to liability for the taking claims asserted. Nowhere in Sisolak does the Nevada Supreme Court ever mention how much Governor Sisolak paid for his property. In fact, the only thing the Court mentions is that he purchased the property (i.e., he was the owner) and what it was *zoned* for when he purchased it. "During the 1980s, Sisolak bought three adjacent parcels of land for investment purposes, which were each zoned for the development of a hotel, a casino, or apartments." Sisolak at 651, 1114. This is because when there is a *per se* taking, whether *per se* categorical or *per se* regulatory, there is no defense to the taking. The City may not use as a defense, that the owner did not pay enough for his property to be entitled to just compensation.[10] Accordingly, even if Governor Sisolak had won his property in a poker game, he would still have been entitled to just compensation for the taking. Thus, the purchase price is irrelevant to whether the City is liable for a taking under the asserted claims.

Therefore, a determination of a taking should be granted on the Landowners' First Claim for Relief – Categorical Taking.

B. The Landowners Have Established Their Third Claim for Relief - Per Se Regulatory Taking Claim.

A "per se" regulatory taking occurs where government action "authorizes" the public to use private property or "preserves" private property for public use. Sisolak, supra, at 1124-25 and Hsu, supra, at 634-635. The City admits that it is preserving the Landowners' Property for the use by the neighboring public for open space, viewshed and now "community interest." City Opp. at 7:2, 89:18-22, 89:23-26, 89:17-22, 91:26-27. As discussed below, the City even denied the Landowners' attempt

[10] The purchase price may be relevant for a Penn Central claim as the owners' investment backed expectations are analyzed, but it is completely irrelevant for the Landowners' First, Third and Fourth Claims for relief.

to fence the property to keep the public out, further showing the City's intent that the 35 Acre Property be utilized by the public. The City argues that limiting the use of the Landowners' Property is not a physical taking. City Opp at 89:25-27. The City is wrong. Because the City needs the Landowners' Property for open space and a viewshed, the City constructs its public project not by way of steel beams and concrete, but by way of denial of all uses. This is similar to the airspace taking cases, the County did not put steel beams and concrete in the sky, instead the County denied all uses that would have been in conflict with its airspace needs. The same is true here, the City is denying all uses that are in conflict with its open space and viewshed needs for the Landowners' Property, thereby, preserving it for public use. This is a taking.

The City claims that the Landowners must establish that the City regulation must permit the public to physically occupy the Property to establish a per se regulatory taking. City Opp. at 89. As detailed in the Landowners' Motion to Determine Take at 38-40, the Nevada Supreme Court holds that a *per se* regulatory taking occurs where government action "authorizes" the public to use private property or **"preserves"** private property for public use. Sisolak, supra, at 1124-25 and Hsu, supra, at 634-635. Federal courts are in harmony as seen in Knick, 139 S.Ct. 2162 (2019), wherein the United States Supreme Court held that a landowner's taking claim was proper and ripe where the government adopted a bill that required the landowner to keep parts of her land "open and accessible to the **general public** during daylight hours" and, even though the bill was suspended and never enforced immediately after the taking actions was filed, the Court held this action still constituted a taking, because it authorized the public to use the property. Id., at 2168. Emphasis added.

Here, the City adopted an ordinance, Bill No. 2018-24, that authorized the public, including the surrounding neighbors, to physically enter the Landowners' Property – a text book per se regulatory taking - by requiring the Landowners to provide for "***ongoing public access*** ….[and to] ensure that such access is maintained." *LO Appx., Ex. 108, Bill No. 2018-24, p. 11, section G.2.d. See,* Knick, at

2168-2169. The City argues that Bill No. 2018-24 does not apply to the Property, because the City had denied the Landowners' application before the Bill's passage. City Opp at 73:26-74:3. The City has no evidence to support this argument and instead relies completely on argument of counsel. As set forth in the moving papers, it is uncontested that this City Bill No. 2018-24 was adopted to solely target and apply to the Landowners' 250 Acre Property. *See* Landowners' Motion to Determine Take at 28-31. And, directly contrary to what the City's counsel is now telling this Court, the City Planning Director and Chief Deputy City Attorney are both on record saying that Bill No. 2018-24 would apply retroactively to golf courses that had already been closed whether applications were pending or not. At the September 4, and November 7, 2018, meetings City Planning Director Summerfield and Chief Deputy City Attorney Val Steed confirmed that the Closure Maintenance Plan part of the Bill (which is where the authorization for public access is found) ***would be applied retroactively***. *LO Appx., Ex. 118, Transcr. November 7, 2018 at 039578-03958, 04077, 04086-04087, City Council minutes for Bill 2018-24; LO Appx., Ex. 119, Transcr. September 4, 2018 at 4163 lines 255-261.*

The City attaches an affidavit from Peter Lowenstein (DDDD) to argue that the City "never gave the [Landowners] notice" of the City law (Bill 2018-24) that required the Landowners to allow public access on to their Property[11]. City Opp at 88:3-5. Whether the City notified the Landowners of the law or not is irrelevant, as everyone is presumed to know and be bound by the law. In fact, the County never notified now Governor Sisolak of the airspace ordinances requiring him to preserve his property so aircraft could enter, he did not learn about the ordinances until approximately 10 years after passage when a relator informed him. Sisolak at 653, 1116. Whether the City notified the Landowners of its ordinance that required the Landowners to allow public access onto their Property is completely

[11] This argument is hollow as the Landowners appeared at every hearing regarding adoption of the Bill and during adoption of the Bill to object to it. Moreover, the Bill was drafted and purposefully targeted at the Landowners' property.

irrelevant to the determination of a *per se* regulatory taking. It becomes even more irrelevant when there is evidence of actual public invasion on the Property. (*LO Appx., Ex. 150*).

In Knick, 139 S.Ct. at 2168-2169 (2019), the United States Supreme Court held that a landowner's taking claim was proper and ripe where the government adopted a Bill that required the landowner to allow "entry upon" her property even when the Bill was ***suspended and never enforced***. In Sisolak, the taking ordinances were adopted in August of 1990, but the runway which allowed planes to fly through Governor Sisolak's airspace was not even constructed until between 1995-1997. (*LO Appx. Ex. 190, Clark County Ordinance 1221*). That means that planes could not have flown through Governor Sisolak's airspace until ***after*** 1995-1997. Nevertheless, the Nevada Supreme Court held the taking occurred in August of 1990 with the adoption of the ordinance – at least five years prior to the date any physical invasion could have occurred. *See* Sisolak, at 675, wherein the Court finds the date of taking in 1990. Accordingly, whether the City notified the Landowners of its authorization and preservation of their Property for public use or even whether the public is actually using the Property (it is here) is irrelevant to the determination of a *per se* regulatory taking. Frankly, Lowenstein (as Deputy Director of Planning) is unable to attest to his statement that "The City has never required the Developer to allow the public on the Badlands, either before or after the Developer closed the golf course. The City has never purported to give permission to any member of the public to occupy the Badlands." City Ex. DDDD at 1520. Such a statement is contrary to the plain language of Bill 2018-24, contrary to the law, contrary to statements made by Councilman Seroka (Lowenstein's superior), and frankly contrary to the City's argument in this litigation (that the land was dedicated as open space).

Next, the City claims that there is "no resemblance, however, between Bill 2018-24 and the ordinances in Sisolak, Knick and Cedar Point. City Opp. at 87:10-11. The City claims ordinance 1221 (the Sisolak ordinance) "automatically exacted an easement for commercial airlines flights from all property owners owning airspace within the flight path;" that the Knick ordinance "automatically

exacted an easement in favor of the public from all owners of property containing human remains;" and the Cedar Point ordinance "automatically exacted an easement in favor of labor union organizers to enter the private property of certain businesses." City Opp. at 87:10-16.

The City is wrong on every point. First, in Sisolak, ordinance 1221 was so technical in nature the County and plaintiff owners often did not agree on what airspace was taken and what was not taken by 1221, accordingly to call it automatic is a stretch. In Knick, the Court made sure to state that it was unknown whether Ms. Knick's property even contained a burial site stating "the property includes a small graveyard where the ancestors of Knick's neighbors are *allegedly* buried" and a code enforcement officer had to determine the existence and location of such a cemetery to implement the regulation. Knick at 2168, emphasis added. And, in Cedar Point, "in order to take access, a labor organization [had to first] file a written notice with the Board and serve a copy on the employer." Cedar Point at 2069. Accordingly, there was nothing automatic about any of these ordinances as the City would have this Court believe in order to distance itself from the striking resemblance between them and City Bill 2018-24.

There can be no doubt that Bill 2018-24 authorizes and preserves private property for public use with its language that unequivocally states: an owner of a shuttered golf course must allow "***ongoing public access*** ….and plans to ensure that such access is maintained." *LO Appx., Ex. 108, Bill No. 2018-24, p. 11, section G.2.d*. The U.S. Supreme Court recently held this exact type of regulation was a taking: "[t]he regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides. Cal. Code Regs., tit. 8, § 20900(e)(1)(C). It is therefore a *per se* physical taking under our precedents." Cedar Point at 2074.

The City has argued ad nauseum in this litigation (and Councilman Seroka personally told the public - *LO Appx., Ex. 136 and 150*) that the Landowners' Property was the recreation and open space property for this area of town and, specifically, for the surrounding neighbors. (City Opp. *passim* and

LO Appx., Ex. 136, 17:23-18:15, 20:23-21:3 HOA transcript of Seroka). The uncontested evidence before this Court is that the public has heard this City position (whether at City Council hearings or from Seroka himself) and because of this is using the Landowners' Property as its recreation and open space. (*LO Appx., Ex. 150*). Like it or not, words have meaning and when the government tells the public that the 250 Acres at Charleston and Alta is their recreation and open space to use **and adopts legislation to further this use**, then the government is responsible for the public's use of the property.

It's hard to even dignify the City's next two argument but they cannot go unaddressed. First, the City argues that the public was trespassing on the Landowners' Property both before and after passage of the City's Bills and therefore the Bills cannot be the cause of the taking. City Opp. at 88:16-19. As detailed in the Landowners' Motion to Determine Take, the City informed the public before and after the passage of the City Bills that the Landowners' Property was for public use. Next, the City argues that "there is no evidence that an individual City Councilmember has the authority to permit anyone to occupy private property." City Opp. at 89. The City is flailing. The City told the surrounding public that the Landowners' Property was "their open space" to use for recreational purposes meaning public use and the Councilman for that very Ward also told the surrounding public that the Landowners' Property was "their open space" to use **and adopted legislation to further this use**. That is a taking no matter how many silly arguments the City makes to try and distract from the ***actual facts***. Cedar Point at 2071 (when third parties are granted access by the government to private property "by whatever means" a *per se* taking has occurred).

As a result of the City's actions, the Landowners' Property has been preserved for public use and the public has been authorized to use the 35 Acre Property. Therefore, a determination of a taking should be granted on the Landowners' Third Claim for Relief – Per Se Regulatory Taking.

C. The Landowners Have Established Their Fourth Claim for Relief - Non-Regulatory Taking.

The Landowners' Fourth Claim for Relief is a non-regulatory taking. The Nevada Supreme Court holds that a non-regulatory taking (also referred to as a de facto taking in some cases) occurs where, there is ***no physical invasion***, but the government has "taken steps that directly and substantially interfere [ ] with [an] owner's property rights to the extent of rendering the property **unusable or valueless to the owner**." State, 131 Nev. at 421. The Court relied on Richmond Elks Hall Assoc. v. Richmond Red. Agency, 561 F.2d 1327, 1330 (9th Cir. 1977), where the Ninth Circuit held that "[t]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a **direct interference with or disturbance of property rights**." Emphasis added.

The City patently misrepresents a non-regulatory taking claim as being limited to "physical takings" and "unreasonable precondemnation conduct" and cites State, supra, as authority. City Opp. at 11:18-20, 90:10-12. First, such language is found nowhere in State. There would be no need for the Court to have a non-regulatory taking claim if there was a physical taking…it would just be a physical taking claim. Second, footnote 5 of State makes it clear it is not a "precondemnation damages" case as alleged by the City - "we decline to address Ad America's precondemnation damages claims because the district court has not decided the issue." Third, Nevada recognizes precondemnation damages as its own separate claim,[12] so again, there would be no need for a non-regulatory taking claim if there were precondemnation damages…it would just be a precondemnation damages claim. Additionally, the Supreme Court dedicates an entire section of State v. Eighth Judicial District Court titled "nonregulatory analysis," for this claim, not "physical taking" or "precondemnation conduct." *See* State supra, at 421.

[12] City of North Las Vegas v. Buzz Stew, 124 Nev. 224, 181 P.3d 670 (2008).

The City's argument that a nonregulatory taking claim is just a "physical taking" is nonsensical. First, the State decision does not require a physical taking as part of the nonregulatory de facto taking standard. Second, Richmond Elks Hall Assoc., relied upon in the case, expressly states a physical taking is not required "***it is not necessary that property be absolutely 'taken' in the narrow sense of that word*** to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a **direct interference with or disturbance of property rights**." Id., at 1330. Emphasis added. Third, Nichols on Eminent Domain, which is consistently relied upon by the Nevada Supreme Court,[13] expressly states a physical invasion is not required under the nonregulatory taking standard: "[c]ontrary to prevalent earlier views, it is now clear that a *de facto* taking ***does not require a physical invasion or appropriation of property***. Rather, a **substantial deprivation** of a property owner's use and enjoyment of his property may, in appropriate circumstances, be found to constitute a 'taking' of that property or of a compensable interest in the property..." 3A Nichols on Eminent Domain §6.05[2], 6-65 (3rd rev. ed. 2002). Emphasis added. Finally, the United States Supreme Court has held that a "physical taking" is ***always*** a taking, meaning it would **never** be an added requirement of a nonregulatory taking claim. *See e.g.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (physical invasion is always a taking no matter how small the invasion or the public interest it may serve).

Nevada's nonregulatory taking standard is met here. Although the Landowners have the "right" to develop residential units, the City has denied the Landowners' the use of their 35 Acres for that purpose. The City has taken action to preserve the 35 Acre Property for use by the surrounding property owners – i.e., the public. And, the City has mandated that the Landowners pay $205,227.22 per year in real estate taxes based on the exact same residential use the City will not allow. The City has clearly

[13] See Plaintiff Landowners' Motion for a New Trial and to Amend in Eighth Judicial District Court case no. A-18-780184-C filed January 27, 2021 at page 57 fn. 28.

"substantially interfered" with the use and enjoyment of the 35 Acre Property. In fact, as a result of the City's actions, the 35 Acre Property has been rendered "useless and valueless" to the Landowners. Therefore, a determination of a taking should be granted on the Landowners' Fourth Claim for Relief – Non-regulatory / De Facto Taking.

D. The City Has Denied the Landowners Access Which is An Independent Property Right in the State of Nevada and Refused to Even Allow the Landowners to Fence the Property.

The well recognized law in Nevada is that a landowner cannot be denied access to abutting roadways, because all property that abuts the roadway has a special right of easement for access purposes and this is a recognized property right in Nevada. Schwartz. Accordingly, the City's action in denying the Landowners access to their Property is one of the many aggregate of City actions that result in the taking in this case.

The City does not deny that it deprived the Landowners of access to the 35 Acre Property. Instead, the City claims that the Landowners had access to the 17 Acre Property. City Opp. at 44:19-23. The 35 Acre Property and the 17 Acre Property are not adjacent, accordingly, any access the 17 Acre Property may or may not have had is irrelevant to access to the 35 Acre property.

The City then had Peter Lowenstein state in his Declaration (City Ex. DDDD) that the City never denied the Landowners' access (or their fence application), because the Landowners never filed an application for a Major Review. (City Ex. DDDD at 18). A Major Review is a massive undertaking reserved for the construction of the largest of developments such as resort hotels and casinos. *See, LO Appx., Ex. 90, LVMC 19.16.100.* It requires a pre-application conference, plan submittal, circulation to interested City departments for comments, recommendation, requirements, and publicly noticed Planning Commission and City Council hearings. Requiring a Major Review for access to an abutting roadway or to simply fence a property is such an irrational obstacle that it amounts to a denial. What the City has argued is that the City has a right to put an irrational obstacle in front of a constitutional

right and if that irrational obstacle is not complied with, then the City has not violated a constitutional right. This would be akin to the City requiring someone to walk 50 miles to vote, when the person refuses to walk 50 miles, the City then claims it did nothing to prevent the person from voting. The City's efforts to excuse its denial of the Landowners access and fencing should be rejected.

E. Whether the City Can Convert its Permanent Taking into a Temporary Taking is Currently Unknown.

Whether the City can convert its permanent taking into a temporary taking is currently unknown. As detailed above, and in the Landowners' Motion to Determine Take, the City has taken the Landowners' Property under three recognized Nevada takings standards. The government may reduce the amount of just compensation it must pay by abandoning its takings whereby making the taking temporary instead of permanent. However, here, the City has done nothing to unwind its taking. Instead, the City has doubled down on its perceived right to take the Landowners' Property without payment of just compensation. Accordingly, it is unknown at this time if the City can even end the taking, thereby making it a temporary taking.

IV. CONCLUSION

The City's actions have resulted in a taking of the Landowners' Property under at least three Nevada takings standards, a per se categorical taking, a per se regulatory taking and a non-regulatory taking. Accordingly, based on the undisputed evidence, the Landowners respectfully request a determination of a taking under their First, Third and Fourth Claims for relief and that the City's countermotion for summary judgment be denied as moot.

DATED this 15th day of September, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 15th day of September, 2021, pursuant to NRCP 5(b), a true and correct copy of the foregoing: **PLAINTIFFS LANDOWNERS' REPLY IN SUPPORT OF MOTION TO DETERMINE TAKE AND MOTION FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF AND OPPOSITION TO THE CITY'S COUNTER-MOTION FOR SUMMARY JUDGMENT** was served on the below via the 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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