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. 117

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, LTD, SEVENTY ACRES, LLC, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, v. CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entitles I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entitles I through X, Defendants.	Case No. A-17-758528-J Dept. No. XVI **CITY OF LAS VEGAS' MOTION TO AMEND JUDGMENT (Rules 59(e) and 60(b)) AND STAY OF EXECUTION** **(HEARING REQUESTED)**

Pursuant to Rules 59(e), 60(b) and 62(b) of the Nevada Rules of Civil Procedure, the City of Las Vegas ("City") respectfully moves for an amendment of the Findings of Fact and Conclusions of Law on Just Compensation of this Court awarding Plaintiffs $34,135,000 in damages and requiring further briefing on the Developer's request for interest on the damage award, costs, attorneys' fees, and property taxes ("Judgment"). The Court entered notice of the Judgment on November 24, 2021. This motion is supported by the existing record in this action, the memorandum of points and authorities, and any oral argument that the Court may allow at the time of the hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

On November 18, 2021, after conducting a 1-day bench trial, the Court filed the Judgment, notice of which was entered on November 24, 2021, awarding the Developer damages of $34,135,000 for the City's alleged taking of the 35-Acre Property, despite the fact that the Developer purchased the entire 250-acre Badlands for less than $4.5 million only two years before the alleged taking (the Court excluded all evidence of the $4.5 million purchase price). While the Judgment requires the City to pay the Developer $34,135,000 for the "taking" of the 35-Acre Property, the Judgment fails to provide that if the City pays the Judgment, the Developer shall be required to convey fee simple title to the 35-Acre Property to the City. It would be contrary to law and unjust for the City to pay the Developer for "taking" the property yet allow the Developer to retain possession and title to the property.

Legal Standard

The Court may grant a motion to amend a judgment under NRCP 59(e) to correct manifest errors of law or to prevent manifest injustice. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010). The court has additional authority under NRCP 60(b) to grant relief from a judgment or order for "any . . . reason that justifies relief."

Argument

I. The Court should amend the Judgment to require that, if the City pays the Judgment, the Developer shall convey fee simple title to the 35-Acre Property to the City

The Judgment erred in not requiring the Developer to convey its fee simple interest in the 35-Acre Property to the City if the City pays the damage award to the Developer. A deed conveying fee simple interest to the government is required upon payment of just compensation for the alleged taking. *See Milens of California v. Richmond Redevelopment Agency*, 665 F.2d 906, 910 (9th Cir. 1982); *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1332 (9th Cir. 1977). Although the Judgment requires the City to pay the alleged market value of the 35-Acre Property—approximately $34 million—it provides no mechanism or procedure for the City to take title to the Property, nor any requirement that the Developer convey title. Unless the Judgment is

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amended to add this requirement, the City faces the manifest injustice of paying for "taking" the property without actually receiving title. To avoid manifest injustice to the City—and a further unwarranted windfall to the Developer—the Court must amend the Judgment to provide such a procedure and requirement.

Without waiving its rights to challenge the Judgment, the City suggests that an additional paragraph should be added to provide that if the City deposits the just compensation and any other amounts that the Court determines are owed to the Developer with the Clerk of the District Court, the Developer shall deposit a deed conveying fee simple title to the 35-Acre Property to the City, whereupon the Clerk shall transfer the deed to the City and the money deposited by the City to the Developer.[1]

II. Because eminent domain law does not apply to this inverse condemnation action, the Court should not impose obligations on the City under NRS Chapter 37

The Developer may contend that the Court should apply NRS 37.140 to this case. That eminent domain statute requires that a public agency taking property by eminent domain must pay the just compensation within 30 days after final judgment and also pay certain prejudgment interest, respectively. These statutory provisions do not apply to this inverse condemnation case.

NRS Chapter 37, the state's eminent domain law, applies only where a public agency has exercised its power of eminent domain. NRS 37.0095; *see also Valley Electric Ass'n v. Overfield*, 121 Nev. 7, 9, 106 P.3d 1198, 1199 (2005) ("NRS Chapter 37 . . . contains the statutory scheme governing Nevada eminent domain proceedings"); *Gold Ridge Partners v. Sierra Pacific Power Co.*, 128 Nev. 495, 499, 285 P.3d 1059, 1062 (2012) ("NRS Chapter 37 governs the power of a public agency to take property through eminent domain proceedings"). As Judge Herndon correctly found,

[1] The City would not be required to deposit the just compensation with the Clerk until the Judgment becomes final after appellate review. Because the City intends to appeal the Judgment and move for a stay, which should be granted as a matter of law, the Judgment would not become final until and unless the Nevada Supreme Court affirms the Judgment and issues a remittitur. *See Clark Cty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 134 Nev. 174, 177, 415 P.3d 16, 19 (2018) ("[u]pon motion, as a secured party, the state or local government is generally entitled to a stay of a money judgment under NRCP 62(d) without posting a supersedeas bond or other security."). The City is separately filing a motion to stay the Judgment.

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eminent domain and inverse condemnation "have little in common. In eminent domain, the government's liability for the taking is established by the filing of the action. The only issue remaining is the valuation of the property taken." *See* City's Appendix of Exhibits Vol. 8 filed 8/25/21, Ex. CCCC at 1499 fn. 4. By contrast, in inverse condemnation, "the government's liability is in dispute and is decided by the court. If the court finds liability, then a judge or jury determines the amount of just compensation." *Id.*

Despite the clear differences between the two doctrines, the Developer has consistently conflated them, relying primarily on language in *Clark County v. Alper*, 100 Nev. 382, 685 P.2d 943 (1984). But *Alper* does not support the proposition that the State's eminent domain law applies wholesale to inverse condemnation cases. In *Alper*, the county physically condemned property for a road-widening project but failed to initiate formal eminent domain proceedings under NRS Chapter 37. 100 Nev. at 391, 685 P.2d at 949. Only then did the property owner file an inverse condemnation action, at which point the parties stipulated to the county's liability. *Id.* The trial court valued the property as of the time of trial rather than the time of the taking when the City physically took possession of the property. In doing so, the court relied on NRS 37.120(1)(b), which allows valuation to be made as of the time of trial where the government does not bring a formal eminent domain proceeding to trial within two years after taking property. *Id.*[2]

The county argued that because the property owner's case was technically brought in inverse condemnation, NRS 37.120(1)(b) was inapplicable. *Id.* The Supreme Court upheld the trial court's date of valuation, holding that "the county [could not] delay formal eminent domain proceedings on the expectation that the landowner [would] file an action for inverse condemnation and thereby avoid its obligation to bring the matter to trial within two years." *Id.* The Court further noted that the eminent domain law "places the burden on the government to move the case to trial within two years after the action is commenced. If it does not, and the delay is not primarily caused by the actions of the

[2] NRS 37.120 has since been amended and no longer includes a subsection (1)(b). However, the substance of the law is essentially unchanged, and still provides that property is valued as of the date of trial if the government fails to bring an eminent domain action to trial within two years of the taking. NRS 37.120.

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landowner, the government must account for the increased value of the property." *Id.* Therefore, to the extent *Alper* holds that eminent domain and inverse condemnation proceedings may be governed by the same rules, that holding is limited to the narrow issue of the date of valuation if the agency that has physically taken the property does not file an eminent domain action and bring it to trial within two years after the date of physical possession. *Id*.

Alper's reasoning was based on the fact that the County physically took property but failed to initiate and timely bring to trial a formal eminent domain proceeding. *Id.* In other words, the County could not take advantage of inverse condemnation law—which would have valued the property at the time of the taking—by failing to meet its obligations under the eminent domain law. Therefore, *Alper* applies narrowly to the small subset of cases where the government physically takes property but fails to initiate eminent domain proceedings, thereby forcing the property owner to file an inverse condemnation action.

No such circumstances exist here. This is a regulatory taking action. The City has not exercised its eminent domain powers under NRS Chapter 37. The Developer does not claim that the City took physical possession of the property, nor does the Developer claim any damages for the alleged public trespass on its property. In sharp contrast to *Alper*, the Developer claims that the City prevented the Developer's *development* of the property for its desired use. This is not a case where the City took physical possession of the property to build a public facility yet failed to file an eminent domain action. Unlike eminent domain actions where the public agency requires title and possession to build a public project, such as a road or a wastewater treatment plant, and in many cases has already taken possession of the property and started the project (*see* NRS 37.100 providing for condemning agency's possession of property prior to judgment to avoid delay in implementing public project), here the City does not need or want the 35-Acre Property for a public facility. Accordingly, it would be a manifest error of law to require the City to pay the assessed compensation within 30 days after

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the Judgment under NRS 37.140, which has no application to this case. In amending the Judgment, therefore, the Court should not rely on the provisions of NRS Chapter 37, including NRS 37.140.[3]

Conclusion

The City respectfully requests that the Court grant its motion and alter and/or amend the Judgment accordingly. In addition, under Rule 62(b)(3) of the Nevada Rules of Civil Procedure, the City requests that the Court stay any execution of the Judgment pending the disposition of this Motion.[4]

DATED this 21st day of December 2021.

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[3] Even if the Court finds that NRS Chapter 37 applies, the City would not be required to pay the Judgment within 30 days. NRS 37.140 requires payment of just compensation only after entry of a "final judgment." "'Final judgment' means a judgment which cannot be directly attacked by appeal, motion for new trial or motion to vacate the judgment." NRS 37.009(2). The Judgment here can be directly attacked by all three procedures and is not final for purposes of NRS 37.140. Accordingly, even assuming *arguendo* NRS 37.140 applies, the City is not required to pay the Judgment unless and until the Nevada Supreme Court affirms it and issues a remittitur.

[4] The City also intends to file a Motion to Stay execution of the Judgment under NRCP 62(d) and 62(e) and NRAP 8 pending the disposition of the instant Motion, which has tolled the time by which the City may file a notice of appeal of the Judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 21st day of December, 2021, I caused a true and correct copy of the foregoing **CITY OF LAS VEGAS' MOTION TO AMEND JUDGMENT (Rules 59(e) and 60(b)) AND STAY OF EXECUTION** 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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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 **MOTION FOR IMMEDIATE STAY OF JUDGMENT** **(HEARING REQUESTED ON ORDER SHORTENING TIME)** **OST Hearing Date:** **OST Hearing Time:**

Under Rules 62(b)(3) and (4), 62(d) and 62(e) of the Nevada Rules of Civil Procedure, Nevada Rule of Appellate Procedure 8, and EDCR 2.26, the City of Las Vegas respectfully moves the Court for an immediate stay of the Findings of Fact and Conclusions of Law on Just Compensation of this Court ("Judgment") awarding Plaintiffs $34,135,000 in damages and potentially interest on the damage award, costs, attorneys' fees, and property taxes, pending a final resolution of the City's Motion to Amend Judgment ("Motion to Amend") and its appeal of the

Judgment to the Nevada Supreme Court.[1] The Court filed the Judgment on November 18, 2021, and Plaintiffs 180 Land Co LLC and Fore Stars Ltd (the "Developer") filed the Notice of Entry of Order of the Judgment on November 24, 2021.

In addition to issuing an immediate stay of the Judgment, the City requests that the Court issue an immediate stay of the following decisions of the Court:

1. Findings of Fact and Conclusions of Law Regarding Plaintiff Landowner's Motion to Determine "Property Interest" filed October 12, 2020;
2. Findings of Fact and Conclusions of Law Granting Plaintiff Landowner's Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief and Denying the City of Las Vegas' Countermotion for Summary Judgment on the Second Claim for Relief filed October 25, 2021; and
3. Decision of the Court filed October 28, 2021.

This motion for an immediate stay is supported by the existing record in this action, the attached Declaration of George F. Ogilvie III, a memorandum of points and authorities, and any oral argument that the Court may allow at the time of the hearing on this Motion.

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[1] Because a motion filed pursuant to NRCP 59(e) tolls the time for the City to file an appeal and allows the Court to maintain jurisdiction over this matter, the City has not filed any notice of appeal at this time. NRAP 4(a)(4). However, the City intends to file a notice of appeal pending the disposition of its Motion to Amend. The notice of appeal will provide a separate basis for an automatic stay without bond. *See* Section I(A), *infra*. Accordingly, the City includes that basis for an automatic stay in the instant Motion.

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ORDER SHORTENING TIME

Upon good cause shown, please take notice that the hearing before the above-entitled Court on the City of Las Vegas' **MOTION FOR IMMEDIATE STAY OF JUDGMENT** is shortened to the ~~_____ day of December, 2021, at ___: _____ __~~ virtual January 13, 2022 at 9:30 am. m., or as soon thereafter as counsel may be heard.

IT IS FURTHER ORDERED that Plaintiffs shall file and serve their opposition, if any, on or before the ~~_____ day of December, 2021~~ January 5, 2022, and Defendant's reply brief, if any, shall be filed and served on or before the ~~____ day of December, 2021~~ January 11, 2022.

Dated this 22nd day of December, 2021

DISTRICT COURT JUDGE

MH

31B EF5 0A4A 17AE
Timothy C. Williams
District Court Judge

Submitted by:

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DECLARATION OF GEORGE F. OGILVIE III IN SUPPORT OF CITY OF LAS VEGAS' MOTION FOR IMMEDIATE STAY OF JUDGMENT

I, George F. Ogilvie III, declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada, and I am a partner in the law firm of McDonald Carano LLP. I am co-counsel for the City of Las Vegas ("City") in the above-captioned matter. I am over the age of 18 years and a resident of Clark County, Nevada. I make this declaration based upon personal knowledge, except where stated to be upon information and belief, and as to that information, I believe it to be true. If called upon to testify as to the contents of this declaration, I am legally competent to do so in a court of law.

2. I make this declaration in support of the City's Motion for Immediate Stay of Judgment and in support of the City's request for an order shortening the time for a hearing on this motion.

3. On November 21, 2018, the Court filed its Findings of Fact and Conclusions of Law on Petition for Judicial Review denying Plaintiffs' Petition for Judicial Review ("PJR FFCL"), finding, among other things, that (a) zoning does not confer constitutionally protected property interests on property owners to use the property for the use the owner chooses, even if the proposed use is a permitted use in the zoning district, (b) Nevada cities have discretion to disapprove or condition an owner's proposed use of property even if the proposed use is a permitted use in the zoning district, (c) single or multi-family housing is not permitted in the Badlands because the Badlands was designated PR-OS in the City's General Plan on the date Plaintiffs purchased the Badlands, and the Badlands is currently designated PR-OS, (d) the City Council has discretion to change the General Plan designation of the Badlands or leave the designation in place.

4. On October 12, 2020, the Court filed its Findings of Fact and Conclusions of Law Regarding Plaintiff Landowner's Motion to Determine "Property Interest" ("FFCL re Property Interest") finding, among other things, that (a) zoning confers constitutionally protected property interests on property owners to use the property for any use the owner chooses as long as the use is a permitted use in the zoning district; (b) Nevada cities have no discretion to disapprove or condition the owner's proposed use as long as the use is a permitted use in the zoning district; (c) single and

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multi-family housing are the only permitted uses in an R-PD7 zoning district; (d) because the Badlands is zoned R-PD7, single and multi-family housing are the only permitted uses in the Badlands; (e) the General Plan designation of property cannot prevent the owner from using its property for any use permitted by zoning.

5. On October 25, 2021, the Court filed its Findings of Fact and Conclusions of Law Granting Plaintiff Landowner's Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief and Denying the City of Las Vegas' Countermotion for Summary Judgment on the Second Claim for Relief ("FFCL re Take"), finding, among other things, that (a) despite the City's denial of only one set of applications to develop the individual 35-Acre Property ("35-Acre Application"), the City has made a final decision that the City will never allow any development of structures on the 35-Acre Property; (b) because the City denied one set of applications filed by the Developer to construct 61 housing units on the 35-Acre Property, the City is liable for a taking of the 35-Acre Property, despite the Court's earlier conclusions of law that (i) the 35-Acre Property is designated PR-OS in the City's General Plan, which does not permit residential use, (ii) the R-PD7 zoning of the Badlands does not confer a property right to develop the property, and (iii) even if zoning conferred property rights and the zoning were inconsistent with the General Plan designation of the property, the PR-OS designation is superior to zoning and controls the allowable use of the 35-Acre Property; (c) the City's Bill 2018-24 effected a physical taking of the 35-Acre Property despite the fact that that legislation did not apply to the 35-Acre Property on its face and the City never applied the legislation to the 35-Acre Property; and (d) the City is liable for a nonregulatory taking despite the Court's failure to identify any nonregulatory action of the City that wiped out all use or value of the 35-Acre Property to the Developer.

6. On October 28, 2021, the Court filed its Decision of the Court ("Decision") finding that the City must pay the Developer $34,135,000 as just compensation for the City's alleged taking of the 35-Acre Property.

7. On November 13, 2021, the Court filed its Order Granting Plaintiffs' Motions in Limine No. 1, 2 and 3 Precluding the City From Presenting to the Jury: 1. Any Evidence or Reference to the Purchase Price of the Land; 2. Any Evidence or Reference to Source of Funds; 3.

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Argument that the Land was Dedicated as Open Space/City's PRMP and PROS Argument ("MIL Order"). Among other things, the MIL Order excluded all evidence that (a) the Developer purchased the entire 250-acre Badlands for less than $4.5 million in an arms-length open market transaction in March 2015, and thus a 35-Acre portion of the Badlands could not possibly be worth $34,135,000 in June 2017 when the City denied the Developer's one set of applications to build 61 housing units on the 35-Acre Property; (b) by the Developer's own evidence, the City's approval of construction of 435 luxury housing units on a 17-Acre portion of the Badlands increased the value of the 17-Acre Property alone to more than $26 million, and the Developer still has 233 acres of the Badlands to use for development, parks, recreation, or open space; (c) at the times the Developer purchased the Badlands and applied to construct 61 housing units on the 35-Acre Property, the Badlands was designated PR-OS in the City's General Plan, which did not permit residential development, and therefore the highest and best use of the Badlands was not residential, as the Developer's appraiser concluded, but rather uses allowed by the PR-OS designation; and (d) because the highest and best use of the 35-Acre Property was PR-OS at the time the City denied the Developer's application, the City's denial of the application did not change the use or value of the Badlands and the Developer suffered no damage as a result of the City's actions.

8. On November 18, 2021, the Court filed its Findings of Fact and Conclusions of Law on Just Compensation ("Judgment") awarding Plaintiffs damages of $34,135,000 for the City's alleged taking of the 35-Acre Property despite excluding the City's evidence that the Developer purchased the entire 250-acre Badlands for less than $4.5 million, and allowing briefing on and reserving its decision on Plaintiffs' claim for attorneys' fees, costs, prejudgment interest, and property taxes.

9. On November 10, 2021, in *180 Land Co. LLC, Fore Stars, Ltd. v. City of Las Vegas*, Eighth Judicial Dist. Ct. Case No. A-18-780184-C ("65-Acre case"), the Developer filed "Plaintiff Landowners' Motion on Order Shortening Time To: 1) Apply Issue Preclusion to the Property Interest Issue [FFCL re Property Interest]; and 2) Set a Short Hearing to Allow the Court to Consider: a) Judge Williams' Findings of Fact and Conclusions of Law on the Take Issue [FFCL re Take]; b) Evidence that was Presented in the 35 Acre Case on the Take Issue; and, c) Very Recent

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Nevada and United States Supreme Court Precedent on the Take Issue" ("65-Acre Issue Preclusion Motion"). *See* City's Supp. App. Vol. 20 filed 10/13/21, Exhibit WWWW. The Developer's 65-Acre Issue Preclusion Motion contended that this Court's FFCL re Property Interest, FFCL re Take, and Decision mandate that Judge Trujillo deny the City's motion for summary judgment now under submission in the 65-Acre case and, by implication, enter other rulings consistent with the FFCL re Property Interest, FFCL re Take, and Decision, on the grounds that those decisions would have preclusive effect on all issues in common in the 35-Acre and 65-Acre cases.

10. On November 15, 2021, in *Fore Stars, Ltd. v. City of Las Vegas*, Eighth Judicial Dist. Ct. Case No. A-18-773268-C ("17-Acre case"), the Developer filed its Supplement to Plaintiff Landowners' Opposition to City's Motion for Summary Judgment and Countermotion for Discovery Pursuant to NRCP 56(d) ("17-Acre Issue Preclusion Motion"). *See* City's Supp. App. Vol. 24 filed 12/20/21, Exhibit CCCCC. The 17-Acre Issue Preclusion Motion contends that Judge Jones should deny, on the basis of issue preclusion, the City's motion for summary judgment that is now under submission in the 17-Acre case, allow the Developer discovery, and, by implication, enter other rulings consistent with the FFCL re Property Interest, FFCL re Take, and Decision in the 17-Acre case on the grounds that those decisions would have preclusive effect on all issues in common in the 35-Acre and 17-Acre cases.

11. The following media articles, copies of which are attached hereto as **Exhibit A**,[2] alerted the public, property owners, and real estate developers in Nevada to the Judgment:

a. September 29, 2021 Las Vegas Review-Journal, "Judge rules Las Vegas took 35 acres on Badlands."

b. September 30, 2021, KNTV "City of Las Vegas suffers another defeat in battle over Badlands: Taxpayers shelling out millions for losing battle."

c. October 5, 2021, Las Vegas Review-Journal, "A win for all landowners': Judge rules Las Vegas took 35 acres on Badlands."

[2] Exhibit A is the only exhibit attached to this motion. All other exhibit references contained herein refer to the City's appendix of exhibits on file with the Court.

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d. October 5, 2021, Editorial in Las Vegas Review-Journal, "Badlands money pit just got deeper."

e. October 6, 2021, Las Vegas Review-Journal, "Las Vegas to appeal Badlands ruling."

f. November 1, 2021, Insurance Journal, "Vegas Owes Builder $34M in Golf Course Dispute" which stated: "Almost all development plans stalled at City Hall in disputes about whether zoning rules prohibit housing and allow only open-space projects."

g. November 30, 2021, Las Vegas Register-Journal, "Time for City to end the Badlands debacle" which stated that "Judge Williams ordered the City to pay $34.1 million for denying the Developer's application to develop the 35-Acre Property with housing 'even though the land was zoned for residential development.'"

h. November 30, 2021, Las Vegas Register-Journal, "Las Vegas to appeal $34M judgment in Badlands ruling" which stated: "[The Developer] accused the City of illegally interfering with development to the point that it made the land impossible to build upon and wiped out its economic value."

i. December 1, 2021, KTNV "First financial verdict dealt to City of Las Vegas in years-long Badlands battle" which stated: "Judge Tim Williams said the City of Las Vegas prevented the legally permitted use of the property . . . ."

j. December 1, 2021, AP News, "Judge rules Vegas owes builder $34M in golf course dispute" which stated: "[The dispute is] about whether zoning rules prohibit housing and allow only open-space projects."

12. At a public session of the Las Vegas City Council on October 6, 2021, members of the City Council explained their understanding that the City is liable for a taking of the 35-Acre Property because the Developer had a legal right to build residences insofar as that use is permitted by the zoning of the property. *See* City's Supp. Appendix of Exhibits Vol. 20 filed 10/13/21, Exhibit YYYY.

13. The City contends that the Court's FFCL re Property Interest, and FFCL re Take, and Judgment are contradicted by all Nevada and federal authority, and it intends to file a notice of

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appeal and respectfully requests that this Court stay enforcement of the Judgment while the appeal is pending before the Nevada Supreme Court.

14. Consistent with standard practice, I am serving a courtesy copy of the motion to stay and the proposed order shortening time on Plaintiffs' counsel at the same time I submit the documents to the Court for signature.

15. Once I receive the signed Order Shortening Time, I will promptly file the same and the motion to stay through the Court's electronic filing system.

I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

DATED this 21st day of December, 2021.

/s/ George F. Ogilvie III
George F. Ogilvie III

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

The City of Las Vegas moves on shortened time for an emergency stay of enforcement of the Judgment pending the disposition of its Motion to Amend and the disposition of the City's appeal, which the City will file after the resolution of the Motion to Amend. Under NRCP 62(b)(3) and (4), the City is entitled to a stay pending the disposition of its Motion to Amend. In addition, the City is entitled to a stay pending appeal as a matter of right, without posting a supersedeas bond under NRCP 62(d) and 62(e). Alternatively, a stay is warranted under the NRAP 8(c) factors.

In ruling that the City has "taken" the 35-Acre Property by denying a single set of applications to build 61 houses on the property, the Court has held that (1) the zoning of property confers a constitutionally protected property right in the owner to build whatever the owner desires as long as the use is permitted under the zoning; (2) the government has no discretion to deny or condition approval of a development application; and (3) Master Plans (General Plans) are irrelevant to any development application. In issuing these unprecedented rulings, the Court has found unconstitutional virtually the entire land use regulatory scheme in Nevada, which requires cities to adopt General Plans governing the legal use of property and confers broad discretion on

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cities to apply General Plan designations and zoning ordinances in reviewing land use permit applications. *See* NRS 278.010–278.630; *see e.g.*, NRS 278.150(1) ("The planning commission shall prepare and adopt a . . . general plan for the physical development of the city . . . which *in the commission's judgment* bears relation to the planning . . . for the development of the city.") (emphasis added); NRS 278.250(2) ("The zoning regulations *must* be adopted in accordance with the master plan for land use and be designed: . . . (b) To promote the conservation of open space . . . (k) To promote health and the general welfare.") (emphasis added); NRS 278.250(4) ("In exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate . . . .").

The Court's ruling also invalidates the City's General Plan and Las Vegas Municipal Code (Unified Development Code ("UDC")) sections 19.10-19.18 and Appendices, under which the City exercises the discretionary powers granted by state law to process land use applications. The UDC requires that, unless otherwise authorized by the UDC, all development approvals must be "consistent with the spirit and intent of the General Plan." UDC 19.16.010.A. The UDC also explains, for example, that the purpose of the review of Site Development Plans is to ensure that proposed development is compatible with nearby development and the General Plan. UDC 19.16.100.E. The City's discretion in reviewing these plans is emphasized by the fact that the UDC provides that the reviewing body may attach "to the amendment to an approved Site Development Plan Review whatever conditions are deemed necessary to ensure the proper amenities and to assure that the proposed development will be compatible" with nearby development. UDC 19.10.050.D. Similarly, the General Plan's Land Use Element states that "any zoning or rezoning or rezoning request must be in substantial agreement with the Master Plan . . . ." Ex. AAAA at 1435 . . . The Court's decision turns this extensive body of property and land use law on its head.

In reaching the sweeping conclusion that local agencies no longer have discretion in the approval of land use permit applications, the Court has disregarded decades of unanimous Nevada Supreme Court authority to the contrary. *See*, *e.g.*, *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527, 96 P.3d 756, 759-60 (2004) (holding that because City of Las Vegas' site development review process [the same process at issue in this case] involved discretionary action

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by the City Council, the project proponent had no vested right to construct); *Boulder City v. Cinnamon Hills Assocs*., 110 Nev. 238, 246, 871 P.2d 320, 325 (1994) ("The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest."). Indeed, if property owners have a constitutionally protected property right to approval of any application for development they choose the file, the three Nevada Supreme Court decisions adjudicating regulatory takings claim based on denial of a land use development application, all of which find no taking, would have reached the opposite conclusion. *See State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993); *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35. These cases, ignored in the Court's rulings, do not even remotely recognize a constitutional right to build conferred by zoning. They stand for the opposite proposition.

This Court's rulings also ignore a Nevada Supreme Court decision in, *Seventy Acres, LLC v. Jack B. Binion, et al.*, NSC Case No. 75481, a related case finding that to develop housing in the Badlands, an owner must first obtain the City's discretionary approval of an amendment to the General Plan. The Badlands has been designated Parks/Recreation/Open Space ("PR-OS") by ordinance in the City's General Plan since 1992 and was so designated in 2015 when the Developer bought the Badlands. Exs. I, M, N, P, Q. The PR-OS designation does not permit housing. In reinstating the City's approval of 435 luxury housing units for the 17-Acre Property, the Nevada Supreme Court stated that "[t]he governing ordinances require the City to make specific findings to approve a general plan amendment, LVMC 19.16.030(1)," among other applications. Ex. DDD at 1014. In so finding, the Supreme Court necessarily acknowledged both the validity of the PR-OS designation *and* the City's discretion to change it or retain it.

Ignoring authorities directly on point, this Court's rulings rely instead on cases that do not even address the issue. *E.g*., *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645 (2006); *City of Las Vegas v. Bustos*, 119 Nev. 360 (2003). Moreover, the Court's recent rulings directly contradict its earlier decision in this case that: (a) "[a] zoning designation does not give the developer a vested right to have its development applications approved"; (b) the PR-OS General Plan designation is

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valid and bars residential use of the Badlands, regardless of the zoning; and (c) the City has discretion to amend the PR-OS designation. Ex. XXX at 1385-86. In particular, in its PJR FFCL, this Court stated that the City Council's decision to grant or deny a general plan amendment application was a discretionary act. *Id.* The Court stated that the City Council was "well within" its discretion to determine that the Developer did not meet the criteria for a General Plan Amendment, regardless of the property's zoning designation.

This Court also found, as a matter of law, that the PR-OS designation governed the permissible uses of the 35-Acre Property, regardless of the zoning, necessarily rejecting the notion that zoning confers rights to build. *Id.* at 1392-94. The Court stated, "no matter the zoning designation," the applications for a general plan amendment were "subject to the Council's discretionary decision making." *Id.* The Court further found that the Developer had purchased the Badlands "knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS)," and that it was up to the Council to decide whether a change in the area or conditions justified the Developer's requested development. *Id.*

The Court's decision is also contrary to the conclusions reached by Judges Sturman and Herndon in the 133-Acre and 65-Acre cases that zoning does not confer any right to build. City's Supp. App. Vol. 21-22, Ex. ZZZZ at 154 (Judge Sturman: "Now the challenge that we have here is this idea that zoning defines the property rights. . . . zoning defines what you can apply to use your property as, not your absolute right."); *see also id*. at 139-40, 142-49, 155-56, 161-62, 166-67; Ex. CCCC at 1496-97 (Judge Herndon: "Because the right to use land for a particular purpose *is not a fundamental constitutional right*, courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use.") (emphasis added).[3]

[3] The 133-Acre case before Judge Sturman is *180 Land Co. LLC, Fore Stars, Ltd., Seventy Acres, LLC v. City of Las Vegas*, Eighth Judicial Dist. Ct. Case No. A-18-775804-J. In the 65-Acre case, *180 Land Co. LLC, Fore Stars, Ltd. v. City of Las Vegas*, Eighth Judicial Dist. Ct. Case No. A-18-780184-C, Judge Herndon granted summary judgment for the City before he elevated to the Nevada Supreme Court. The 65-Acre case is now before Judge Trujillo. Judge Trujillo reheard the City's motion for summary judgment but has not issued a ruling.

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Before an ordinary appeal of the Court's ruling can be adjudicated by the Nevada Supreme Court, the land use regulatory system in Nevada could be thrown into chaos due to the perceived significance attributed by governing bodies to the Court's conclusions. As an indication of the potential effects of the Court's decision, the Developer contends that the decision is an issue-preclusion bar to a local agency's exercise of discretion to deny or condition its approval of any application to develop property in Nevada, as long as the proposed development is permitted by the zoning. Based on this rationale, property owners could rush to file applications for intensive development of property, contending that if the application is not approved ministerially, the agency is liable for just compensation to the owner. Local agencies would be placed in the difficult position of either approving development that causes irreparable harm to the environment and other community values or facing financial disaster. To avoid this dark scenario, the City requests that the Court stay the Judgment to allow this Court to rule on the pending Motion to Amend and further, to allow the Nevada Supreme Court time to review and correct the Court's Judgment.

The financial component of the Court's Judgment fails to take into account that the Developer paid less than $4.5 million for the entire 250-acre Badlands in 2015 in an arms-length transaction. Accordingly, a 35-Acre portion of the Badlands cannot possibly have a value of $34,135,000 only two years after the Developer's purchased the 250-acre property for $4.5 million, or $630,000 for the 35-Acre Property (4,500,000/250 = $18,000/acre x 35 = $630,000). This Court, however, excluded the City's evidence of the purchase price of the property, despite the fact that it is a perfect comparable sale for the 35-Acre Property. The Judgment should, therefore, be stayed before the City is required to pay the Judgment to allow the Supreme Court time to review the Court's conclusion that the City is required to pay the Developer $34,135,000 for a property that the Developer purchased for $630,000.

The Judgment should also be stayed because it ignores the City's approval of the Developer's applications to build 435 luxury housing units on the 17-Acre Property, which is part of the 250-acre parcel as a whole. In approving the 435-unit project, the City upzoned the Property and lifted the PR-OS restriction to allow 25 housing units per acre. According to Judge Herndon, the City's approval increased the value of the 17-Acre Property alone to more than $26 million. Ex.

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CCCC at 1495. As the City demonstrated, the Developer engaged in the prohibited tactic of segmenting the 250-acre Badlands into four separate development sites and separately suing for a taking on each site. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 641 & n.1, 651, 855 P2d 1027, 1029 & n.1 (1993). In ignoring the parcel as a whole, the Court fails to acknowledge that the Developer has made six times its initial investment in the Badlands on the 17-Acre Property alone, and the Developer also owns the remaining 233 acres with the potential for development or continued use as a park, recreational, and open space amenity.

In sum, if the Judgment stands, the value of 52 acres of the Badlands would be increased from less than $1 million (17 acres + 35 acres x $18,000/acre purchase price = $936,000) to more than $60 million ($26 million for 17-Acre Property + $34 million for 35-Acre Property) in two years, and the Developer would also retain 198 acres of the Badlands for future use. The Judgment is a miscarriage of justice and is likely to be reversed.

Argument

This Court has broad discretion to manage its docket and "control the disposition of the cases with economy of time and effort for itself, for counsel, and for litigants." *Maheu v. Eighth Jud. Dist. Ct.*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)).

I. The City is entitled as a matter of right to a stay of the Judgment's requirement that the City pay damages to the Developer without posting a supersedeas bond, or is alternatively entitled to a stay under the NRAP 8(c) factors.

A. The Judgment should be stayed pending disposition of the Motion to Amend.

Rule 62(b)(3) and (4) of the Nevada Rules of Civil Procedure state that "the court may stay execution on a judgment – or any proceedings to enforce it – pending disposition of any of the following motions: . . .(3) under Rule 59, for a new trial or to alter or amend a judgment; or (4) under Rule 60, for relief from a judgment or order." *See* NRCP 62(b)(3) and (4). On December 21, 2021, the City filed its Motion to Amend under NRCP 59(e) and NRCP 60. Accordingly, the City requests that the Court stay execution of the Judgment pending a ruling on the Motion to Amend. In addition, the City requests that the stay be imposed without posting a bond because the City

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intends to file a notice of appeal of the Judgment immediately after the Court rules on the Motion to Amend and, thus, the City will be entitled to an automatic stay without posting a bond as set forth in NRCP 62(d).

B. The City is entitled to an automatic stay of the money judgment without posting a bond.

The City is entitled to a stay as a matter of right – without posting a supersedeas bond – simply by filing this motion. NRCP 62(d) requires private appellants to file a bond as a prerequisite to a stay of the judgment. Public agencies, however, are exempt from the general rule: "When an appeal is taken by the State or by any county, city or town within the State, or an officer or agency thereof and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant." NRCP 62(e). The Supreme Court requires that NRCP 62(d) and (e) be read conjunctively to give a local government such as the City a right to a stay pending appeal without posting a bond. *Clark Cty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 134 Nev. 174, 177, 415 P.3d 16, 19 (2018). As the Supreme Court explained, "Upon motion, as a secured party, the state or local government is generally entitled to a stay of a money judgment under NRCP 62(d) without posting a supersedeas bond or other security." *Id.* As a result, upon the City's filing of this motion, and because the City intends to file its notice of appeal immediately following the Court's decision on the Motion to Amend, the Court should grant an automatic stay of the Judgment and further order that no bond is required. *See id.*

C. Even if a stay of the money judgment were not automatically warranted, the City is entitled to a stay of the money judgment under the NRAP 8(c) factors.

Even if the Court were to conclude, notwithstanding the foregoing authority, that the City is not entitled to an automatic stay of the money judgment under NRAP 62 (b)(3) and (4) and 62(d) and (e), it should nevertheless find the City is entitled to stay the money judgment pursuant to the NRAP 8(c) factors. In determining whether to stay a judgment pending an appeal, courts consider the following four factors: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether the appellant will suffer irreparable or serious injury if the stay is denied; (3) whether the respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether the appellant is likely to prevail on the appeal. NRAP 8(c)(1)-(4); *Mikohn Gaming Corp. v. McCrea*,

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120 Nev. 248, 251, 89 P.3d 36, 38 (2004). The Nevada Supreme Court has "recognized[d] that if one or two factors are especially strong, they may counterbalance other weak factors." *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38. Applying these factors to the money judgment in this case, the City is entitled to a stay.

1. The object of the City's appeal would be defeated and the City would suffer irreparable harm if the stay were denied.

The City satisfies the first and second factors. The object of the City's appeal is to overturn the judgment finding it liable for a taking and ordering immediate payment of $34 million and perhaps additional money in the form of prejudgment interest, property taxes, attorneys' fees, and costs sought by the Developer (the Developer claims prejudgment interest of $52 million, more than $3 million in attorneys' fees, $1 million in property taxes, and more than $300,000 in costs). If the stay were denied and the City were forced to pay the money judgment, the Developer could spend or allocate the money elsewhere, and the City might never recover it, even if its appeal were successful. *Cf. Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 658, 6 P.3d 982, 987 (2000) (noting that increased litigation expenses alone do not constitute irreparable harm). In such a scenario, the money would be irrevocably lost, and "any victory on appeal will be hollow." *Mikohn*, 120 Nev. at 252, 89 P.3d at 39. The loss of $34 million, and perhaps more for prejudgment interest, etc. from the public treasury, would similarly constitute an irreparable harm to the City. For these reasons, the first and second factors weigh heavily in favor of granting the City a stay.

2. The Developer will not suffer injury if the stay were granted.

The City also satisfies the third factor. Permitting a stay of the money judgment against the City while its appeal is pending will not cause harm to the Developer. Instead, in the event the City's appeal is not successful, the Developer will be entitled to interest on the judgment even while it is stayed under NRS 17.130. As a result, the Developer would be made whole for the delay in payment by the additional interest it will earn on the Judgment.

. . .

. . .

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3. The City is likely to prevail on appeal.

The fourth factor weighs in the City's favor because the City is likely to prevail on appeal. When moving for a stay pending appeal, "a movant does not always have to show a probability of success on the merits," but instead "must 'present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.'" *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle* (5th Cir. 1981) 650 F.2d 555, 565).

a. The Categorical and *Penn Central* claims are devoid of merit

The Developer faces three separate and insurmountable barriers to prevail on its categorical and *Penn Central* taking claims. First, the claims are not ripe. Second, even if deemed ripe, the City did not wipe out or nearly wipe out the value of the 35-Acre Property. Third, even if the City had wiped out the value of the 35-Acre Property, the City allowed substantial development of the parcel as a whole, of which the 35-Acre Property is only one segment, negating a taking.

i. The Categorical and *Penn Central* claims are not ripe

In its categorical and *Penn Central* claims, the Developer alleges that the City excessively regulated the use of the 35-Acre Property. But as Judge Herndon found in the 65-Acre case, the court cannot determine whether the City has "taken" the property unless the City has made a final decision disallowing development that wipes out or nearly wipes out the economic value of the property. Judge Herndon found, in reliance on *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) and *State v. Eighth Jud. Dist. Ct*., 131 Nev. 411, 419-20, 351 P.3d 736, 742 (2015), that the Developer's categorical and *Penn Central* claims were unripe and granted summary judgment to the City because the Developer had not filed and had denied any application to develop the individual 65-Acre Property. Ex. CCCC at 1504-15. Judge Sturman agreed with Judge Herndon's ripeness analysis, concluding that the categorical and *Penn Central* taking claims in the 133-Acre case are unripe because the City never had the chance to rule on the merits of the applications. *See* City's Supp. App. Vol. 21-22, Ex. ZZZZ at 152-53 ("I believe that with respect to the zoning issues that Herndon's analysis of ripeness is correct."); *see also id*. at 128-29, 150, 159.

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Williamson County and all cases following that seminal decision require that a developer file and have denied at least two applications for development before a taking claim is ripe. 473 U.S. at 191; *see* Ex. CCCC at 1504-05 and authorities cited therein (Judge Herndon: "A regulatory takings claim is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is also denied.") (citing *Williamson County*, 473 at 191). Here, the Developer filed only one set of applications to develop the 35-Acre Property, which the City denied. Under *State*, 131 Nev. at 419-20, 351 P.3d at 742, the Developer's regulation of use taking claims are clearly unripe because it failed to file and have denied at least two applications for development of the property it claims was taken. As the Court noted in *State*, and as noted by Judge Herndon, the Developer must file applications to develop the "property at issue." *Id*. (quoting *Williamson County*, 473 U.S. at 186). Accordingly, applications to develop other segments of the Badlands or to develop property that included not only the 35-Acre Property standing alone but the entire Badlands, such as a Major Development Agreement ("MDA"), are irrelevant to determine final decision ripeness. *See* Ex. CCCC at 1506-07, 1509-12. As Judge Herndon concluded:

> The Court also does not consider the MDA to constitute an initial application to develop the 65-Acre Property for purposes of a final decision because the MDA was not the specific and detailed application required for the City to take final action on a development project. . . . Given the uncertainty in the MDA as to what might be developed on the 65-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 65-Acre Property. This once again places the court in the untenable position of having to speculate about what the City might have done, said speculation being improper."

Ex. CCCC at 1510-11. Because the Developer filed only one set of applications to develop the individual 35-Acre Property, its taking claims are unripe as a matter of well-established law.

ii. Because the 35-Acre Property was designated PR-OS in the City's General Plan when the Developer bought the Badlands, and PR-OS does not permit residential use, the City did not devalue the property by simply maintaining the status quo

Even if the Developer's taking claims alleging an excessive burden on the owner's use of

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the 35-Acre Property were ripe, the Developer cannot prevail on its regulation of use claims because it cannot meet Nevada's test for a regulatory taking, which requires that the City's action must "completely deprive an owner of all economically beneficial use of her property." *State*, 131 Nev. at 419, 351 P.3d at 741 (internal quotes and citations omitted); *see also Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993) (regulation must deny "all economically viable use of [] property" to constitute a taking under either categorical or *Penn Central* tests); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-35 (1994) (taking requires agency action that "destroy[s] all viable economic value of the prospective development property"). At the time the Developer bought the Badlands, the land could not legally be used for housing under the PR-OS General Plan designation, regardless of the zoning of the property. NRS 278.150 (requiring cities to adopt General Plans that govern land uses); NRS 278.250(2) (zoning "must" be consistent with General Plan); *Am. W. Dev.,* 111 Nev. at 807, 898 P.2d at 111; *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989).

Indeed, UDC 19.00.040 provides:

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

Thus, even if the City had denied two separate applications to develop the property with housing, the City would not have changed the use or value of the 35-Acre Property by declining to lift the PR-OS designation and denying applications to build housing and, therefore, it could not be liable for a taking.

iii. Because the City has permitted substantial development of the parcel as a whole, the taking claims fail

Even if the ripeness analysis were rejected, the City's regulatory actions with respect to the 35-Acre Property must be analyzed in the context of the parcel as a whole, which is either the 1,596-acre Peccole Ranch Master Plan ("PRMP") or the 250-acre Badlands. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017) (requiring a wipeout or near wipeout of the parcel as a whole to find

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liability for a taking); *Kelly*, 109 Nev. at 651, 855 P2d at 1035 (finding that the developer had improperly segmented the property to manufacture a takings claim, and that "Uppaway must be viewed as a whole, not as thirty-nine individual lots" when assessing whether the developer had been deprived of all economic use). The City has permitted substantial development in both the PRMP and the Badlands, negating a taking of the 35-Acre Property that the Developer segmented from the Badlands. Again, Nevada authority is directly on point and requires rejection of the Developer's taking claims of excessive regulation of the Developer's use of the 35-Acre Property.[4]

This Court erred in not recognizing the parcel-as-a-whole doctrine. The Court would not have found a taking if the Developer had not segmented the Badlands into four parts because the City approved 435 luxury units for the Badlands, which is substantial development. Nor would this Court have found a taking of the Badlands if the Developer had bought the entire PRMP from the original landowner and *then* developed thousands of housing units, a hotel, a casino, a retail shopping mall, and a golf course, and the City later denied a request to develop the Badlands, which had been approved as an open space amenity for the PRMP. The fact that, after full buildout of the PRMP the original landowner carved the open space out of the PRMP and sold it to the Developer does not require the City to allow the Developer to eliminate the open space that the City required to be set aside as a condition of approval of the PRMP. Segmentation of the PRMP to attempt to compel the City to approve development is prohibited by all courts that have confronted the issue.

iv. The Developer's theory that zoning confers a right to build housing is contrary to all authority

Ignoring these taking standards, the Developer manufactures a takings test out of thin air by claiming a constitutionally protected property interest in a permit to build 61 housing units on the

[4] Judge Herndon saw through the Developer's segmentation tactic, concluding that: "At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. The Developer transferred 178.27 acres to 180 Land Co. LLC . . . and 70.52 acres to Seventy Acres LLC . . . , leaving Fore Stars with 2.13 acres. Each of these entities is controlled by the Developer's EHB Companies LLC. The Developer then segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands." Ex. CCCC at 1490 (citations to exhibits omitted).

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35-Acre Property. This claim is based on the fact that the property is zoned R-PD7, which merely *permits* residential use, but confers no "rights," constitutional or otherwise. Under regulatory powers delegated by the state, Nevada cities are *required* to exercise discretion to promote the health, safety and general welfare of the public in adopting, amending, and applying General Plans and zoning ordinances. NRS 278.150, NRS 278.250. The R-PD7 zoning ordinance that the Developer falsely claims confers a "right" to develop housing is in fact infused with discretion that is inconsistent with the alleged "right to develop":

> The R-PD District has been to provide for *flexibility and innovation* in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space, . . . Single-family and multi-family residential and supporting uses are permitted in the R-PD District *to the extent they are determined by the Director to be consistent with the density approved for the District and are compatible with surrounding uses*. . . . The approving body may attach to the amendment to an approved Site Development Plan Review *whatever conditions are deemed necessary to ensure the proper amenities and to assure that the proposed development will be compatible with surrounding existing and proposed land uses*.

UDC 19.10.050 (emphasis added).

UDC 19.18.020 defines the term "Permitted Use" as "[a]ny use allowed in a zoning district as a matter of right *if it is conducted in accordance with the restrictions applicable to that district*." (Emphasis added). This broad discretion to approve development generally and, in particular, in an R-PD-7 zoning district, is not compatible with a constitutional right to build whatever the owner wants to build. If the Developer were correct, a vast body of state and local land use regulations conferring discretion on the City would be rendered a nullity.

The Developer fails to cite a single case or statute that remotely supports its theory that the City lacks the discretion to limit the Developer's construction of housing in the Badlands. And the Developer's contention is contrary to all authority. *Stratosphere Gaming v. City of Las Vegas*, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004) (holding that because City's site development review process involved discretionary action by City Council, the project proponent had no vested right to construct); *id*. ("[C]ompatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *City of Reno v. Harris*, 111 Nev. 672, 679, 895 P.2d 663, 667 (1995) ("Once it is established that an area permits several

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uses, it is within the discretion and good judgment of the municipality to determine what specific use should be permitted."); *Boulder City*, 110 Nev. at 246, 871 P.2d at 325 ("The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest."); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992) ("Although the land upon which Von Goerken intended to construct a tavern was zoned to accommodate such a commercial enterprise, it is clear that compatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *Nevada Contractors v. Washoe County*, 106 Nev. 310, 314, 792 P.2d 31 (1990) ("Because of the Board's particular expertise in zoning, the courts must defer to and not interfere with the Board's discretion if this discretion is not abused."); *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112 ("In order for rights in a proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting project commencement . . . "); *Bd. of Cty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983) (There are no vested rights against changes in zoning laws "unless zoning or use approvals are not subject to further governmental discretionary actions affecting project commencement."). The broad discretion granted to the City to limit the use of property cannot be reconciled with the notion that a property owner has a constitutionally protected "right" to build on their property.

The Developer's attempt to distinguish these authorities on the grounds that they involved adjudication of petitions for judicial review ("PJR") is without merit. A PJR is a procedure and remedy for challenging government decisions that employs the same substantive law as an original claim. There is no separate substantive law of PJRs. *See*, *e.g.*, *Bombardier Transp. (Holdings) USA, Inc. v. Nevada Lab. Comm'r*, 135 Nev. 15, 18, 433 P.3d 248, 252 (2019) (reviewing de novo "statutory interpretation questions in the administrative context"). The cases rejecting the Developer's zoning-grants-property-rights theory are based squarely on the underlying Nevada law of property and land use regulation. These rules apply whether a property owner is challenging a regulation of the use of its property by PJR or by complaint for a regulatory taking. Indeed, it would be an absurd result if the City Council had discretion to deny an application to develop property if

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after the City's denial the applicant then sues for a PJR, but the City Council had no discretion to deny the application if the applicant then sues for a regulatory taking. Moreover, the *Boulder City* case, squarely rejecting the notion that owners have property rights in zoning, was a constitutional challenge to the denial of a permit, not a PJR. 110 Nev. at 246, 871 P.2d at 325.

The Ninth Circuit agrees. In *180 Land Co. LLC v. City of Las Vegas*, Ninth Circuit Case No. 19-16114, a case involving the same parties and legal issue, the Developer alleged that it has "vested zoning rights to develop residential units on the [Badlands]." Ex. HHH at 1037. The Ninth Circuit rejected that claim, finding the Developer had no such right under Nevada property law:

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

Ex. III at 1125-26. Like *Boulder City*, the *180 Land* case involved a constitutional challenge to a denial of a building permit, not a PJR. These authorities are directly on point and require judgment for the City on the Developer's categorical and *Penn Central* claims.

b. The Developer's physical taking claim fails because the City did not exact an easement for public use of the 35-Acre Property

Nor does the Developer's physical taking claim have the slightest merit. Bill 2018-24, which the Developer claims exacted an easement from the Developer, did no such thing. *See* City's Reply in Support of Countermotion for Summary Judgment filed 9/21/21 ("9/21/21 Reply") at 21-23.

c. No evidence supports a non-regulatory taking

The Developer's non-regulatory taking claim is also frivolous. The Developer presented no evidence to this Court that the City interfered with the Developer's property, rendering it "unusable or valueless" as required in *State* for a non-regulatory taking. *Id*. at 23-24; *State*, 131 Nev. at 421, 351 P.3d at 743. Indeed, the only allegations the Developer could muster to support its non-regulatory taking claim is the contention that the City denied the Developer's applications for permits to use the property for housing, *which states a regulatory taking claim*, duplicating the Developer's first and second causes of action. *See* 9/21/21 Reply at 24.

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d. Because the City did not effect a permanent taking of the 35-Acre Property, the temporary taking claim fails

Finally, as demonstrated in the City's brief, the temporary taking claim must fail. A temporary taking occurs when a court finds that a regulation effects a permanent taking under *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) or *Penn Central*, and the public agency thereafter rescinds the regulation to avoid paying compensation for a permanent taking. *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 318-19, 321 (1987). Because the Court should not have found a permanent taking, the temporary taking claim necessarily fails as a matter of law.

As the foregoing analysis demonstrates, the City is likely to prevail on the merits of its appeal. The Judgment is inconsistent with all state and federal statutory and caselaw, the Court's own previous ruling in the same case on the petition for judicial review, with the decision of the Nevada Supreme Court in the 17-Acre Case, and with the decisions of Judges Herndon and Sturman in the 65-Acre and 133-Acre cases, respectively. For all these reasons, the City is likely to prevail on appeal. At a minimum, the City has "present[ed] a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen*, 116 Nev. at 659, 6 P.3d at 987.

II. A stay of the Court's FFCL re Property Interest, FFCL re Take, 10/28/21 Decision, and 11/18/21 Judgment is also warranted under the NRAP 8(c) factors

Applying the same NRAP 8(c) factors described above to the Court's decisions in this case, all interlocutory decisions should also be stayed pending the City's appeal. All of the Court's substantive decisions in the FFCL re Property Interest, the FFCL re Take, the Decision, and the Judgment, satisfy the four factors in NRAP 8.

A. The City and every other community in the State of Nevada could suffer irreparable harm if the stay is denied because property owners could claim a constitutional right to build while the City's appeal is pending

The first and second factors are satisfied for a variety of reasons. Because the Court's ruling could effect a sea-change in State law regarding the scope of local police power to regulated land use delegated to cities by the State, the Nevada Supreme Court should decide this issue before the

alleged precedent in this case is used to influence decisions by local public agencies throughout the State. For an issue of this extreme importance, the Nevada Supreme Court will obviously determine whether this Court has erred.

If, while the Court's ruling is on appeal, local governments feel compelled by the Court's ruling to abandon their duty to exercise discretion over land use applications, the public interest would be seriously compromised. The State Legislature mandates that cities and counties, "prepare and adopt a comprehensive, long-term plan" for their physical development and to "regulate and restrict" the construction, alteration and use of buildings or lands in accordance with that plan to preserve air and water quality, promote the conservation of open space, provide for recreation, and generally promote health and welfare. NRS 278.250(1) & (2). If cities and counties follow this Court's ruling invalidating these discretionary powers and ministerially approve every application that is consistent with a zoning district, then the object of the City's appeal – to preserve local agencies' authority to regulate land use in the best interest of the community – would be defeated. In such a scenario, even if the City prevails in the appeal, it would be too late to reverse these approvals of development that would cause great harm to the community and the environment that would not have been granted but for the Court's decision.

The concern that local agencies and District Courts across the entire State might follow the Court's ruling that (a) property owners have constitutional rights conferred by zoning to build whatever they choose as long as the use is a permitted use under the zoning ordinance, (b) cities and counties have no discretion to disapprove or condition an owner's real estate development project as long as the project is for a permitted use, and (c) the general plans of cities and counties are nullities is real. The media has already reported the Court's decision to the public. *See* Ogilvie Decl. ¶¶11.a-j and Exhibit A attached hereto. For example, the November 30, 2021 article in the Las Vegas Register-Journal, entitled *Time for City to end the Badlands debacle*, states that Judge Williams ordered the City to pay $34.1 million for denying the Developer's application to develop the 35-Acre Property with housing "even though the land was zoned for residential development." *Id*. At its meeting on October 6, 2021, the Las Vegas City Council described the Court's ruling, alerting the public that a court has found that the City is now faced with the Hobson's choice of

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either granting every land use permit application put before it or compensate property owners for the market value of their property. *See* City's Supp. App. Vol. 20, Ex. YYYY. As a result, local governments can expect a flood of building permit applications in which the applicants will claim a constitutional right to approval of their application or the right to compensation under the Court's decision.

The Developer has also attempted to use the Court's decision in the other pending cases involving the Badlands. For example, immediately following the Court's ruling finding a taking on September 28, 2021, the Developer filed a motion in the 65-Acre case claiming that this Court's decision mandates that the Court find that the City is liable for a taking of the 65-Acre Property under issue preclusion. *See* City's Supp. App. Vol. 20, Ex. WWWW.

Similarly, if not stayed, the Court's ruling will result in irreparable harm to the City and the public. The State's planning and zoning laws set forth in NRS 278.010-278.828 are designed to protect the public against harmful development and to promote safe, healthy, efficient, well-balanced land use development that provides adequate amenities and services for all. If deemed authoritative by local land use decision makers, the Court's decision will likely create chaos in land use in the State in the near term and lead public agencies, in reliance on this Court's decision, to allow construction and other land uses that would have been denied or conditionally approved before the Court's ruling. While this matter is on appeal, those decision makers might believe they must approve land use applications without conditions unless the agency is willing to use public money to pay compensation to potentially thousands of property owners. Once these applications are approved and the projects built during the pendency of the appeal, these potentially harmful physical changes in land use could not be undone should the Nevada Supreme Court reverse the Court's Judgment. The bell cannot be unrung.

B. The Nevada Supreme Court should be allowed an opportunity to resolve these crucial issues of law before the City is required to part with more than $34 million of the taxpayers money

If the City is required to pay the Developer $34 million plus another $50 million+ in prejudgment interest, attorneys' fees, property taxes, and costs, but the Nevada Supreme Court later reverses the Judgment, the City is unlikely to retrieve the money paid to the Developer, to the

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detriment of the taxpayers. In contrast to the extreme public harm if the City is required to pay the Judgment to the Developer within 30 days, a stay of the Judgment would not prejudice the Developer in the least. The Judgment is entitled to interest under NRS 17.100 until paid. Thus, the harm to the State if the Court's ruling is not immediately stayed could be substantial and irreparable.

C. Because the Developer was awarded only money damages, the Developer would not suffer irreparable harm if a stay is entered

The third factor, lack of irreparable harm to the Developer, is easily met, because the Developer sought and was awarded only money damages. In March 2018, Judge Crockett invalidated the City's approval of the Developer's applications to construct 435 luxury housing units in the 17-Acre portion of the Badlands on the ground that the Developer was required to file a major modification application ("MMA") to develop housing in the Badlands ("Crockett Order"). More than one year ago, in September 2020, after the Nevada Supreme Court had overruled the Crockett Order and reinstated the City's approval of construction of 435 luxury housing units in the Badlands (Exs. DDD, SSSS), the City notified the Developer that the order reinstating its approvals was final, the Developer was free to build. The City even extended the deadline for the Developer to start construction by two years to account for the time the appeal of Judge Crockett's Order was pending in the Supreme Court. Ex. GGG. The Developer, however, has made it clear that it has no intention of actually building the 435-unit project. Instead, the Developer has elected to pursue the City for money damages in all four Badlands cases, even in the 17-Acre case, making the outlandish claim that the City has "nullified" the 17-Acre approvals, despite the Supreme Court's order reinstating the permits and the City's express acknowledgement that the permits are valid for another two years.[5]

[5] Based on the City's research and experience, this is the first case on record anywhere in the United States where a developer has sued the government for a taking despite approval of the developer's application for development. It is also the first case where a developer, when granted a permit, pretends that the permit is invalid, instead seeking money damages for a taking. Judge Herndon held that the Developer's claim that the City has nullified the permit to build 435 luxury units on the 17-Acre Property is "frivolous." Ex. CCCC at 1507-08.

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Further confirming that the Developer's only interest is in money damages, the City also afforded the Developer an opportunity to seek development of the 133-Acre Property, but the Developer has declined. In 2018, adhering to Judge Crockett's Order then in effect, the City Council was compelled to strike the Developer's 133-Acre Applications because the Developer had not filed a Major Modification Application. After the Supreme Court reversed the Crockett Order, the City notified the Developer that it was free to refile the applications to allow the City Council to consider the applications on the merits for the first time. Ex. NNN. Despite the fact that the City Council had not disapproved any application to develop the 133-Acre Property on the merits and the City invited the Developer to resubmit the applications for a decision on the merits, the Developer declined to refile the applications or do anything to attempt to develop the 133-Acre Property, and even vigorously opposed the City's request that Judge Sturman remand the 133-Acre Applications to the City Council for consideration of the applications for the first time on the merits. Ex. AAAAA (Plaintiff Landowner's Opposition to City of Las Vegas' Motion to Remand 133-Acre Applications to the Las Vegas City Council filed 8/24/2021).

In the aftermath of the Supreme Court's decision reversing Judge Crockett, the City also invited the Developer to file a first application for the 65-Acre Property (the Developer had not filed any applications to develop the 65-Acre Property) and a second application for the 35-Acre Property. Exs. OOO, PPP. The Developer ignored all four City requests. Clearly, the Developer is seeking the relief of money damages only. The Developer is entitled to interest on any damages from the date of the taking. *City of North Las Vegas v. 5th & Centennial*, 130 Nev. 619, 624, 331 P.3d 896, 899 ("[J]ust compensation includes interest from the date of taking."). Moreover, the Developer will receive the statutory rate of interest on any judgment. NRS 17.100. A delay in payment of money damages where interest accrues on the damages is not irreparable harm. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 297, 183 P.3d 895, 901 (2008) *abrogated on other grounds by Saticoy Bay, LLC, Series 9720 Hitching Rail v. Peccole Ranch Community Ass'n*, 2021 WL 4344955 (2021) ("Generally, harm is 'irreparable' if it cannot adequately be remedied by compensatory damages.").

The Developer's claim that it is harmed because it is incurring property taxes on property

the use of which the city has denied during this litigation rings hollow. The City has given the Developer ample opportunity to develop the Badlands, including approving the 17-Acre applications and inviting the Developer to file an application for the first time to develop the 65-Acre Property, re-file its 133-Acre Applications for decision for the first time on the merits, and file a second application for the 35-Acre Property. Although the City handed the Developer a permit for 435 luxury units on a silver platter, the Developer has elected instead to attempt to try to extort $386 million – the Developer's total damages claim - from the taxpayers. If the Developer had developed the Badlands, it would have no complaint that it had to pay property taxes.

The Developer's claim for reimbursement of the property taxes it paid during this litigation is pure hypocrisy. The Developer is in no position to complain about the amount of its property taxes where the Developer voluntarily shut down the golf course. As a result, under settled Nevada law, the Developer no longer qualified for a tax break for a golf course. Ex. HHHH at 4222.

Moreover, the Developer contends that the Clark County tax assessor based its tax assessment on the assessor's opinion that the highest and best use of the 35-Acre Property was residential. The Developer appealed the Assessor's determination but failed to argue to the assessor in its appeal that the PR-OS designation of the property prevented residential use of the property, instead entering a settlement with the Assessor that the Badlands would be assessed based on a highest and best use of housing. According to the Developer's appraiser, unless the 35-Acre Property could be used for housing, it's value would be zero. Plaintiff Landowner's Motion for Summary Judgment on Just Compensation filed 10/5/21, Ex. 2 at 95-96. In that case, the tax assessment, according to the Developer's appraiser, would also be zero. *Id*. at 96. Of course, the Developer could not concede in the appeal that the property was designated PR-OS and should be assessed at zero without undercutting its regulatory taking claims against the City, where the Developer hoped to achieve a windfall in takings damages based on the fiction that the PR-OS designation either does not exist or that the General Plan is a nullity. The Developer's strategy has, thus far, paid off. While it claims approximately $1 million for reimbursement of property tax payments, this Court awarded the Developer more than $34 million for a regulatory taking of only a 35-Acre portion of the Badlands. The Developer cannot have it both ways: it cannot agree with

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the Assessor to an incorrect highest and best use of the property and then claim that it should be reimbursed for tax payments based on that phony agreement.

As demonstrated above, the Developer is entitled to interest on the Judgment until it is paid. Accordingly, the Developer would be made whole if the Nevada Supreme Court does not reverse the Judgment. In addition to entitlement to interest, the Developer's loss of immediate access to the funds awarded in the Judgment would not constitute irreparable harm to the Developer. The Developer purchased the entire 250-acre Badlands for less than $4.5 million. Exs. AAA at 966, UUU at 1300, CCCC at 1496, FFFF at 1591-97. The City's approval of the 435-unit project on the 17-Acre Property already increased the value of that property by $26 million and the Developer would retain the remaining 233 acres of the Badlands for potential development or use as park, recreation, or open space. The Developer, accordingly, could start building today and reap and multiply its investment in the Badlands by a factor of six, even without the Judgment. Accordingly, the Developer can hardly claim harm as a result of a stay of the Judgment.

D. Because the Court's decisions are contrary to Nevada and federal caselaw, Nevada Revised statutes, and City ordinances, the City is likely to prevail on its appeal

For the reasons presented at pages 8-15 above, the City is likely to prevail on the merits of its appeal. Accordingly, the Court should stay its Judgment pending a decision of the Nevada Supreme Court on the merits of the City's appeal.

Conclusion

Because the Court's decision is contrary to all authority and could have far reaching effects on the entire State, giving property owners nearly unlimited rights to build on their property, the Court's Judgment should be stayed pending the disposition of the Motion to Amend and the City's appeal to the Nevada Supreme Court without the need for the City to post any security.

DATED this 21st day of December 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the __ day of December, 2021, I caused a true and correct copy of the foregoing **MOTION FOR IMMEDIATE STAY OF 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

EXHIBIT “A”

13 INVESTIGATES

City of Las Vegas suffers another defeat in battle over Badlands

Taxpayers shelling out millions for losing battle

The battle over Badlands continues in Las Vegas, Darcy Spears reports.




By: Darcy Spears

Posted at 3:26 PM, Sep 29, 2021 and last updated 11:37 AM, Sep 30, 2021

LAS VEGAS (KTNV) — Another major court victory has been delivered to the developer in the battle over Badlands.

In a Tuesday hearing, Clark County District Court Judge Timothy Williams said, "We have a very vigorous and well-developed record in this case and I'm going to make some decisions right now."

Williams then ruled that the City of Las Vegas illegally "took" the land.

A "taking" is when the government seizes private property for public use.

In the Badlands case, Judge Williams ruled city leaders restricted the owner's rights so much that it equated to a physical seizure.

Developer Yohan Lowie bought the land in 2015 and the city approved his plan to turn the defunct golf course into luxury homes and tree-lined walking paths.

But, as 13 Investigates first exposed in 2018, high-powered Queensridge homeowners fought it, effectively halting any development of Badlands.

As the property was held in limbo, it became a wasteland, safety hazard, and haven for crime.

Lowie sued the city for taking his property, denying his building permit applications and clawing back the zoning.

In March of last year, the Nevada Supreme Court ruled development of Badlands should have been allowed all along.

Tuesday's ruling in District Court adds to that with Judge Williams saying, "I think under the vast facts and circumstances, it's pretty clear that we had a taking."

Vickie DeHart, executive managing partner of Lowie's EHB Companies said,“This has been a six-year battle that has taken all of our resources. Fighting the government and politically connected people who threatened to take our land early on is no easy feat. It is wonderful to see justice prevail and the courts uphold our constitutional rights. A win for us is a win for all landowners.”

This case, which covers 35 acres and 61 lots, is just one of multiple ongoing Badlands cases that have cost taxpayers millions: $4,060,288.00 to date.

And the dollar figure will only get higher as the next phase of the case determines how much the city has to pay for taking Lowie's land.

We reached out to the City Attorney's office for comment, but they declined, saying "It's the city's practice not to comment on ongoing or pending litigation."

Report a typo

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A "taking" is when the government seizes private property for public use.

In the Badlands case, Judge Williams ruled city leaders restricted the owner's rights so much that it equated to a physical seizure.

Developer Yohan Lowie bought the land in 2015 and the city approved his plan to turn the defunct golf course into luxury homes and tree-lined walking paths.

But, as 13 Investigates first exposed in 2018, high-powered Queensridge homeowners fought it, effectively halting any development of Badlands.

As the property was held in limbo, it became a wasteland, safety hazard, and haven for crime.

Lowie sued the city for taking his property, denying his building permit applications and clawing back the zoning.

In March of last year, the Nevada Supreme Court ruled development of Badlands should have been allowed all along.

Tuesday's ruling in District Court adds to that with Judge Williams saying, "I think under the vast facts and circumstances, it's pretty clear that we had a taking."

Vickie DeHart, executive managing partner of Lowie's EHB Companies said,“This has been a six-year battle that has taken all of our resources. Fighting the government and politically connected people who threatened to take our land early on is no easy feat. It is wonderful to see justice prevail and the courts uphold our constitutional rights. A win for us is a win for all landowners.”

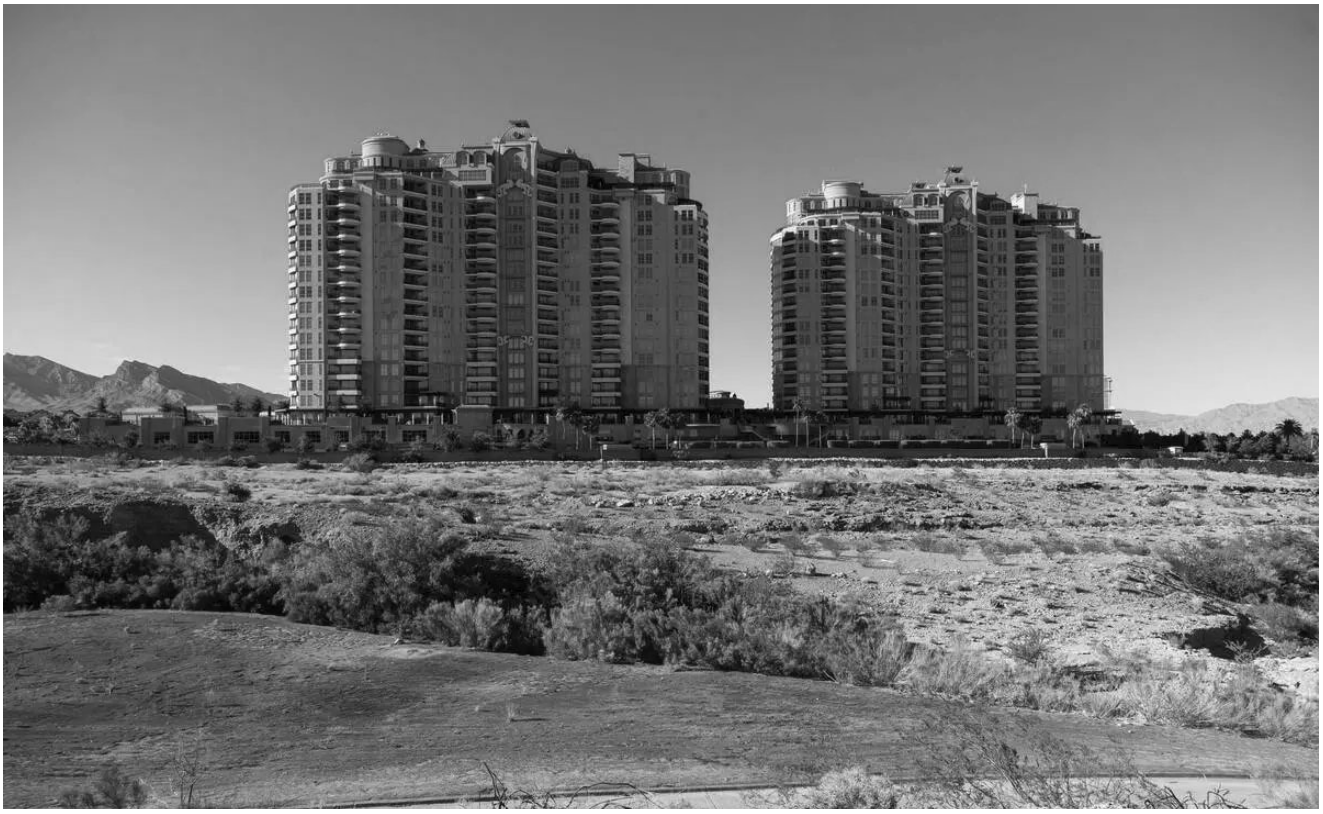
This case, which covers 35 acres and 61 lots, is just one of multiple ongoing Badlands cases that have cost taxpayers millions: $4,060,288.00 to date.

And the dollar figure will only get higher as the next phase of the case determines how much the city has to pay for taking Lowie's land.

We reached out to the City Attorney's office for comment, but they declined, saying "It's the city's practice not to comment on ongoing or pending litigation."

Report a typo

'A win for all landowners': Judge rules Las Vegas took 35 acres on Badlands



The land where the now defunct Badlands Golf Course lies empty on Wednesday, Sept. 29, 2021, in Las Vegas. (Benjamin Hager/Las Vegas Review-Journal) @benjaminhphoto

By Shea Johnson Las Vegas Review-Journal

September 29, 2021 - 1:42 pm

Updated September 30, 2021 - 12:13 am

A Clark County District Court judge has agreed with the developer behind stalled housing plans on the defunct Badlands Golf Club course near Summerlin who claimed that interference by Las Vegas officials made land impossible to develop.

Judge Timothy Williams ruled on Tuesday in favor of developer EHB Cos., which alleged that city actions were tantamount to the city taking the

company's 35-acre parcel near the intersection of Hualapai Way and Alta Drive, court records show.

In recent years, the Las Vegas City Council has held or rejected plans to build homes on the closed golf course except for a 435-condominium project on 17 acres that has not moved forward. EHB has contended that lengthy delays and denials were unnecessary and aimed at preserving the private land's use for the surrounding public.

Efforts to develop the golf course began after EHB purchased the land in 2015. During marathon hearings that followed, lawmakers expressed distaste for piecemeal development. Plans were also opposed by a coalition of residents in the upscale Queensridge neighborhood, which the course weaves through, citing fears of high density and diminishing property values.

"This has been a four-year battle that has taken all of our resources," said Vickie DeHart, a principal with EHB, in a statement. "Fighting the government and politically connected people who threatened to take our land early on is no easy feat. It is wonderful to see justice prevail and the courts uphold our constitutional rights. A win for us is a win for all landowners."

Three other cases pending

The decision Tuesday from the case brought forth in 2017 marks the second liability ruling in four so-called inverse condemnation cases filed by EHB. It is the first to go its way, although a ruling favorable to the city in December regarding a 65-acre parcel was later reopened and is under review, court records show.

Each case represents a different parcel of the former golf course and each case is in front of a different Clark County District Court judge. But

combined the lawsuits account for the entire 250-acre plot and make the same central allegation: a "categorical taking."

In essence, the developer is arguing that it deserves to be compensated because it claims the city's purported intention to preserve private property for public use has wiped out the economic value of the land.

Attorney Kermitt Waters, one of the lawyers representing EHB in litigation, said Wednesday he believed it was only "a matter of time" before the city would be found liable in the remaining cases following Tuesday's ruling.

Allegations of extortion

The stakes could be high depending on the outcome of the cases. EHB CEO Yohan Lowie previously estimated that the city would be liable for more than $1 billion in damages. In an August rebuttal to the lawsuit in question, city attorneys wrote that a finding against the city "would bring down the entire system of land use regulation in the State of Nevada."

In court filings, city attorneys say the developer knew the land was designated for open space, recreation and parks when it purchased the land six years ago, although EHB insists that residential construction is permitted. City attorneys also noted that the council may exercise discretion on land-use matters, such as when they allowed the scaled-back condominium project.

"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," city attorneys wrote in a court filing.

Lowie, himself, has accused Queensridge residents of trying to extort him.

Item does not exist or is inaccessible.

Damages to be determined

The city declined to comment Wednesday on the ruling in the case, citing its practice of not publicly addressing ongoing or pending litigation. A hearing on readiness for trial to establish damages is scheduled Thursday, according to Waters and court records.

It is one of at least a dozen lawsuits brought forward by EHB in recent years in the protracted and expensive legal battle it has waged against the city. The court fight has cost Las Vegas taxpayers more than $4 million in legal fees and staff expenses as of Sept. 23, according to city-provided figures.

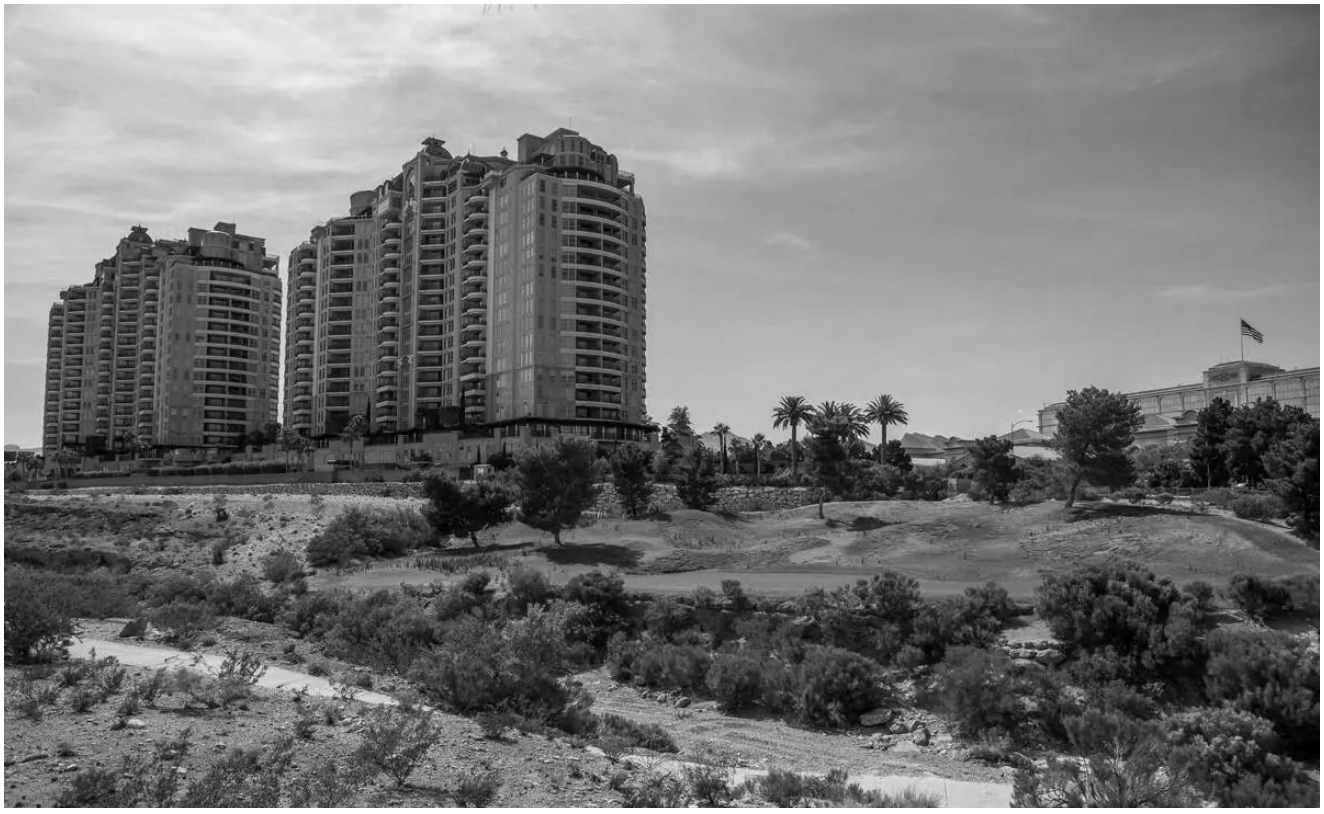
"When I ran for office, I ran with a goal of bringing the City of Las Vegas and the developer together to avoid this eventual day in court," said Las Vegas Councilwoman Victoria Seaman, whose district covers the golf course, in a statement.

Seaman had criticized her predecessor, ex-Councilman Steve Seroka, for representing a "few people in Queensridge" and not taxpayers or the city throughout the dispute. Seaman's candidacy in 2019 was supported by a union and developer-linked company that contributed to a Seaman-backed effort to recall Seroka, who ultimately stepped down amid allegations of sexual harassment.

"While the legal process will linger on, and costs to the taxpayers will continue to mount, my objective has always been to avoid this litigation and work for an amicable resolution," Seaman said. "My position remains the same."

Contact Shea Johnson at sjohnson@reviewjournal.com or 702-383-0272. Follow @Shea_LVRJ on Twitter.

EDITORIAL: Badlands money pit just got deeper



The 250-acre site of a closed golf course is now slated for the development of condos, estate lots and a hotel, photographed on Tuesday, June 6, 2017. Patrick Connolly Las Vegas Review-Journal @PConnPie

Las Vegas Review-Journal
October 2, 2021 - 9:01 pm

The dilapidated Badlands golf course is more than just an unkempt expanse of scruffy land winding its way through the exclusive Queensridge development. It's also a massive money pit for the city of Las Vegas.

On Tuesday, a District Court judge added to the city's misery by siding with a developer in a long-running dispute involving the property. It was an unsurprising decision in the face of the city's hubris and exposes city taxpayers to millions in liability. It's also a cautionary tale for elected officials and bureaucrats who believe that zoning codes give them virtually unlimited powers to dictate how private land owners use their property.

The case at hand involved EHB Cos., a development outfit that bought the 35-acre parcel south of Alta between Hualapai and Rampart in 2015 with an eye on building residential homes on the golf course, which had gone belly-up two years earlier. The plan angered several homeowners in the surrounding Queensridge community who felt it would devalue their residences. City officials initially OK'd the project, but well-heeled homeowners living nearby fought the approval and won in District Court. The Nevada Supreme Court last year overturned that decision.

But in 2017, a newly constituted City Council rescinded the initial go-ahead and began erecting barriers to the EHB development, triggering more lawsuits. The council even passed a narrowly tailored ordinance essentially outlawing residential development on old golf courses. City taxpayers have paid the price, shelling out more than $4 million for litigation.

In fact, the land was zoned for residential development from the get-go and the city had little legal basis to deny EHB's plans. Former City Councilman Bob Beers, who represented the area in question, likely lost his seat in 2017 for defending the developers. He warned time and again that city officials were putting taxpayers at risk by ignoring their obligations.

"After an exhaustive review of historical records and the law," Mr. Beers wrote in a 2019 Review-Journal op-ed on the property, "both the city attorney and the Planning Department agreed that the land was still zoned residential from the last action the City Council took. Yes, it was 20 years ago and all of the council members at that time are no longer serving. But zoning, once granted, doesn't change."

Had the city listened to Mr. Beers, it wouldn't be in this mess. Instead, attorneys representing the city were reduced to arguing that EHB's lawsuit seeking compensation for the city's obstructionism was an attempt to "extort hundreds of millions of dollars from taxpayers."

The courts weren't buying that malarkey. On Tuesday, District Judge Timothy Williams held that EHB had a legitimate Fifth Amendment claim against the city for its overzealous attempt to restrict development on the Badlands property. "I think under the vast facts and circumstances," the judge said, "It's pretty clear that we had a taking."

The next step in the saga could be a hearing to determine how big a hit city taxpayers will take thanks to their misguided representatives. The city may have an appeal in mind, but that would be a colossal waste. At this point, the City Council needs to minimize the damage and do what it should have done years ago: See what EHB will accept to make this whole fiasco go away.

And in the future, when city officials may be tempted to flex their regulatory muscle against an unpopular property owner, perhaps they'll remember the high costs of arbitrarily and capriciously denying owners the economic use of their property.

Las Vegas City Council votes to appeal Badlands ruling to Supreme Court

The land where the now defunct Badlands Golf Course lies empty on Wednesday, Sept. 29, 2021, in Las Vegas. (Benjamin Hager/Las Vegas Review-Journal) @benjaminhphoto

By Shea Johnson Las Vegas Review-Journal

October 6, 2021 - 11:27 am

Updated October 6, 2021 - 6:19 pm

Las Vegas city officials will contest a recent court ruling in a long-stewing clash with the owner of the former Badlands Golf Club, seeking to curtail the liability to city taxpayers who have already footed the bill for millions of dollars in legal fees.

Clark County District Court Judge Timothy Williams ruled Sept. 28 in favor of EHB Cos., which accused the city of "taking" 35 acres through actions that made the developer's land impossible to develop.

The council voted 6-1 on Wednesday to appeal to the Nevada Supreme Court.

EHB had proposed housing plans on the defunct golf course near Summerlin and later sued the city in 2017 after contending that lengthy delays and denials from City Hall were unnecessary and aimed at preserving the private land's use for the surrounding public.

The city attorney's office said it believed the lower court ruling to be "legally improper."

Councilwoman Victoria Seaman, who represents the district where the expensive land-use battle has been waged, called upon the city to once more reach out to the developer before filing its appeal.

"The city council has an opportunity to correct the mistakes of the past councils," she said.

Seaman has pressed for settling the dispute since running for office in a special election more than two years ago. She noted that taxpayers could end up paying for a government taking.

"The recent court ruling has put that reality more into focus today," she said.

Seaman also sponsored city-approved bills that scrapped and replaced stringent rules on developing golf courses and open spaces in January 2020, saying they eliminated burdensome regulations but maintained government oversight.

City lawmakers have frequently approved spending more money to fight at least a dozen Badlands-related cases in court. Seaman has often paired her reluctant "yes" votes with calls for resolution, although any agreement outside of court to stop the bleeding appears unlikely. EHB CEO Yohan Lowie

told the Las Vegas Review-Journal last year that "we don't trust the city one bit."

"I must vote for the appeal because I work for the city taxpayers and at this point I believe that we have to continue on," Seaman said Wednesday.

'This has to stop'

Las Vegas has paid more than $4 million in legal fees and staff expenses on Badlands litigation since fiscal year 2015, according to city-provided figures. Councilwoman Michele Fiore, the lone dissenter on appealing the recent court ruling, claimed the real number is about $10 million.

"This has to stop and unfortunately past councils have made political mistakes, and it has cost the taxpayers millions and it's going to continue costing taxpayers millions," she said. "So I am not in support to continue this battle. I am in support in making the city whole."

The court case in question is only one of four similar so-called inverse condemnation cases filed by EHB, with each representing a different parcel adding up to 250 acres for the full golf course plot. The other three lawsuits remain pending. A favorable ruling to the city in December regarding a 65-acre parcel was later reopened.

It is not clear how much the city could be ordered to pay if it were to lose the other cases, and if the recent ruling is not overturned, but Seaman said she has heard projections in the hundreds of millions of dollars. Lowie said last year he believed the city would be liable for more than $1 billion.

Contact Shea Johnson at sjohnson@reviewjournal.com or 702-383-0272. Follow @Shea_LVRJ on Twitter.

INSURANCE JOURNAL

View this article online: https://www.insurancejournal.com/news/west/2021/11/01/640060.htm

Vegas Owes Builder $34M in Golf Course Dispute

A Nevada court judge has ordered the city of Las Vegas to pay about $34 million to a developer who has tried for years to build homes on a vacant former golf course in northwest Las Vegas.

Clark County District Court Judge Timothy Williams previously found the city liable for blocking development of the former Badlands Golf Club course by 180 Land Co. LLC, a company belonging to developer EHB Cos.

The Las Vegas Review-Journal reported the city could be on the hook for much more.

The civil judgment involves a nearly 35-acre parcel, in just one of four lawsuits related to large slices of the disputed 250 acres including the golf course. It does not count attorney fees.

Similar lawsuits are pending before different judges over developers' plans for parcels totaling 133 acres , 65 acres and 17 acres.

EHB sought to build homes after buying the property in 2015 south of the Summerlin Parkway near the upscale Queensridge neighborhood.

Almost all development plans stalled at City Hall in disputes about whether zoning rules prohibit housing and allow only open-space projects. Lawsuits were filed in 2017 and 2018.

City Councilwoman Victoria Seaman represents the district where the property is located. She ran a special election campaign in 2019 that largely centered on her vow to settle the dispute to protect taxpayers.

Seaman told the Review-Journal on Friday that continued litigation is wasting taxpayer money and that the city should reach an agreement with the developer.

The City Council voted this month to appeal Williams' ruling. City officials declined to comment about the judgment, citing a practice of not speaking publicly about litigation.

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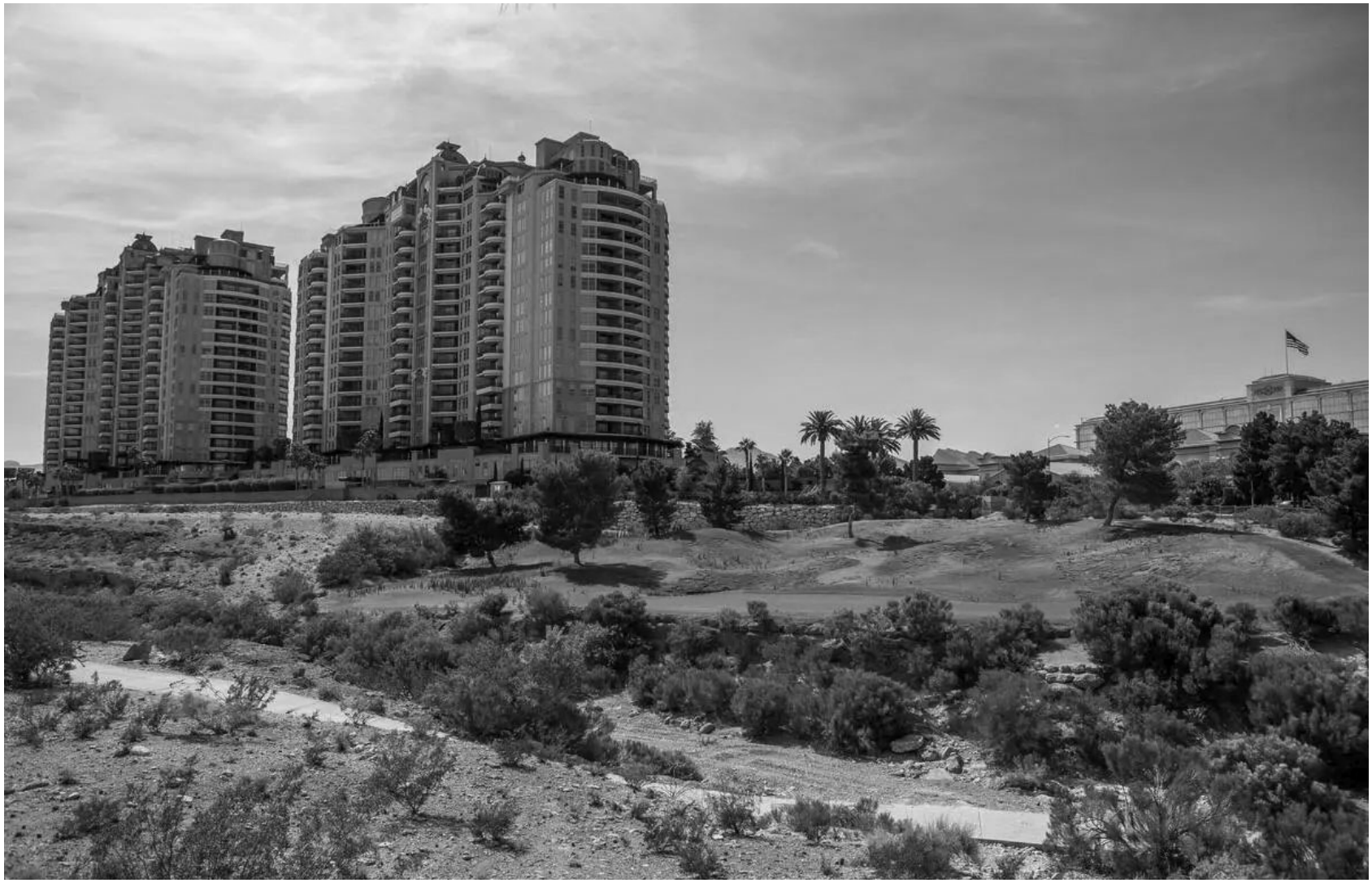
EDITORIAL: Time for city to end the Badlands debacle



The 250-acre site of a closed golf course is now slated for the development of condos, estate lots and a hotel. Patrick Connolly Las Vegas Review-Journal @PConnPie

Las Vegas Review-Journal

November 4, 2021 - 9:00 pm

Brochures for the Problem Gamblers Helpline — slogan: When the fun stops — are available at many Las Vegas gaming establishments. Perhaps a few pamphlets should also be distributed to City Council members, who seem intent on going all in with a losing hand in their reckless showdown with a local developer.

Last week, a Clark County judge ordered the city to pay $34.1 million to EHB Cos., which for six years has been trying to develop the abandoned Badlands golf course on the west side. Residents of the surrounding upscale Queensridge community opposed the plan and convinced a majority of the City Council to block the proposal even though the land was zoned for residential development.

That led to numerous lawsuits.

In September, District Judge Timothy Williams determined that the city had indeed committed a taking under the Fifth Amendment by refusing to let the developer make use of 35 acres on the now dilapidated golf course. Last week's $34 million award was determined to be "just compensation." Three other related legal filings — each dealing separately with parcels of 133, 65 and 17 acres — remain unresolved.

Do the math. If the remaining 215 acres are valued similarly, the city — read: local taxpayers — could be on the hook for another $209 million, making the total payout $243 million, not including the legal fees the city has expended to fight this futile battle.

This dispute should have been resolved long ago. The city had little legal basis to abuse its regulatory authority to deny the Badlands makeover. Yet the council last month voted to appeal Judge Williams' ruling. Apparently, those 10-spot keno wagers don't seem like such a reach when you're playing with other people's money.

But the Williams ruling, along with the seven-figure judgment, should bring council members to their senses. Stop gambling with money collected from city taxpayers and cut a deal with EHB Cos. "We are wasting taxpayer money," said Councilwoman Victoria Seaman, who represents the district that includes Badlands, "and it is time to come to the table, no matter what happened in the past, and make it right."

She's correct. Yes, the makeup of the council has changed somewhat from when the dispute began. But it's well past time that this council took seriously the potential taxpayer liability here and moved to minimize the damage. The alternative is to roll the dice with their political futures.

Las Vegas to appeal $34M judgment in Badlands ruling

Las Vegas to appeal $34M judgment in Badlands ruling

By Shea Johnson Las Vegas Review-Journal

November 17, 2021 - 10:06 am

The Las Vegas City Council voted on Wednesday to appeal to the state Supreme Court a $34 million judgment against the city after it was found liable for "taking" a nearly 35-acre parcel on the defunct Badlands Golf Club course.

District Court Judge Timothy Williams, who found the city liable for the so-called government taking in late September, awarded the multimillion dollar judgment late last month to 180 Land Co. LLC., a company belonging to developer EHB Cos.

City lawmakers previously voted to appeal Williams' liability ruling, with the city attorney's office finding it to be "legally improper." It is the same justification that led the council on Wednesday to appeal the monetary judgment too, a move that was expected.

EHB had sought to construct housing on the closed golf course after its 2015 purchase of the 250-acre plot winding through the upscale Queensridge neighborhood near Summerlin.

But after nearly all of its plans stalled in City Hall, it accused the city of illegally interfering with development to the point that it made the land impossible to build upon and wiped out its economic value.

Government-taking cases that involve parcels of 133, 65 and 17 acres remain undecided, raising concerns that the damages to city taxpayers may significantly grow.

"I, along with the Las Vegas taxpayers, are getting more frustrated by the day," Councilwoman Victoria Seaman said.

"We must get this settled once and for all."

Seaman sought assurances that the city was involved in active negotiations with the developer.

City Manager Jorge Cervantes said the city met with EHB Cos. representatives two weeks ago, noting that "those conversations are ongoing."

The city has spent more than $4 million defending itself in at least a dozen lawsuits and in staff expenses related to the politically charged Badlands dispute since fiscal year 2015, according to city-provided figures.

Councilwoman Michele Fiore, the lone dissenter to both appeals, has claimed the real costs are about $10 million.

Contact Shea Johnson at sjohnson@reviewjournal.com or 702-383-0272. Follow @Shea_LVRJ on Twitter.

13 INVESTIGATES

First financial verdict dealt to City of Las Vegas in years-long Badlands battle

Judge awards $34 million to developer

KTNV LAS VEGAS

The first financial verdict has been dealt to the City of Las Vegas in its ongoing battle over the Badlands golf course, and as it's a big one: $34 million. 13 Investigates' Darcy Spears has been on top of this long-running legal fight and as she reports, this is just the beginning.

By: Darcy Spears

Posted at 11:47 PM, Oct 28, 2021 and last updated 12:04 AM, Oct 29, 2021

LAS VEGAS (KTNV) — $1 million an acre. That's what a judge awarded the developer for one parcel of land on the vast Badlands golf course.

Land the judge ruled the City of Las Vegas took illegally. Now, we're all paying for it.

The Badlands golf course, now a wasteland, was supposed to have been converted to luxury homes years ago. Developer Yohan Lowie owns it. It's zoned for residential development.

But, the city essentially seized it by blocking development plans.

As a result, it's been locked up in a court battle for five years. But as of Thursday, there's light at the end of the tunnel.

"It's been a long road, so we were really happy that justice prevailed over politics," said Elizabeth Ghanem, an attorney for the developer. "We always knew we had the law on our side, so it was nice to see the court's

RELATED: **Battle over Badlands reaches boiling point**

The politics behind the city's battle involves a handful of wealthy Queensbridge homeowners who didn't want development on the shuttered golf course behind their homes. Some have since sold their mansions and moved, but the battle rages on.

"It was a nice decision from the court to sort of lay out in more detail what the city's actions were and to confirm that we've always had rights," Ghanem said.

The judge's ruling involves the parcel of land at the southeast corner of Alta drive and Hualapai way.

Judge Tim Williams said the City of Las Vegas prevented the legally permitted use of the property and required the property to remain vacant. Due to the government's unlawful taking of the land, he ruled the city must pay $34,135,000.

"The judgment we received from the court is just the beginning," said Ghanem. "There will be costs associated with that and interest starting from the date of value, so we expect that amount to be substantial on top of the judgment."

PREVIOUS: **Taxpayers will continue to foot multi-million-dollar bill as city votes to appeal Badlands ruling**

KTNV LAS VEGAS

> *13 Chief Investigator Darcy Spears: "A lot of people ask us, 'What's going to happen with that land? What can you tell them and what kind of a message do you want taxpayers to hear from your side of the fence?'*
>
> *Attorney Elizabeth Ghanem: "Well, we're hopeful that this court's decision will encourage the city to come to a final resolution of all matters, which will be beneficial to everyone, including the community."*

The city wouldn't talk about the court ruling, citing its practice of not commenting on ongoing litigation.

Thursday's court ruling covers just one 35-acre parcel on the 250-acre Badlands property. There are three more pending lawsuits on the other parcels, so this may just be the tip of the iceberg.

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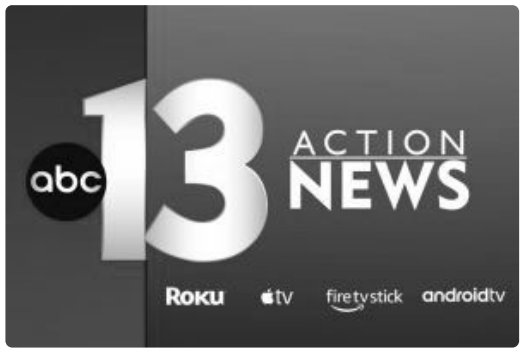

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The Las Vegas Review-Journal reported Friday the city could be on the hook for much more.

The civil judgment involves a nearly 35-acre (14-hectare) parcel, in just one of four lawsuits related to large slices of the disputed 250 acres (101 hectares) including the golf course. It does not count attorney fees.

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Shortening Time 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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Attorneys for City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **NOTICE OF ENTRY OF ORDER SHORTENING TIME RE:** **CITY OF LAS VEGAS' MOTION FOR IMMEDIATE STAY OF JUDGMENT**

PLEASE TAKE NOTICE that the Order Shortening Time was granted and the hearing on the City of Las Vegas' Motion for Immediate Stay of Judgment (the "Motion") before the above-entitled Court is scheduled for January 13, 2022 at 9:30 a.m.

Further, Plaintiffs shall file and serve their opposition to the Motion, if any, on or before January 5, 2022, and Defendants reply brief, if any, shall be filed and served on or before January 11, 2022. A copy of the Order Shortening Time is attached hereto.

DATED this 22nd day of December, 2021.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 22nd day of December, 2021, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER SHORTENING TIME RE: CITY OF LAS VEGAS' MOTION FOR IMMEDIATE STAY OF 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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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 **MOTION FOR IMMEDIATE STAY OF JUDGMENT** **(HEARING REQUESTED ON ORDER SHORTENING TIME)** **OST Hearing Date:** **OST Hearing Time:**

Under Rules 62(b)(3) and (4), 62(d) and 62(e) of the Nevada Rules of Civil Procedure, Nevada Rule of Appellate Procedure 8, and EDCR 2.26, the City of Las Vegas respectfully moves the Court for an immediate stay of the Findings of Fact and Conclusions of Law on Just Compensation of this Court ("Judgment") awarding Plaintiffs $34,135,000 in damages and potentially interest on the damage award, costs, attorneys' fees, and property taxes, pending a final resolution of the City's Motion to Amend Judgment ("Motion to Amend") and its appeal of the

Judgment to the Nevada Supreme Court.[1] The Court filed the Judgment on November 18, 2021, and Plaintiffs 180 Land Co LLC and Fore Stars Ltd (the "Developer") filed the Notice of Entry of Order of the Judgment on November 24, 2021.

In addition to issuing an immediate stay of the Judgment, the City requests that the Court issue an immediate stay of the following decisions of the Court:

1. Findings of Fact and Conclusions of Law Regarding Plaintiff Landowner's Motion to Determine "Property Interest" filed October 12, 2020;
2. Findings of Fact and Conclusions of Law Granting Plaintiff Landowner's Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief and Denying the City of Las Vegas' Countermotion for Summary Judgment on the Second Claim for Relief filed October 25, 2021; and
3. Decision of the Court filed October 28, 2021.

This motion for an immediate stay is supported by the existing record in this action, the attached Declaration of George F. Ogilvie III, a memorandum of points and authorities, and any oral argument that the Court may allow at the time of the hearing on this Motion.

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[1] Because a motion filed pursuant to NRCP 59(e) tolls the time for the City to file an appeal and allows the Court to maintain jurisdiction over this matter, the City has not filed any notice of appeal at this time. NRAP 4(a)(4). However, the City intends to file a notice of appeal pending the disposition of its Motion to Amend. The notice of appeal will provide a separate basis for an automatic stay without bond. *See* Section I(A), *infra*. Accordingly, the City includes that basis for an automatic stay in the instant Motion.

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ORDER SHORTENING TIME

Upon good cause shown, please take notice that the hearing before the above-entitled Court on the City of Las Vegas' **MOTION FOR IMMEDIATE STAY OF JUDGMENT** is shortened to the ~~_____ day of December, 2021, at ___: _____ __. m.,~~ January 13, 2022 at 9:30 am or as soon thereafter as counsel may be heard.

IT IS FURTHER ORDERED that Plaintiffs shall file and serve their opposition, if any, on or before the ~~_____ day of December, 2021~~ January 5, 2022, and Defendant's reply brief, if any, shall be filed and served on or before the ~~____ day of December, 2021~~ January 11, 2022.

Dated this 22nd day of December, 2021

DISTRICT COURT JUDGE

MH

31B EF5 0A4A 17AE
Timothy C. Williams
District Court Judge

Submitted by:

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III (NV Bar No. 3552)
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DECLARATION OF GEORGE F. OGILVIE III IN SUPPORT OF CITY OF LAS VEGAS' MOTION FOR IMMEDIATE STAY OF JUDGMENT

I, George F. Ogilvie III, declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada, and I am a partner in the law firm of McDonald Carano LLP. I am co-counsel for the City of Las Vegas ("City") in the above-captioned matter. I am over the age of 18 years and a resident of Clark County, Nevada. I make this declaration based upon personal knowledge, except where stated to be upon information and belief, and as to that information, I believe it to be true. If called upon to testify as to the contents of this declaration, I am legally competent to do so in a court of law.

2. I make this declaration in support of the City's Motion for Immediate Stay of Judgment and in support of the City's request for an order shortening the time for a hearing on this motion.

3. On November 21, 2018, the Court filed its Findings of Fact and Conclusions of Law on Petition for Judicial Review denying Plaintiffs' Petition for Judicial Review ("PJR FFCL"), finding, among other things, that (a) zoning does not confer constitutionally protected property interests on property owners to use the property for the use the owner chooses, even if the proposed use is a permitted use in the zoning district, (b) Nevada cities have discretion to disapprove or condition an owner's proposed use of property even if the proposed use is a permitted use in the zoning district, (c) single or multi-family housing is not permitted in the Badlands because the Badlands was designated PR-OS in the City's General Plan on the date Plaintiffs purchased the Badlands, and the Badlands is currently designated PR-OS, (d) the City Council has discretion to change the General Plan designation of the Badlands or leave the designation in place.

4. On October 12, 2020, the Court filed its Findings of Fact and Conclusions of Law Regarding Plaintiff Landowner's Motion to Determine "Property Interest" ("FFCL re Property Interest") finding, among other things, that (a) zoning confers constitutionally protected property interests on property owners to use the property for any use the owner chooses as long as the use is a permitted use in the zoning district; (b) Nevada cities have no discretion to disapprove or condition the owner's proposed use as long as the use is a permitted use in the zoning district; (c) single and

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multi-family housing are the only permitted uses in an R-PD7 zoning district; (d) because the Badlands is zoned R-PD7, single and multi-family housing are the only permitted uses in the Badlands; (e) the General Plan designation of property cannot prevent the owner from using its property for any use permitted by zoning.

5. On October 25, 2021, the Court filed its Findings of Fact and Conclusions of Law Granting Plaintiff Landowner's Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief and Denying the City of Las Vegas' Countermotion for Summary Judgment on the Second Claim for Relief ("FFCL re Take"), finding, among other things, that (a) despite the City's denial of only one set of applications to develop the individual 35-Acre Property ("35-Acre Application"), the City has made a final decision that the City will never allow any development of structures on the 35-Acre Property; (b) because the City denied one set of applications filed by the Developer to construct 61 housing units on the 35-Acre Property, the City is liable for a taking of the 35-Acre Property, despite the Court's earlier conclusions of law that (i) the 35-Acre Property is designated PR-OS in the City's General Plan, which does not permit residential use, (ii) the R-PD7 zoning of the Badlands does not confer a property right to develop the property, and (iii) even if zoning conferred property rights and the zoning were inconsistent with the General Plan designation of the property, the PR-OS designation is superior to zoning and controls the allowable use of the 35-Acre Property; (c) the City's Bill 2018-24 effected a physical taking of the 35-Acre Property despite the fact that that legislation did not apply to the 35-Acre Property on its face and the City never applied the legislation to the 35-Acre Property; and (d) the City is liable for a nonregulatory taking despite the Court's failure to identify any nonregulatory action of the City that wiped out all use or value of the 35-Acre Property to the Developer.

6. On October 28, 2021, the Court filed its Decision of the Court ("Decision") finding that the City must pay the Developer $34,135,000 as just compensation for the City's alleged taking of the 35-Acre Property.

7. On November 13, 2021, the Court filed its Order Granting Plaintiffs' Motions in Limine No. 1, 2 and 3 Precluding the City From Presenting to the Jury: 1. Any Evidence or Reference to the Purchase Price of the Land; 2. Any Evidence or Reference to Source of Funds; 3.

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Argument that the Land was Dedicated as Open Space/City's PRMP and PROS Argument ("MIL Order"). Among other things, the MIL Order excluded all evidence that (a) the Developer purchased the entire 250-acre Badlands for less than $4.5 million in an arms-length open market transaction in March 2015, and thus a 35-Acre portion of the Badlands could not possibly be worth $34,135,000 in June 2017 when the City denied the Developer's one set of applications to build 61 housing units on the 35-Acre Property; (b) by the Developer's own evidence, the City's approval of construction of 435 luxury housing units on a 17-Acre portion of the Badlands increased the value of the 17-Acre Property alone to more than $26 million, and the Developer still has 233 acres of the Badlands to use for development, parks, recreation, or open space; (c) at the times the Developer purchased the Badlands and applied to construct 61 housing units on the 35-Acre Property, the Badlands was designated PR-OS in the City's General Plan, which did not permit residential development, and therefore the highest and best use of the Badlands was not residential, as the Developer's appraiser concluded, but rather uses allowed by the PR-OS designation; and (d) because the highest and best use of the 35-Acre Property was PR-OS at the time the City denied the Developer's application, the City's denial of the application did not change the use or value of the Badlands and the Developer suffered no damage as a result of the City's actions.

8. On November 18, 2021, the Court filed its Findings of Fact and Conclusions of Law on Just Compensation ("Judgment") awarding Plaintiffs damages of $34,135,000 for the City's alleged taking of the 35-Acre Property despite excluding the City's evidence that the Developer purchased the entire 250-acre Badlands for less than $4.5 million, and allowing briefing on and reserving its decision on Plaintiffs' claim for attorneys' fees, costs, prejudgment interest, and property taxes.

9. On November 10, 2021, in *180 Land Co. LLC, Fore Stars, Ltd. v. City of Las Vegas*, Eighth Judicial Dist. Ct. Case No. A-18-780184-C ("65-Acre case"), the Developer filed "Plaintiff Landowners' Motion on Order Shortening Time To: 1) Apply Issue Preclusion to the Property Interest Issue [FFCL re Property Interest]; and 2) Set a Short Hearing to Allow the Court to Consider: a) Judge Williams' Findings of Fact and Conclusions of Law on the Take Issue [FFCL re Take]; b) Evidence that was Presented in the 35 Acre Case on the Take Issue; and, c) Very Recent

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Nevada and United States Supreme Court Precedent on the Take Issue" ("65-Acre Issue Preclusion Motion"). *See* City's Supp. App. Vol. 20 filed 10/13/21, Exhibit WWWW. The Developer's 65-Acre Issue Preclusion Motion contended that this Court's FFCL re Property Interest, FFCL re Take, and Decision mandate that Judge Trujillo deny the City's motion for summary judgment now under submission in the 65-Acre case and, by implication, enter other rulings consistent with the FFCL re Property Interest, FFCL re Take, and Decision, on the grounds that those decisions would have preclusive effect on all issues in common in the 35-Acre and 65-Acre cases.

10. On November 15, 2021, in *Fore Stars, Ltd. v. City of Las Vegas*, Eighth Judicial Dist. Ct. Case No. A-18-773268-C ("17-Acre case"), the Developer filed its Supplement to Plaintiff Landowners' Opposition to City's Motion for Summary Judgment and Countermotion for Discovery Pursuant to NRCP 56(d) ("17-Acre Issue Preclusion Motion"). *See* City's Supp. App. Vol. 24 filed 12/20/21, Exhibit CCCCC. The 17-Acre Issue Preclusion Motion contends that Judge Jones should deny, on the basis of issue preclusion, the City's motion for summary judgment that is now under submission in the 17-Acre case, allow the Developer discovery, and, by implication, enter other rulings consistent with the FFCL re Property Interest, FFCL re Take, and Decision in the 17-Acre case on the grounds that those decisions would have preclusive effect on all issues in common in the 35-Acre and 17-Acre cases.

11. The following media articles, copies of which are attached hereto as **Exhibit A**,[2] alerted the public, property owners, and real estate developers in Nevada to the Judgment:

a. September 29, 2021 Las Vegas Review-Journal, "Judge rules Las Vegas took 35 acres on Badlands."

b. September 30, 2021, KNTV "City of Las Vegas suffers another defeat in battle over Badlands: Taxpayers shelling out millions for losing battle."

c. October 5, 2021, Las Vegas Review-Journal, "A win for all landowners': Judge rules Las Vegas took 35 acres on Badlands."

[2] Exhibit A is the only exhibit attached to this motion. All other exhibit references contained herein refer to the City's appendix of exhibits on file with the Court.

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d. October 5, 2021, Editorial in Las Vegas Review-Journal, "Badlands money pit just got deeper."

e. October 6, 2021, Las Vegas Review-Journal, "Las Vegas to appeal Badlands ruling."

f. November 1, 2021, Insurance Journal, "Vegas Owes Builder $34M in Golf Course Dispute" which stated: "Almost all development plans stalled at City Hall in disputes about whether zoning rules prohibit housing and allow only open-space projects."

g. November 30, 2021, Las Vegas Register-Journal, "Time for City to end the Badlands debacle" which stated that "Judge Williams ordered the City to pay $34.1 million for denying the Developer's application to develop the 35-Acre Property with housing 'even though the land was zoned for residential development.'"

h. November 30, 2021, Las Vegas Register-Journal, "Las Vegas to appeal $34M judgment in Badlands ruling" which stated: "[The Developer] accused the City of illegally interfering with development to the point that it made the land impossible to build upon and wiped out its economic value."

i. December 1, 2021, KTNV "First financial verdict dealt to City of Las Vegas in years-long Badlands battle" which stated: "Judge Tim Williams said the City of Las Vegas prevented the legally permitted use of the property . . . ."

j. December 1, 2021, AP News, "Judge rules Vegas owes builder $34M in golf course dispute" which stated: "[The dispute is] about whether zoning rules prohibit housing and allow only open-space projects."

12. At a public session of the Las Vegas City Council on October 6, 2021, members of the City Council explained their understanding that the City is liable for a taking of the 35-Acre Property because the Developer had a legal right to build residences insofar as that use is permitted by the zoning of the property. *See* City's Supp. Appendix of Exhibits Vol. 20 filed 10/13/21, Exhibit YYYY.

13. The City contends that the Court's FFCL re Property Interest, and FFCL re Take, and Judgment are contradicted by all Nevada and federal authority, and it intends to file a notice of

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appeal and respectfully requests that this Court stay enforcement of the Judgment while the appeal is pending before the Nevada Supreme Court.

14. Consistent with standard practice, I am serving a courtesy copy of the motion to stay and the proposed order shortening time on Plaintiffs' counsel at the same time I submit the documents to the Court for signature.

15. Once I receive the signed Order Shortening Time, I will promptly file the same and the motion to stay through the Court's electronic filing system.

I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

DATED this 21st day of December, 2021.

/s/ George F. Ogilvie III
George F. Ogilvie III

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

The City of Las Vegas moves on shortened time for an emergency stay of enforcement of the Judgment pending the disposition of its Motion to Amend and the disposition of the City's appeal, which the City will file after the resolution of the Motion to Amend. Under NRCP 62(b)(3) and (4), the City is entitled to a stay pending the disposition of its Motion to Amend. In addition, the City is entitled to a stay pending appeal as a matter of right, without posting a supersedeas bond under NRCP 62(d) and 62(e). Alternatively, a stay is warranted under the NRAP 8(c) factors.

In ruling that the City has "taken" the 35-Acre Property by denying a single set of applications to build 61 houses on the property, the Court has held that (1) the zoning of property confers a constitutionally protected property right in the owner to build whatever the owner desires as long as the use is permitted under the zoning; (2) the government has no discretion to deny or condition approval of a development application; and (3) Master Plans (General Plans) are irrelevant to any development application. In issuing these unprecedented rulings, the Court has found unconstitutional virtually the entire land use regulatory scheme in Nevada, which requires cities to adopt General Plans governing the legal use of property and confers broad discretion on

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cities to apply General Plan designations and zoning ordinances in reviewing land use permit applications. *See* NRS 278.010–278.630; *see e.g.*, NRS 278.150(1) ("The planning commission shall prepare and adopt a . . . general plan for the physical development of the city . . . which *in the commission's judgment* bears relation to the planning . . . for the development of the city.") (emphasis added); NRS 278.250(2) ("The zoning regulations *must* be adopted in accordance with the master plan for land use and be designed: . . . (b) To promote the conservation of open space . . . (k) To promote health and the general welfare.") (emphasis added); NRS 278.250(4) ("In exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate . . . .").

The Court's ruling also invalidates the City's General Plan and Las Vegas Municipal Code (Unified Development Code ("UDC")) sections 19.10-19.18 and Appendices, under which the City exercises the discretionary powers granted by state law to process land use applications. The UDC requires that, unless otherwise authorized by the UDC, all development approvals must be "consistent with the spirit and intent of the General Plan." UDC 19.16.010.A. The UDC also explains, for example, that the purpose of the review of Site Development Plans is to ensure that proposed development is compatible with nearby development and the General Plan. UDC 19.16.100.E. The City's discretion in reviewing these plans is emphasized by the fact that the UDC provides that the reviewing body may attach "to the amendment to an approved Site Development Plan Review whatever conditions are deemed necessary to ensure the proper amenities and to assure that the proposed development will be compatible" with nearby development. UDC 19.10.050.D. Similarly, the General Plan's Land Use Element states that "any zoning or rezoning or rezoning request must be in substantial agreement with the Master Plan . . . ." Ex. AAAA at 1435 . . . The Court's decision turns this extensive body of property and land use law on its head.

In reaching the sweeping conclusion that local agencies no longer have discretion in the approval of land use permit applications, the Court has disregarded decades of unanimous Nevada Supreme Court authority to the contrary. *See*, *e.g.*, *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527, 96 P.3d 756, 759-60 (2004) (holding that because City of Las Vegas' site development review process [the same process at issue in this case] involved discretionary action

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by the City Council, the project proponent had no vested right to construct); *Boulder City v. Cinnamon Hills Assocs*., 110 Nev. 238, 246, 871 P.2d 320, 325 (1994) ("The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest."). Indeed, if property owners have a constitutionally protected property right to approval of any application for development they choose the file, the three Nevada Supreme Court decisions adjudicating regulatory takings claim based on denial of a land use development application, all of which find no taking, would have reached the opposite conclusion. *See State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993); *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35. These cases, ignored in the Court's rulings, do not even remotely recognize a constitutional right to build conferred by zoning. They stand for the opposite proposition.

This Court's rulings also ignore a Nevada Supreme Court decision in, *Seventy Acres, LLC v. Jack B. Binion, et al.*, NSC Case No. 75481, a related case finding that to develop housing in the Badlands, an owner must first obtain the City's discretionary approval of an amendment to the General Plan. The Badlands has been designated Parks/Recreation/Open Space ("PR-OS") by ordinance in the City's General Plan since 1992 and was so designated in 2015 when the Developer bought the Badlands. Exs. I, M, N, P, Q. The PR-OS designation does not permit housing. In reinstating the City's approval of 435 luxury housing units for the 17-Acre Property, the Nevada Supreme Court stated that "[t]he governing ordinances require the City to make specific findings to approve a general plan amendment, LVMC 19.16.030(1)," among other applications. Ex. DDD at 1014. In so finding, the Supreme Court necessarily acknowledged both the validity of the PR-OS designation *and* the City's discretion to change it or retain it.

Ignoring authorities directly on point, this Court's rulings rely instead on cases that do not even address the issue. *E.g*., *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645 (2006); *City of Las Vegas v. Bustos*, 119 Nev. 360 (2003). Moreover, the Court's recent rulings directly contradict its earlier decision in this case that: (a) "[a] zoning designation does not give the developer a vested right to have its development applications approved"; (b) the PR-OS General Plan designation is

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valid and bars residential use of the Badlands, regardless of the zoning; and (c) the City has discretion to amend the PR-OS designation. Ex. XXX at 1385-86. In particular, in its PJR FFCL, this Court stated that the City Council's decision to grant or deny a general plan amendment application was a discretionary act. *Id.* The Court stated that the City Council was "well within" its discretion to determine that the Developer did not meet the criteria for a General Plan Amendment, regardless of the property's zoning designation.

This Court also found, as a matter of law, that the PR-OS designation governed the permissible uses of the 35-Acre Property, regardless of the zoning, necessarily rejecting the notion that zoning confers rights to build. *Id.* at 1392-94. The Court stated, "no matter the zoning designation," the applications for a general plan amendment were "subject to the Council's discretionary decision making." *Id.* The Court further found that the Developer had purchased the Badlands "knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS)," and that it was up to the Council to decide whether a change in the area or conditions justified the Developer's requested development. *Id.*

The Court's decision is also contrary to the conclusions reached by Judges Sturman and Herndon in the 133-Acre and 65-Acre cases that zoning does not confer any right to build. City's Supp. App. Vol. 21-22, Ex. ZZZZ at 154 (Judge Sturman: "Now the challenge that we have here is this idea that zoning defines the property rights. . . . zoning defines what you can apply to use your property as, not your absolute right."); *see also id*. at 139-40, 142-49, 155-56, 161-62, 166-67; Ex. CCCC at 1496-97 (Judge Herndon: "Because the right to use land for a particular purpose *is not a fundamental constitutional right*, courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use.") (emphasis added).[3]

[3] The 133-Acre case before Judge Sturman is *180 Land Co. LLC, Fore Stars, Ltd., Seventy Acres, LLC v. City of Las Vegas*, Eighth Judicial Dist. Ct. Case No. A-18-775804-J. In the 65-Acre case, *180 Land Co. LLC, Fore Stars, Ltd. v. City of Las Vegas*, Eighth Judicial Dist. Ct. Case No. A-18-780184-C, Judge Herndon granted summary judgment for the City before he elevated to the Nevada Supreme Court. The 65-Acre case is now before Judge Trujillo. Judge Trujillo reheard the City's motion for summary judgment but has not issued a ruling.

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Before an ordinary appeal of the Court's ruling can be adjudicated by the Nevada Supreme Court, the land use regulatory system in Nevada could be thrown into chaos due to the perceived significance attributed by governing bodies to the Court's conclusions. As an indication of the potential effects of the Court's decision, the Developer contends that the decision is an issue-preclusion bar to a local agency's exercise of discretion to deny or condition its approval of any application to develop property in Nevada, as long as the proposed development is permitted by the zoning. Based on this rationale, property owners could rush to file applications for intensive development of property, contending that if the application is not approved ministerially, the agency is liable for just compensation to the owner. Local agencies would be placed in the difficult position of either approving development that causes irreparable harm to the environment and other community values or facing financial disaster. To avoid this dark scenario, the City requests that the Court stay the Judgment to allow this Court to rule on the pending Motion to Amend and further, to allow the Nevada Supreme Court time to review and correct the Court's Judgment.

The financial component of the Court's Judgment fails to take into account that the Developer paid less than $4.5 million for the entire 250-acre Badlands in 2015 in an arms-length transaction. Accordingly, a 35-Acre portion of the Badlands cannot possibly have a value of $34,135,000 only two years after the Developer's purchased the 250-acre property for $4.5 million, or $630,000 for the 35-Acre Property (4,500,000/250 = $18,000/acre x 35 = $630,000). This Court, however, excluded the City's evidence of the purchase price of the property, despite the fact that it is a perfect comparable sale for the 35-Acre Property. The Judgment should, therefore, be stayed before the City is required to pay the Judgment to allow the Supreme Court time to review the Court's conclusion that the City is required to pay the Developer $34,135,000 for a property that the Developer purchased for $630,000.

The Judgment should also be stayed because it ignores the City's approval of the Developer's applications to build 435 luxury housing units on the 17-Acre Property, which is part of the 250-acre parcel as a whole. In approving the 435-unit project, the City upzoned the Property and lifted the PR-OS restriction to allow 25 housing units per acre. According to Judge Herndon, the City's approval increased the value of the 17-Acre Property alone to more than $26 million. Ex.

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CCCC at 1495. As the City demonstrated, the Developer engaged in the prohibited tactic of segmenting the 250-acre Badlands into four separate development sites and separately suing for a taking on each site. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 641 & n.1, 651, 855 P2d 1027, 1029 & n.1 (1993). In ignoring the parcel as a whole, the Court fails to acknowledge that the Developer has made six times its initial investment in the Badlands on the 17-Acre Property alone, and the Developer also owns the remaining 233 acres with the potential for development or continued use as a park, recreational, and open space amenity.

In sum, if the Judgment stands, the value of 52 acres of the Badlands would be increased from less than $1 million (17 acres + 35 acres x $18,000/acre purchase price = $936,000) to more than $60 million ($26 million for 17-Acre Property + $34 million for 35-Acre Property) in two years, and the Developer would also retain 198 acres of the Badlands for future use. The Judgment is a miscarriage of justice and is likely to be reversed.

Argument

This Court has broad discretion to manage its docket and "control the disposition of the cases with economy of time and effort for itself, for counsel, and for litigants." *Maheu v. Eighth Jud. Dist. Ct.*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)).

I. The City is entitled as a matter of right to a stay of the Judgment's requirement that the City pay damages to the Developer without posting a supersedeas bond, or is alternatively entitled to a stay under the NRAP 8(c) factors.

A. The Judgment should be stayed pending disposition of the Motion to Amend.

Rule 62(b)(3) and (4) of the Nevada Rules of Civil Procedure state that "the court may stay execution on a judgment – or any proceedings to enforce it – pending disposition of any of the following motions: . . .(3) under Rule 59, for a new trial or to alter or amend a judgment; or (4) under Rule 60, for relief from a judgment or order." *See* NRCP 62(b)(3) and (4). On December 21, 2021, the City filed its Motion to Amend under NRCP 59(e) and NRCP 60. Accordingly, the City requests that the Court stay execution of the Judgment pending a ruling on the Motion to Amend. In addition, the City requests that the stay be imposed without posting a bond because the City

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intends to file a notice of appeal of the Judgment immediately after the Court rules on the Motion to Amend and, thus, the City will be entitled to an automatic stay without posting a bond as set forth in NRCP 62(d).

B. The City is entitled to an automatic stay of the money judgment without posting a bond.

The City is entitled to a stay as a matter of right – without posting a supersedeas bond – simply by filing this motion. NRCP 62(d) requires private appellants to file a bond as a prerequisite to a stay of the judgment. Public agencies, however, are exempt from the general rule: "When an appeal is taken by the State or by any county, city or town within the State, or an officer or agency thereof and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant." NRCP 62(e). The Supreme Court requires that NRCP 62(d) and (e) be read conjunctively to give a local government such as the City a right to a stay pending appeal without posting a bond. *Clark Cty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 134 Nev. 174, 177, 415 P.3d 16, 19 (2018). As the Supreme Court explained, "Upon motion, as a secured party, the state or local government is generally entitled to a stay of a money judgment under NRCP 62(d) without posting a supersedeas bond or other security." *Id.* As a result, upon the City's filing of this motion, and because the City intends to file its notice of appeal immediately following the Court's decision on the Motion to Amend, the Court should grant an automatic stay of the Judgment and further order that no bond is required. *See id.*

C. Even if a stay of the money judgment were not automatically warranted, the City is entitled to a stay of the money judgment under the NRAP 8(c) factors.

Even if the Court were to conclude, notwithstanding the foregoing authority, that the City is not entitled to an automatic stay of the money judgment under NRAP 62 (b)(3) and (4) and 62(d) and (e), it should nevertheless find the City is entitled to stay the money judgment pursuant to the NRAP 8(c) factors. In determining whether to stay a judgment pending an appeal, courts consider the following four factors: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether the appellant will suffer irreparable or serious injury if the stay is denied; (3) whether the respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether the appellant is likely to prevail on the appeal. NRAP 8(c)(1)-(4); *Mikohn Gaming Corp. v. McCrea*,

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120 Nev. 248, 251, 89 P.3d 36, 38 (2004). The Nevada Supreme Court has "recognized[d] that if one or two factors are especially strong, they may counterbalance other weak factors." *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38. Applying these factors to the money judgment in this case, the City is entitled to a stay.

1. The object of the City's appeal would be defeated and the City would suffer irreparable harm if the stay were denied.

The City satisfies the first and second factors. The object of the City's appeal is to overturn the judgment finding it liable for a taking and ordering immediate payment of $34 million and perhaps additional money in the form of prejudgment interest, property taxes, attorneys' fees, and costs sought by the Developer (the Developer claims prejudgment interest of $52 million, more than $3 million in attorneys' fees, $1 million in property taxes, and more than $300,000 in costs). If the stay were denied and the City were forced to pay the money judgment, the Developer could spend or allocate the money elsewhere, and the City might never recover it, even if its appeal were successful. *Cf. Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 658, 6 P.3d 982, 987 (2000) (noting that increased litigation expenses alone do not constitute irreparable harm). In such a scenario, the money would be irrevocably lost, and "any victory on appeal will be hollow." *Mikohn*, 120 Nev. at 252, 89 P.3d at 39. The loss of $34 million, and perhaps more for prejudgment interest, etc. from the public treasury, would similarly constitute an irreparable harm to the City. For these reasons, the first and second factors weigh heavily in favor of granting the City a stay.

2. The Developer will not suffer injury if the stay were granted.

The City also satisfies the third factor. Permitting a stay of the money judgment against the City while its appeal is pending will not cause harm to the Developer. Instead, in the event the City's appeal is not successful, the Developer will be entitled to interest on the judgment even while it is stayed under NRS 17.130. As a result, the Developer would be made whole for the delay in payment by the additional interest it will earn on the Judgment.

. . .

. . .

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3. The City is likely to prevail on appeal.

The fourth factor weighs in the City's favor because the City is likely to prevail on appeal. When moving for a stay pending appeal, "a movant does not always have to show a probability of success on the merits," but instead "must 'present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.'" *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (quoting *Ruiz v. Estelle* (5th Cir. 1981) 650 F.2d 555, 565).

a. The Categorical and *Penn Central* claims are devoid of merit

The Developer faces three separate and insurmountable barriers to prevail on its categorical and *Penn Central* taking claims. First, the claims are not ripe. Second, even if deemed ripe, the City did not wipe out or nearly wipe out the value of the 35-Acre Property. Third, even if the City had wiped out the value of the 35-Acre Property, the City allowed substantial development of the parcel as a whole, of which the 35-Acre Property is only one segment, negating a taking.

i. The Categorical and *Penn Central* claims are not ripe

In its categorical and *Penn Central* claims, the Developer alleges that the City excessively regulated the use of the 35-Acre Property. But as Judge Herndon found in the 65-Acre case, the court cannot determine whether the City has "taken" the property unless the City has made a final decision disallowing development that wipes out or nearly wipes out the economic value of the property. Judge Herndon found, in reliance on *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) and *State v. Eighth Jud. Dist. Ct*., 131 Nev. 411, 419-20, 351 P.3d 736, 742 (2015), that the Developer's categorical and *Penn Central* claims were unripe and granted summary judgment to the City because the Developer had not filed and had denied any application to develop the individual 65-Acre Property. Ex. CCCC at 1504-15. Judge Sturman agreed with Judge Herndon's ripeness analysis, concluding that the categorical and *Penn Central* taking claims in the 133-Acre case are unripe because the City never had the chance to rule on the merits of the applications. *See* City's Supp. App. Vol. 21-22, Ex. ZZZZ at 152-53 ("I believe that with respect to the zoning issues that Herndon's analysis of ripeness is correct."); *see also id*. at 128-29, 150, 159.

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Williamson County and all cases following that seminal decision require that a developer file and have denied at least two applications for development before a taking claim is ripe. 473 U.S. at 191; *see* Ex. CCCC at 1504-05 and authorities cited therein (Judge Herndon: "A regulatory takings claim is ripe only when the landowner has filed at least one application that is denied and a second application for a reduced density or a variance that is also denied.") (citing *Williamson County*, 473 at 191). Here, the Developer filed only one set of applications to develop the 35-Acre Property, which the City denied. Under *State*, 131 Nev. at 419-20, 351 P.3d at 742, the Developer's regulation of use taking claims are clearly unripe because it failed to file and have denied at least two applications for development of the property it claims was taken. As the Court noted in *State*, and as noted by Judge Herndon, the Developer must file applications to develop the "property at issue." *Id*. (quoting *Williamson County*, 473 U.S. at 186). Accordingly, applications to develop other segments of the Badlands or to develop property that included not only the 35-Acre Property standing alone but the entire Badlands, such as a Major Development Agreement ("MDA"), are irrelevant to determine final decision ripeness. *See* Ex. CCCC at 1506-07, 1509-12. As Judge Herndon concluded:

> The Court also does not consider the MDA to constitute an initial application to develop the 65-Acre Property for purposes of a final decision because the MDA was not the specific and detailed application required for the City to take final action on a development project. . . . Given the uncertainty in the MDA as to what might be developed on the 65-Acre Property, the Court cannot determine what action the City Council would take on a proposal to develop only the 65-Acre Property. This once again places the court in the untenable position of having to speculate about what the City might have done, said speculation being improper."

Ex. CCCC at 1510-11. Because the Developer filed only one set of applications to develop the individual 35-Acre Property, its taking claims are unripe as a matter of well-established law.

ii. Because the 35-Acre Property was designated PR-OS in the City's General Plan when the Developer bought the Badlands, and PR-OS does not permit residential use, the City did not devalue the property by simply maintaining the status quo

Even if the Developer's taking claims alleging an excessive burden on the owner's use of

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the 35-Acre Property were ripe, the Developer cannot prevail on its regulation of use claims because it cannot meet Nevada's test for a regulatory taking, which requires that the City's action must "completely deprive an owner of all economically beneficial use of her property." *State*, 131 Nev. at 419, 351 P.3d at 741 (internal quotes and citations omitted); *see also Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993) (regulation must deny "all economically viable use of [] property" to constitute a taking under either categorical or *Penn Central* tests); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-35 (1994) (taking requires agency action that "destroy[s] all viable economic value of the prospective development property"). At the time the Developer bought the Badlands, the land could not legally be used for housing under the PR-OS General Plan designation, regardless of the zoning of the property. NRS 278.150 (requiring cities to adopt General Plans that govern land uses); NRS 278.250(2) (zoning "must" be consistent with General Plan); *Am. W. Dev.,* 111 Nev. at 807, 898 P.2d at 111; *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989).

Indeed, UDC 19.00.040 provides:

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

Thus, even if the City had denied two separate applications to develop the property with housing, the City would not have changed the use or value of the 35-Acre Property by declining to lift the PR-OS designation and denying applications to build housing and, therefore, it could not be liable for a taking.

iii. Because the City has permitted substantial development of the parcel as a whole, the taking claims fail

Even if the ripeness analysis were rejected, the City's regulatory actions with respect to the 35-Acre Property must be analyzed in the context of the parcel as a whole, which is either the 1,596-acre Peccole Ranch Master Plan ("PRMP") or the 250-acre Badlands. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017) (requiring a wipeout or near wipeout of the parcel as a whole to find

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liability for a taking); *Kelly*, 109 Nev. at 651, 855 P2d at 1035 (finding that the developer had improperly segmented the property to manufacture a takings claim, and that "Uppaway must be viewed as a whole, not as thirty-nine individual lots" when assessing whether the developer had been deprived of all economic use). The City has permitted substantial development in both the PRMP and the Badlands, negating a taking of the 35-Acre Property that the Developer segmented from the Badlands. Again, Nevada authority is directly on point and requires rejection of the Developer's taking claims of excessive regulation of the Developer's use of the 35-Acre Property.[4]

This Court erred in not recognizing the parcel-as-a-whole doctrine. The Court would not have found a taking if the Developer had not segmented the Badlands into four parts because the City approved 435 luxury units for the Badlands, which is substantial development. Nor would this Court have found a taking of the Badlands if the Developer had bought the entire PRMP from the original landowner and *then* developed thousands of housing units, a hotel, a casino, a retail shopping mall, and a golf course, and the City later denied a request to develop the Badlands, which had been approved as an open space amenity for the PRMP. The fact that, after full buildout of the PRMP the original landowner carved the open space out of the PRMP and sold it to the Developer does not require the City to allow the Developer to eliminate the open space that the City required to be set aside as a condition of approval of the PRMP. Segmentation of the PRMP to attempt to compel the City to approve development is prohibited by all courts that have confronted the issue.

iv. The Developer's theory that zoning confers a right to build housing is contrary to all authority

Ignoring these taking standards, the Developer manufactures a takings test out of thin air by claiming a constitutionally protected property interest in a permit to build 61 housing units on the

[4] Judge Herndon saw through the Developer's segmentation tactic, concluding that: "At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. The Developer transferred 178.27 acres to 180 Land Co. LLC . . . and 70.52 acres to Seventy Acres LLC . . . , leaving Fore Stars with 2.13 acres. Each of these entities is controlled by the Developer's EHB Companies LLC. The Developer then segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands." Ex. CCCC at 1490 (citations to exhibits omitted).

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35-Acre Property. This claim is based on the fact that the property is zoned R-PD7, which merely *permits* residential use, but confers no "rights," constitutional or otherwise. Under regulatory powers delegated by the state, Nevada cities are *required* to exercise discretion to promote the health, safety and general welfare of the public in adopting, amending, and applying General Plans and zoning ordinances. NRS 278.150, NRS 278.250. The R-PD7 zoning ordinance that the Developer falsely claims confers a "right" to develop housing is in fact infused with discretion that is inconsistent with the alleged "right to develop":

> The R-PD District has been to provide for *flexibility and innovation* in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space, . . . Single-family and multi-family residential and supporting uses are permitted in the R-PD District *to the extent they are determined by the Director to be consistent with the density approved for the District and are compatible with surrounding uses*. . . . The approving body may attach to the amendment to an approved Site Development Plan Review *whatever conditions are deemed necessary to ensure the proper amenities and to assure that the proposed development will be compatible with surrounding existing and proposed land uses*.

UDC 19.10.050 (emphasis added).

UDC 19.18.020 defines the term "Permitted Use" as "[a]ny use allowed in a zoning district as a matter of right *if it is conducted in accordance with the restrictions applicable to that district*." (Emphasis added). This broad discretion to approve development generally and, in particular, in an R-PD-7 zoning district, is not compatible with a constitutional right to build whatever the owner wants to build. If the Developer were correct, a vast body of state and local land use regulations conferring discretion on the City would be rendered a nullity.

The Developer fails to cite a single case or statute that remotely supports its theory that the City lacks the discretion to limit the Developer's construction of housing in the Badlands. And the Developer's contention is contrary to all authority. *Stratosphere Gaming v. City of Las Vegas*, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004) (holding that because City's site development review process involved discretionary action by City Council, the project proponent had no vested right to construct); *id*. ("[C]ompatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *City of Reno v. Harris*, 111 Nev. 672, 679, 895 P.2d 663, 667 (1995) ("Once it is established that an area permits several

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uses, it is within the discretion and good judgment of the municipality to determine what specific use should be permitted."); *Boulder City*, 110 Nev. at 246, 871 P.2d at 325 ("The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest."); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992) ("Although the land upon which Von Goerken intended to construct a tavern was zoned to accommodate such a commercial enterprise, it is clear that compatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest."); *Nevada Contractors v. Washoe County*, 106 Nev. 310, 314, 792 P.2d 31 (1990) ("Because of the Board's particular expertise in zoning, the courts must defer to and not interfere with the Board's discretion if this discretion is not abused."); *Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112 ("In order for rights in a proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting project commencement . . . "); *Bd. of Cty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983) (There are no vested rights against changes in zoning laws "unless zoning or use approvals are not subject to further governmental discretionary actions affecting project commencement."). The broad discretion granted to the City to limit the use of property cannot be reconciled with the notion that a property owner has a constitutionally protected "right" to build on their property.

The Developer's attempt to distinguish these authorities on the grounds that they involved adjudication of petitions for judicial review ("PJR") is without merit. A PJR is a procedure and remedy for challenging government decisions that employs the same substantive law as an original claim. There is no separate substantive law of PJRs. *See*, *e.g.*, *Bombardier Transp. (Holdings) USA, Inc. v. Nevada Lab. Comm'r*, 135 Nev. 15, 18, 433 P.3d 248, 252 (2019) (reviewing de novo "statutory interpretation questions in the administrative context"). The cases rejecting the Developer's zoning-grants-property-rights theory are based squarely on the underlying Nevada law of property and land use regulation. These rules apply whether a property owner is challenging a regulation of the use of its property by PJR or by complaint for a regulatory taking. Indeed, it would be an absurd result if the City Council had discretion to deny an application to develop property if

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after the City's denial the applicant then sues for a PJR, but the City Council had no discretion to deny the application if the applicant then sues for a regulatory taking. Moreover, the *Boulder City* case, squarely rejecting the notion that owners have property rights in zoning, was a constitutional challenge to the denial of a permit, not a PJR. 110 Nev. at 246, 871 P.2d at 325.

The Ninth Circuit agrees. In *180 Land Co. LLC v. City of Las Vegas*, Ninth Circuit Case No. 19-16114, a case involving the same parties and legal issue, the Developer alleged that it has "vested zoning rights to develop residential units on the [Badlands]." Ex. HHH at 1037. The Ninth Circuit rejected that claim, finding the Developer had no such right under Nevada property law:

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

Ex. III at 1125-26. Like *Boulder City*, the *180 Land* case involved a constitutional challenge to a denial of a building permit, not a PJR. These authorities are directly on point and require judgment for the City on the Developer's categorical and *Penn Central* claims.

b. The Developer's physical taking claim fails because the City did not exact an easement for public use of the 35-Acre Property

Nor does the Developer's physical taking claim have the slightest merit. Bill 2018-24, which the Developer claims exacted an easement from the Developer, did no such thing. *See* City's Reply in Support of Countermotion for Summary Judgment filed 9/21/21 ("9/21/21 Reply") at 21-23.

c. No evidence supports a non-regulatory taking

The Developer's non-regulatory taking claim is also frivolous. The Developer presented no evidence to this Court that the City interfered with the Developer's property, rendering it "unusable or valueless" as required in *State* for a non-regulatory taking. *Id*. at 23-24; *State*, 131 Nev. at 421, 351 P.3d at 743. Indeed, the only allegations the Developer could muster to support its non-regulatory taking claim is the contention that the City denied the Developer's applications for permits to use the property for housing, *which states a regulatory taking claim*, duplicating the Developer's first and second causes of action. *See* 9/21/21 Reply at 24.

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d. Because the City did not effect a permanent taking of the 35-Acre Property, the temporary taking claim fails

Finally, as demonstrated in the City's brief, the temporary taking claim must fail. A temporary taking occurs when a court finds that a regulation effects a permanent taking under *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) or *Penn Central*, and the public agency thereafter rescinds the regulation to avoid paying compensation for a permanent taking. *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 318-19, 321 (1987). Because the Court should not have found a permanent taking, the temporary taking claim necessarily fails as a matter of law.

As the foregoing analysis demonstrates, the City is likely to prevail on the merits of its appeal. The Judgment is inconsistent with all state and federal statutory and caselaw, the Court's own previous ruling in the same case on the petition for judicial review, with the decision of the Nevada Supreme Court in the 17-Acre Case, and with the decisions of Judges Herndon and Sturman in the 65-Acre and 133-Acre cases, respectively. For all these reasons, the City is likely to prevail on appeal. At a minimum, the City has "present[ed] a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen*, 116 Nev. at 659, 6 P.3d at 987.

II. A stay of the Court's FFCL re Property Interest, FFCL re Take, 10/28/21 Decision, and 11/18/21 Judgment is also warranted under the NRAP 8(c) factors

Applying the same NRAP 8(c) factors described above to the Court's decisions in this case, all interlocutory decisions should also be stayed pending the City's appeal. All of the Court's substantive decisions in the FFCL re Property Interest, the FFCL re Take, the Decision, and the Judgment, satisfy the four factors in NRAP 8.

A. The City and every other community in the State of Nevada could suffer irreparable harm if the stay is denied because property owners could claim a constitutional right to build while the City's appeal is pending

The first and second factors are satisfied for a variety of reasons. Because the Court's ruling could effect a sea-change in State law regarding the scope of local police power to regulated land use delegated to cities by the State, the Nevada Supreme Court should decide this issue before the

alleged precedent in this case is used to influence decisions by local public agencies throughout the State. For an issue of this extreme importance, the Nevada Supreme Court will obviously determine whether this Court has erred.

If, while the Court's ruling is on appeal, local governments feel compelled by the Court's ruling to abandon their duty to exercise discretion over land use applications, the public interest would be seriously compromised. The State Legislature mandates that cities and counties, "prepare and adopt a comprehensive, long-term plan" for their physical development and to "regulate and restrict" the construction, alteration and use of buildings or lands in accordance with that plan to preserve air and water quality, promote the conservation of open space, provide for recreation, and generally promote health and welfare. NRS 278.250(1) & (2). If cities and counties follow this Court's ruling invalidating these discretionary powers and ministerially approve every application that is consistent with a zoning district, then the object of the City's appeal – to preserve local agencies' authority to regulate land use in the best interest of the community – would be defeated. In such a scenario, even if the City prevails in the appeal, it would be too late to reverse these approvals of development that would cause great harm to the community and the environment that would not have been granted but for the Court's decision.

The concern that local agencies and District Courts across the entire State might follow the Court's ruling that (a) property owners have constitutional rights conferred by zoning to build whatever they choose as long as the use is a permitted use under the zoning ordinance, (b) cities and counties have no discretion to disapprove or condition an owner's real estate development project as long as the project is for a permitted use, and (c) the general plans of cities and counties are nullities is real. The media has already reported the Court's decision to the public. *See* Ogilvie Decl. ¶¶11.a-j and Exhibit A attached hereto. For example, the November 30, 2021 article in the Las Vegas Register-Journal, entitled *Time for City to end the Badlands debacle*, states that Judge Williams ordered the City to pay $34.1 million for denying the Developer's application to develop the 35-Acre Property with housing "even though the land was zoned for residential development." *Id*. At its meeting on October 6, 2021, the Las Vegas City Council described the Court's ruling, alerting the public that a court has found that the City is now faced with the Hobson's choice of

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either granting every land use permit application put before it or compensate property owners for the market value of their property. *See* City's Supp. App. Vol. 20, Ex. YYYY. As a result, local governments can expect a flood of building permit applications in which the applicants will claim a constitutional right to approval of their application or the right to compensation under the Court's decision.

The Developer has also attempted to use the Court's decision in the other pending cases involving the Badlands. For example, immediately following the Court's ruling finding a taking on September 28, 2021, the Developer filed a motion in the 65-Acre case claiming that this Court's decision mandates that the Court find that the City is liable for a taking of the 65-Acre Property under issue preclusion. *See* City's Supp. App. Vol. 20, Ex. WWWW.

Similarly, if not stayed, the Court's ruling will result in irreparable harm to the City and the public. The State's planning and zoning laws set forth in NRS 278.010-278.828 are designed to protect the public against harmful development and to promote safe, healthy, efficient, well-balanced land use development that provides adequate amenities and services for all. If deemed authoritative by local land use decision makers, the Court's decision will likely create chaos in land use in the State in the near term and lead public agencies, in reliance on this Court's decision, to allow construction and other land uses that would have been denied or conditionally approved before the Court's ruling. While this matter is on appeal, those decision makers might believe they must approve land use applications without conditions unless the agency is willing to use public money to pay compensation to potentially thousands of property owners. Once these applications are approved and the projects built during the pendency of the appeal, these potentially harmful physical changes in land use could not be undone should the Nevada Supreme Court reverse the Court's Judgment. The bell cannot be unrung.

B. The Nevada Supreme Court should be allowed an opportunity to resolve these crucial issues of law before the City is required to part with more than $34 million of the taxpayers money

If the City is required to pay the Developer $34 million plus another $50 million+ in prejudgment interest, attorneys' fees, property taxes, and costs, but the Nevada Supreme Court later reverses the Judgment, the City is unlikely to retrieve the money paid to the Developer, to the

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detriment of the taxpayers. In contrast to the extreme public harm if the City is required to pay the Judgment to the Developer within 30 days, a stay of the Judgment would not prejudice the Developer in the least. The Judgment is entitled to interest under NRS 17.100 until paid. Thus, the harm to the State if the Court's ruling is not immediately stayed could be substantial and irreparable.

C. Because the Developer was awarded only money damages, the Developer would not suffer irreparable harm if a stay is entered

The third factor, lack of irreparable harm to the Developer, is easily met, because the Developer sought and was awarded only money damages. In March 2018, Judge Crockett invalidated the City's approval of the Developer's applications to construct 435 luxury housing units in the 17-Acre portion of the Badlands on the ground that the Developer was required to file a major modification application ("MMA") to develop housing in the Badlands ("Crockett Order"). More than one year ago, in September 2020, after the Nevada Supreme Court had overruled the Crockett Order and reinstated the City's approval of construction of 435 luxury housing units in the Badlands (Exs. DDD, SSSS), the City notified the Developer that the order reinstating its approvals was final, the Developer was free to build. The City even extended the deadline for the Developer to start construction by two years to account for the time the appeal of Judge Crockett's Order was pending in the Supreme Court. Ex. GGG. The Developer, however, has made it clear that it has no intention of actually building the 435-unit project. Instead, the Developer has elected to pursue the City for money damages in all four Badlands cases, even in the 17-Acre case, making the outlandish claim that the City has "nullified" the 17-Acre approvals, despite the Supreme Court's order reinstating the permits and the City's express acknowledgement that the permits are valid for another two years.[5]

[5] Based on the City's research and experience, this is the first case on record anywhere in the United States where a developer has sued the government for a taking despite approval of the developer's application for development. It is also the first case where a developer, when granted a permit, pretends that the permit is invalid, instead seeking money damages for a taking. Judge Herndon held that the Developer's claim that the City has nullified the permit to build 435 luxury units on the 17-Acre Property is "frivolous." Ex. CCCC at 1507-08.

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Further confirming that the Developer's only interest is in money damages, the City also afforded the Developer an opportunity to seek development of the 133-Acre Property, but the Developer has declined. In 2018, adhering to Judge Crockett's Order then in effect, the City Council was compelled to strike the Developer's 133-Acre Applications because the Developer had not filed a Major Modification Application. After the Supreme Court reversed the Crockett Order, the City notified the Developer that it was free to refile the applications to allow the City Council to consider the applications on the merits for the first time. Ex. NNN. Despite the fact that the City Council had not disapproved any application to develop the 133-Acre Property on the merits and the City invited the Developer to resubmit the applications for a decision on the merits, the Developer declined to refile the applications or do anything to attempt to develop the 133-Acre Property, and even vigorously opposed the City's request that Judge Sturman remand the 133-Acre Applications to the City Council for consideration of the applications for the first time on the merits. Ex. AAAAA (Plaintiff Landowner's Opposition to City of Las Vegas' Motion to Remand 133-Acre Applications to the Las Vegas City Council filed 8/24/2021).

In the aftermath of the Supreme Court's decision reversing Judge Crockett, the City also invited the Developer to file a first application for the 65-Acre Property (the Developer had not filed any applications to develop the 65-Acre Property) and a second application for the 35-Acre Property. Exs. OOO, PPP. The Developer ignored all four City requests. Clearly, the Developer is seeking the relief of money damages only. The Developer is entitled to interest on any damages from the date of the taking. *City of North Las Vegas v. 5th & Centennial*, 130 Nev. 619, 624, 331 P.3d 896, 899 ("[J]ust compensation includes interest from the date of taking."). Moreover, the Developer will receive the statutory rate of interest on any judgment. NRS 17.100. A delay in payment of money damages where interest accrues on the damages is not irreparable harm. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 297, 183 P.3d 895, 901 (2008) *abrogated on other grounds by Saticoy Bay, LLC, Series 9720 Hitching Rail v. Peccole Ranch Community Ass'n*, 2021 WL 4344955 (2021) ("Generally, harm is 'irreparable' if it cannot adequately be remedied by compensatory damages.").

The Developer's claim that it is harmed because it is incurring property taxes on property

the use of which the city has denied during this litigation rings hollow. The City has given the Developer ample opportunity to develop the Badlands, including approving the 17-Acre applications and inviting the Developer to file an application for the first time to develop the 65-Acre Property, re-file its 133-Acre Applications for decision for the first time on the merits, and file a second application for the 35-Acre Property. Although the City handed the Developer a permit for 435 luxury units on a silver platter, the Developer has elected instead to attempt to try to extort $386 million – the Developer's total damages claim - from the taxpayers. If the Developer had developed the Badlands, it would have no complaint that it had to pay property taxes.

The Developer's claim for reimbursement of the property taxes it paid during this litigation is pure hypocrisy. The Developer is in no position to complain about the amount of its property taxes where the Developer voluntarily shut down the golf course. As a result, under settled Nevada law, the Developer no longer qualified for a tax break for a golf course. Ex. HHHH at 4222.

Moreover, the Developer contends that the Clark County tax assessor based its tax assessment on the assessor's opinion that the highest and best use of the 35-Acre Property was residential. The Developer appealed the Assessor's determination but failed to argue to the assessor in its appeal that the PR-OS designation of the property prevented residential use of the property, instead entering a settlement with the Assessor that the Badlands would be assessed based on a highest and best use of housing. According to the Developer's appraiser, unless the 35-Acre Property could be used for housing, it's value would be zero. Plaintiff Landowner's Motion for Summary Judgment on Just Compensation filed 10/5/21, Ex. 2 at 95-96. In that case, the tax assessment, according to the Developer's appraiser, would also be zero. *Id*. at 96. Of course, the Developer could not concede in the appeal that the property was designated PR-OS and should be assessed at zero without undercutting its regulatory taking claims against the City, where the Developer hoped to achieve a windfall in takings damages based on the fiction that the PR-OS designation either does not exist or that the General Plan is a nullity. The Developer's strategy has, thus far, paid off. While it claims approximately $1 million for reimbursement of property tax payments, this Court awarded the Developer more than $34 million for a regulatory taking of only a 35-Acre portion of the Badlands. The Developer cannot have it both ways: it cannot agree with

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the Assessor to an incorrect highest and best use of the property and then claim that it should be reimbursed for tax payments based on that phony agreement.

As demonstrated above, the Developer is entitled to interest on the Judgment until it is paid. Accordingly, the Developer would be made whole if the Nevada Supreme Court does not reverse the Judgment. In addition to entitlement to interest, the Developer's loss of immediate access to the funds awarded in the Judgment would not constitute irreparable harm to the Developer. The Developer purchased the entire 250-acre Badlands for less than $4.5 million. Exs. AAA at 966, UUU at 1300, CCCC at 1496, FFFF at 1591-97. The City's approval of the 435-unit project on the 17-Acre Property already increased the value of that property by $26 million and the Developer would retain the remaining 233 acres of the Badlands for potential development or use as park, recreation, or open space. The Developer, accordingly, could start building today and reap and multiply its investment in the Badlands by a factor of six, even without the Judgment. Accordingly, the Developer can hardly claim harm as a result of a stay of the Judgment.

D. Because the Court's decisions are contrary to Nevada and federal caselaw, Nevada Revised statutes, and City ordinances, the City is likely to prevail on its appeal

For the reasons presented at pages 8-15 above, the City is likely to prevail on the merits of its appeal. Accordingly, the Court should stay its Judgment pending a decision of the Nevada Supreme Court on the merits of the City's appeal.

Conclusion

Because the Court's decision is contrary to all authority and could have far reaching effects on the entire State, giving property owners nearly unlimited rights to build on their property, the Court's Judgment should be stayed pending the disposition of the Motion to Amend and the City's appeal to the Nevada Supreme Court without the need for the City to post any security.

DATED this 21st day of December 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the __ day of December, 2021, I caused a true and correct copy of the foregoing **MOTION FOR IMMEDIATE STAY OF 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

EXHIBIT “A”

13 INVESTIGATES

City of Las Vegas suffers another defeat in battle over Badlands

Taxpayers shelling out millions for losing battle

The battle over Badlands continues in Las Vegas, Darcy Spears reports.




By: Darcy Spears

Posted at 3:26 PM, Sep 29, 2021 and last updated 11:37 AM, Sep 30, 2021

LAS VEGAS (KTNV) — Another major court victory has been delivered to the developer in the battle over Badlands.

In a Tuesday hearing, Clark County District Court Judge Timothy Williams said, "We have a very vigorous and well-developed record in this case and I'm going to make some decisions right now."

Williams then ruled that the City of Las Vegas illegally "took" the land.

A "taking" is when the government seizes private property for public use.

In the Badlands case, Judge Williams ruled city leaders restricted the owner's rights so much that it equated to a physical seizure.

Developer Yohan Lowie bought the land in 2015 and the city approved his plan to turn the defunct golf course into luxury homes and tree-lined walking paths.

But, as 13 Investigates first exposed in 2018, high-powered Queensridge homeowners fought it, effectively halting any development of Badlands.

As the property was held in limbo, it became a wasteland, safety hazard, and haven for crime.

Lowie sued the city for taking his property, denying his building permit applications and clawing back the zoning.

In March of last year, the Nevada Supreme Court ruled development of Badlands should have been allowed all along.

Tuesday's ruling in District Court adds to that with Judge Williams saying, "I think under the vast facts and circumstances, it's pretty clear that we had a taking."

Vickie DeHart, executive managing partner of Lowie's EHB Companies said,“This has been a six-year battle that has taken all of our resources. Fighting the government and politically connected people who threatened to take our land early on is no easy feat. It is wonderful to see justice prevail and the courts uphold our constitutional rights. A win for us is a win for all landowners.”

This case, which covers 35 acres and 61 lots, is just one of multiple ongoing Badlands cases that have cost taxpayers millions: $4,060,288.00 to date.

And the dollar figure will only get higher as the next phase of the case determines how much the city has to pay for taking Lowie's land.

We reached out to the City Attorney's office for comment, but they declined, saying "It's the city's practice not to comment on ongoing or pending litigation."

Report a typo

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Report a typo

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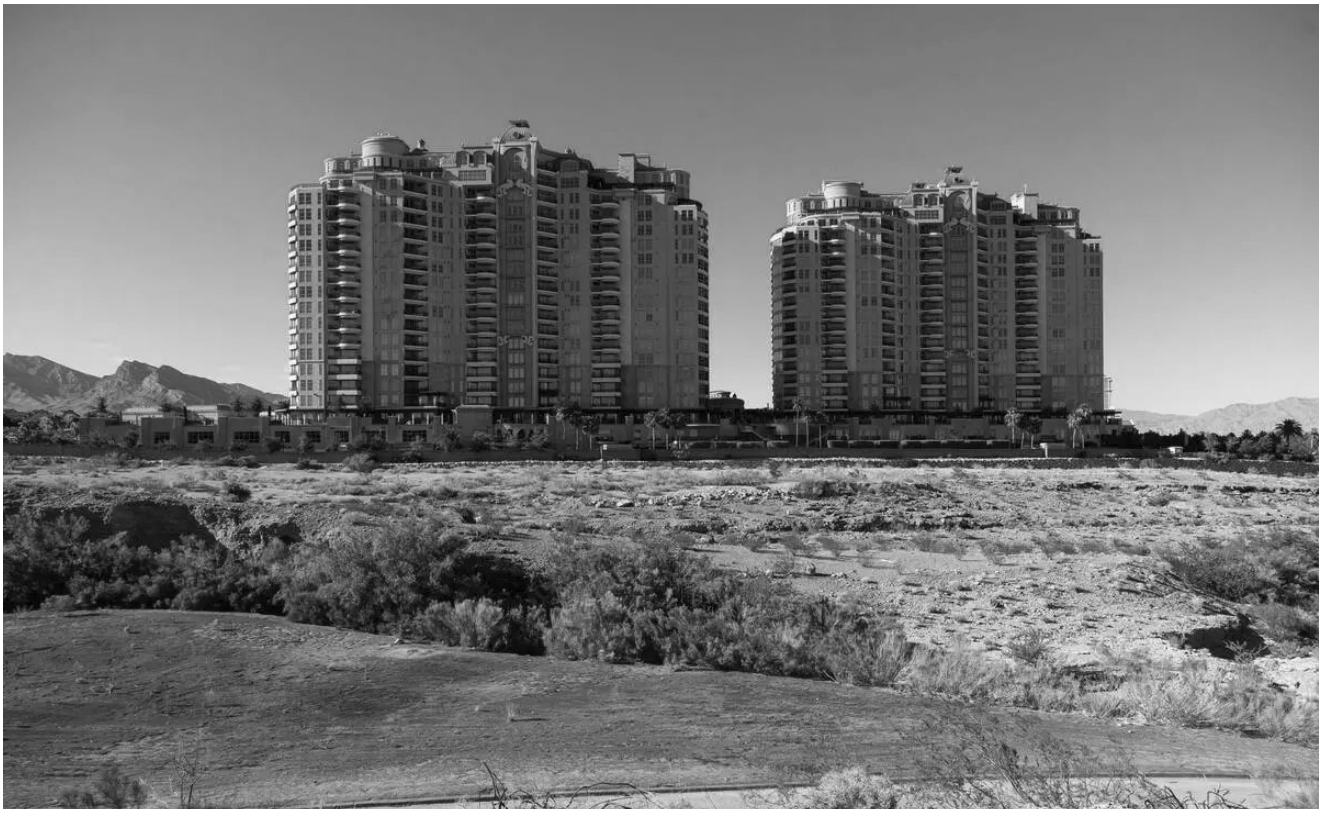
'A win for all landowners': Judge rules Las Vegas took 35 acres on Badlands



The land where the now defunct Badlands Golf Course lies empty on Wednesday, Sept. 29, 2021, in Las Vegas. (Benjamin Hager/Las Vegas Review-Journal) @benjaminhphoto

By Shea Johnson Las Vegas Review-Journal

September 29, 2021 - 1:42 pm

Updated September 30, 2021 - 12:13 am

A Clark County District Court judge has agreed with the developer behind stalled housing plans on the defunct Badlands Golf Club course near Summerlin who claimed that interference by Las Vegas officials made land impossible to develop.

Judge Timothy Williams ruled on Tuesday in favor of developer EHB Cos., which alleged that city actions were tantamount to the city taking the

company's 35-acre parcel near the intersection of Hualapai Way and Alta Drive, court records show.

In recent years, the Las Vegas City Council has held or rejected plans to build homes on the closed golf course except for a 435-condominium project on 17 acres that has not moved forward. EHB has contended that lengthy delays and denials were unnecessary and aimed at preserving the private land's use for the surrounding public.

Efforts to develop the golf course began after EHB purchased the land in 2015. During marathon hearings that followed, lawmakers expressed distaste for piecemeal development. Plans were also opposed by a coalition of residents in the upscale Queensridge neighborhood, which the course weaves through, citing fears of high density and diminishing property values.

"This has been a four-year battle that has taken all of our resources," said Vickie DeHart, a principal with EHB, in a statement. "Fighting the government and politically connected people who threatened to take our land early on is no easy feat. It is wonderful to see justice prevail and the courts uphold our constitutional rights. A win for us is a win for all landowners."

Three other cases pending

The decision Tuesday from the case brought forth in 2017 marks the second liability ruling in four so-called inverse condemnation cases filed by EHB. It is the first to go its way, although a ruling favorable to the city in December regarding a 65-acre parcel was later reopened and is under review, court records show.

Each case represents a different parcel of the former golf course and each case is in front of a different Clark County District Court judge. But

combined the lawsuits account for the entire 250-acre plot and make the same central allegation: a "categorical taking."

In essence, the developer is arguing that it deserves to be compensated because it claims the city's purported intention to preserve private property for public use has wiped out the economic value of the land.

Attorney Kermitt Waters, one of the lawyers representing EHB in litigation, said Wednesday he believed it was only "a matter of time" before the city would be found liable in the remaining cases following Tuesday's ruling.

Allegations of extortion

The stakes could be high depending on the outcome of the cases. EHB CEO Yohan Lowie previously estimated that the city would be liable for more than $1 billion in damages. In an August rebuttal to the lawsuit in question, city attorneys wrote that a finding against the city "would bring down the entire system of land use regulation in the State of Nevada."

In court filings, city attorneys say the developer knew the land was designated for open space, recreation and parks when it purchased the land six years ago, although EHB insists that residential construction is permitted. City attorneys also noted that the council may exercise discretion on land-use matters, such as when they allowed the scaled-back condominium project.

"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," city attorneys wrote in a court filing.

Lowie, himself, has accused Queensridge residents of trying to extort him.

Item does not exist or is inaccessible.

Damages to be determined

The city declined to comment Wednesday on the ruling in the case, citing its practice of not publicly addressing ongoing or pending litigation. A hearing on readiness for trial to establish damages is scheduled Thursday, according to Waters and court records.

It is one of at least a dozen lawsuits brought forward by EHB in recent years in the protracted and expensive legal battle it has waged against the city. The court fight has cost Las Vegas taxpayers more than $4 million in legal fees and staff expenses as of Sept. 23, according to city-provided figures.

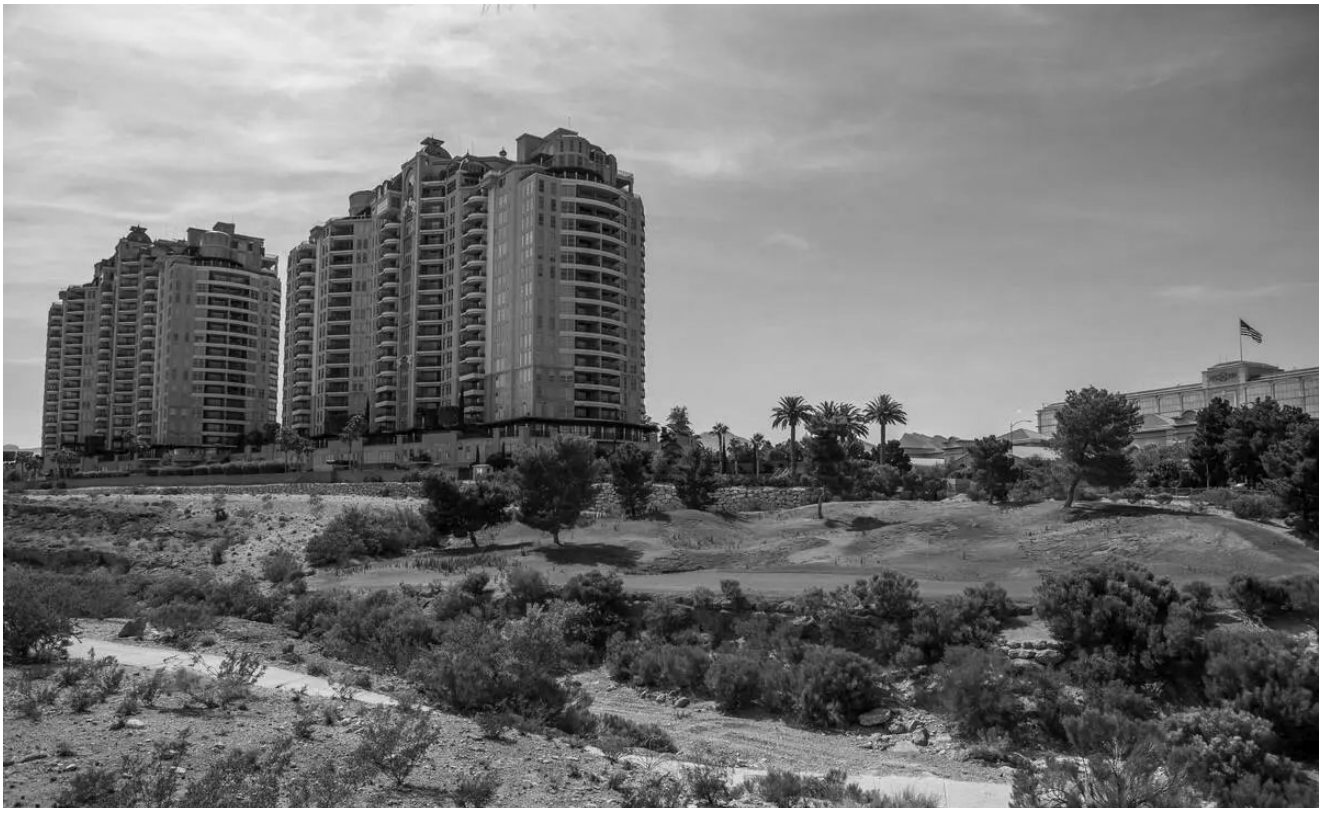
"When I ran for office, I ran with a goal of bringing the City of Las Vegas and the developer together to avoid this eventual day in court," said Las Vegas Councilwoman Victoria Seaman, whose district covers the golf course, in a statement.

Seaman had criticized her predecessor, ex-Councilman Steve Seroka, for representing a "few people in Queensridge" and not taxpayers or the city throughout the dispute. Seaman's candidacy in 2019 was supported by a union and developer-linked company that contributed to a Seaman-backed effort to recall Seroka, who ultimately stepped down amid allegations of sexual harassment.

"While the legal process will linger on, and costs to the taxpayers will continue to mount, my objective has always been to avoid this litigation and work for an amicable resolution," Seaman said. "My position remains the same."

Contact Shea Johnson at sjohnson@reviewjournal.com or 702-383-0272. Follow @Shea_LVRJ on Twitter.

EDITORIAL: Badlands money pit just got deeper



The 250-acre site of a closed golf course is now slated for the development of condos, estate lots and a hotel, photographed on Tuesday, June 6, 2017. Patrick Connolly Las Vegas Review-Journal @PConnPie

Las Vegas Review-Journal
October 2, 2021 - 9:01 pm

The dilapidated Badlands golf course is more than just an unkempt expanse of scruffy land winding its way through the exclusive Queensridge development. It's also a massive money pit for the city of Las Vegas.

On Tuesday, a District Court judge added to the city's misery by siding with a developer in a long-running dispute involving the property. It was an unsurprising decision in the face of the city's hubris and exposes city taxpayers to millions in liability. It's also a cautionary tale for elected officials and bureaucrats who believe that zoning codes give them virtually unlimited powers to dictate how private land owners use their property.

The case at hand involved EHB Cos., a development outfit that bought the 35-acre parcel south of Alta between Hualapai and Rampart in 2015 with an eye on building residential homes on the golf course, which had gone belly-up two years earlier. The plan angered several homeowners in the surrounding Queensridge community who felt it would devalue their residences. City officials initially OK'd the project, but well-heeled homeowners living nearby fought the approval and won in District Court. The Nevada Supreme Court last year overturned that decision.

But in 2017, a newly constituted City Council rescinded the initial go-ahead and began erecting barriers to the EHB development, triggering more lawsuits. The council even passed a narrowly tailored ordinance essentially outlawing residential development on old golf courses. City taxpayers have paid the price, shelling out more than $4 million for litigation.

In fact, the land was zoned for residential development from the get-go and the city had little legal basis to deny EHB's plans. Former City Councilman Bob Beers, who represented the area in question, likely lost his seat in 2017 for defending the developers. He warned time and again that city officials were putting taxpayers at risk by ignoring their obligations.

"After an exhaustive review of historical records and the law," Mr. Beers wrote in a 2019 Review-Journal op-ed on the property, "both the city attorney and the Planning Department agreed that the land was still zoned residential from the last action the City Council took. Yes, it was 20 years ago and all of the council members at that time are no longer serving. But zoning, once granted, doesn't change."

Had the city listened to Mr. Beers, it wouldn't be in this mess. Instead, attorneys representing the city were reduced to arguing that EHB's lawsuit seeking compensation for the city's obstructionism was an attempt to "extort hundreds of millions of dollars from taxpayers."

The courts weren't buying that malarkey. On Tuesday, District Judge Timothy Williams held that EHB had a legitimate Fifth Amendment claim against the city for its overzealous attempt to restrict development on the Badlands property. "I think under the vast facts and circumstances," the judge said, "It's pretty clear that we had a taking."

The next step in the saga could be a hearing to determine how big a hit city taxpayers will take thanks to their misguided representatives. The city may have an appeal in mind, but that would be a colossal waste. At this point, the City Council needs to minimize the damage and do what it should have done years ago: See what EHB will accept to make this whole fiasco go away.

And in the future, when city officials may be tempted to flex their regulatory muscle against an unpopular property owner, perhaps they'll remember the high costs of arbitrarily and capriciously denying owners the economic use of their property.

Las Vegas City Council votes to appeal Badlands ruling to Supreme Court

The land where the now defunct Badlands Golf Course lies empty on Wednesday, Sept. 29, 2021, in Las Vegas. (Benjamin Hager/Las Vegas Review-Journal) @benjaminhphoto

By Shea Johnson Las Vegas Review-Journal

October 6, 2021 - 11:27 am

Updated October 6, 2021 - 6:19 pm

Las Vegas city officials will contest a recent court ruling in a long-stewing clash with the owner of the former Badlands Golf Club, seeking to curtail the liability to city taxpayers who have already footed the bill for millions of dollars in legal fees.

Clark County District Court Judge Timothy Williams ruled Sept. 28 in favor of EHB Cos., which accused the city of "taking" 35 acres through actions that made the developer's land impossible to develop.

The council voted 6-1 on Wednesday to appeal to the Nevada Supreme Court.

EHB had proposed housing plans on the defunct golf course near Summerlin and later sued the city in 2017 after contending that lengthy delays and denials from City Hall were unnecessary and aimed at preserving the private land's use for the surrounding public.

The city attorney's office said it believed the lower court ruling to be "legally improper."

Councilwoman Victoria Seaman, who represents the district where the expensive land-use battle has been waged, called upon the city to once more reach out to the developer before filing its appeal.

"The city council has an opportunity to correct the mistakes of the past councils," she said.

Seaman has pressed for settling the dispute since running for office in a special election more than two years ago. She noted that taxpayers could end up paying for a government taking.

"The recent court ruling has put that reality more into focus today," she said.

Seaman also sponsored city-approved bills that scrapped and replaced stringent rules on developing golf courses and open spaces in January 2020, saying they eliminated burdensome regulations but maintained government oversight.

City lawmakers have frequently approved spending more money to fight at least a dozen Badlands-related cases in court. Seaman has often paired her reluctant "yes" votes with calls for resolution, although any agreement outside of court to stop the bleeding appears unlikely. EHB CEO Yohan Lowie

told the Las Vegas Review-Journal last year that "we don't trust the city one bit."

"I must vote for the appeal because I work for the city taxpayers and at this point I believe that we have to continue on," Seaman said Wednesday.

'This has to stop'

Las Vegas has paid more than $4 million in legal fees and staff expenses on Badlands litigation since fiscal year 2015, according to city-provided figures. Councilwoman Michele Fiore, the lone dissenter on appealing the recent court ruling, claimed the real number is about $10 million.

"This has to stop and unfortunately past councils have made political mistakes, and it has cost the taxpayers millions and it's going to continue costing taxpayers millions," she said. "So I am not in support to continue this battle. I am in support in making the city whole."

The court case in question is only one of four similar so-called inverse condemnation cases filed by EHB, with each representing a different parcel adding up to 250 acres for the full golf course plot. The other three lawsuits remain pending. A favorable ruling to the city in December regarding a 65-acre parcel was later reopened.

It is not clear how much the city could be ordered to pay if it were to lose the other cases, and if the recent ruling is not overturned, but Seaman said she has heard projections in the hundreds of millions of dollars. Lowie said last year he believed the city would be liable for more than $1 billion.

Contact Shea Johnson at sjohnson@reviewjournal.com or 702-383-0272. Follow @Shea_LVRJ on Twitter.

INSURANCE JOURNAL

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Vegas Owes Builder $34M in Golf Course Dispute

A Nevada court judge has ordered the city of Las Vegas to pay about $34 million to a developer who has tried for years to build homes on a vacant former golf course in northwest Las Vegas.

Clark County District Court Judge Timothy Williams previously found the city liable for blocking development of the former Badlands Golf Club course by 180 Land Co. LLC, a company belonging to developer EHB Cos.

The Las Vegas Review-Journal reported the city could be on the hook for much more.

The civil judgment involves a nearly 35-acre parcel, in just one of four lawsuits related to large slices of the disputed 250 acres including the golf course. It does not count attorney fees.

Similar lawsuits are pending before different judges over developers' plans for parcels totaling 133 acres , 65 acres and 17 acres.

EHB sought to build homes after buying the property in 2015 south of the Summerlin Parkway near the upscale Queensridge neighborhood.

Almost all development plans stalled at City Hall in disputes about whether zoning rules prohibit housing and allow only open-space projects. Lawsuits were filed in 2017 and 2018.

City Councilwoman Victoria Seaman represents the district where the property is located. She ran a special election campaign in 2019 that largely centered on her vow to settle the dispute to protect taxpayers.

Seaman told the Review-Journal on Friday that continued litigation is wasting taxpayer money and that the city should reach an agreement with the developer.

The City Council voted this month to appeal Williams' ruling. City officials declined to comment about the judgment, citing a practice of not speaking publicly about litigation.

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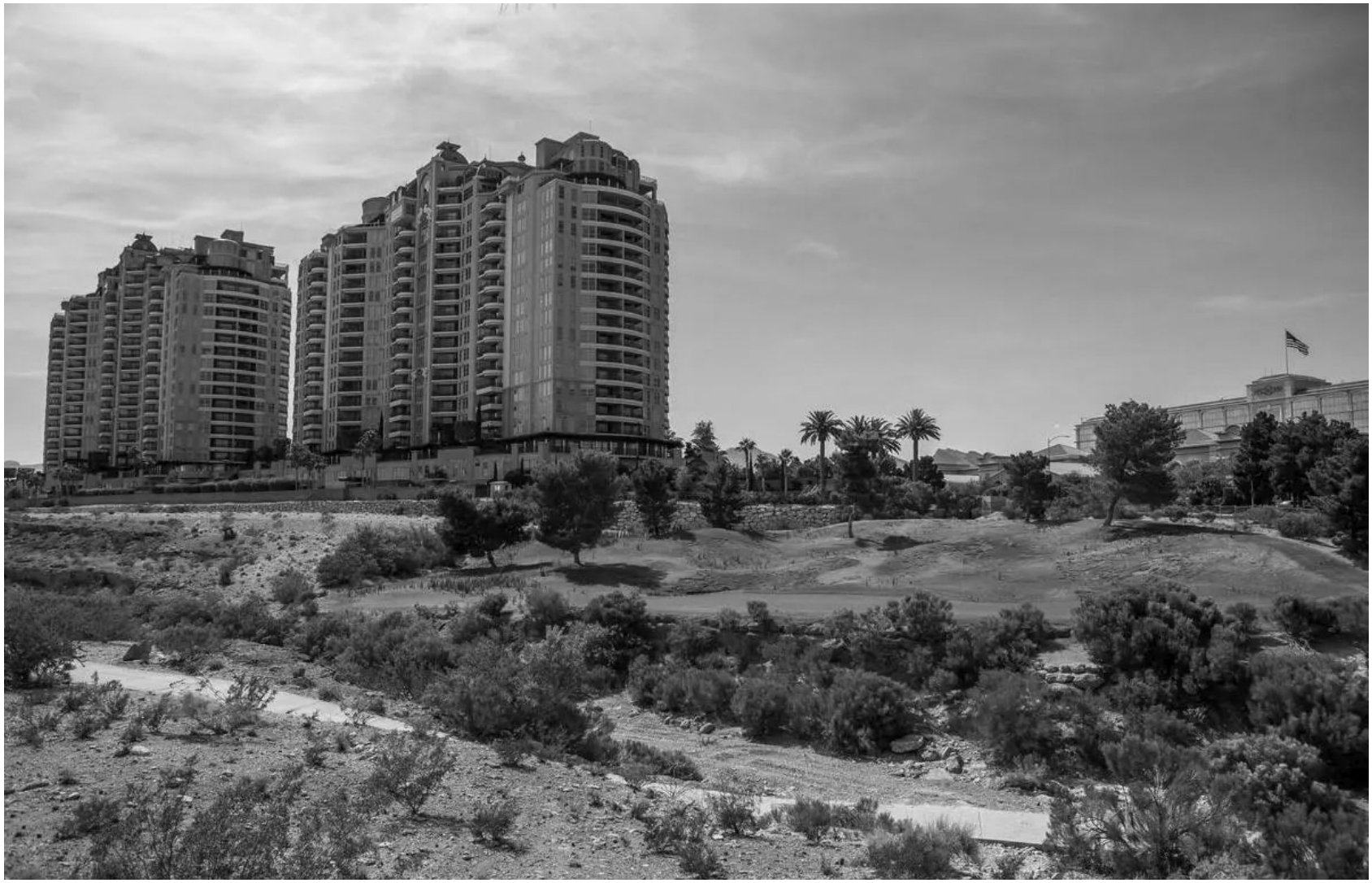
EDITORIAL: Time for city to end the Badlands debacle



The 250-acre site of a closed golf course is now slated for the development of condos, estate lots and a hotel. Patrick Connolly Las Vegas Review-Journal @PConnPie

Las Vegas Review-Journal

November 4, 2021 - 9:00 pm

Brochures for the Problem Gamblers Helpline — slogan: When the fun stops — are available at many Las Vegas gaming establishments. Perhaps a few pamphlets should also be distributed to City Council members, who seem intent on going all in with a losing hand in their reckless showdown with a local developer.

Last week, a Clark County judge ordered the city to pay $34.1 million to EHB Cos., which for six years has been trying to develop the abandoned Badlands golf course on the west side. Residents of the surrounding upscale Queensridge community opposed the plan and convinced a majority of the City Council to block the proposal even though the land was zoned for residential development.

That led to numerous lawsuits.

In September, District Judge Timothy Williams determined that the city had indeed committed a taking under the Fifth Amendment by refusing to let the developer make use of 35 acres on the now dilapidated golf course. Last week's $34 million award was determined to be "just compensation." Three other related legal filings — each dealing separately with parcels of 133, 65 and 17 acres — remain unresolved.

Do the math. If the remaining 215 acres are valued similarly, the city — read: local taxpayers — could be on the hook for another $209 million, making the total payout $243 million, not including the legal fees the city has expended to fight this futile battle.

This dispute should have been resolved long ago. The city had little legal basis to abuse its regulatory authority to deny the Badlands makeover. Yet the council last month voted to appeal Judge Williams' ruling. Apparently, those 10-spot keno wagers don't seem like such a reach when you're playing with other people's money.

But the Williams ruling, along with the seven-figure judgment, should bring council members to their senses. Stop gambling with money collected from city taxpayers and cut a deal with EHB Cos. "We are wasting taxpayer money," said Councilwoman Victoria Seaman, who represents the district that includes Badlands, "and it is time to come to the table, no matter what happened in the past, and make it right."

She's correct. Yes, the makeup of the council has changed somewhat from when the dispute began. But it's well past time that this council took seriously the potential taxpayer liability here and moved to minimize the damage. The alternative is to roll the dice with their political futures.

Las Vegas to appeal $34M judgment in Badlands ruling

Las Vegas to appeal $34M judgment in Badlands ruling

By Shea Johnson Las Vegas Review-Journal

November 17, 2021 - 10:06 am

The Las Vegas City Council voted on Wednesday to appeal to the state Supreme Court a $34 million judgment against the city after it was found liable for "taking" a nearly 35-acre parcel on the defunct Badlands Golf Club course.

District Court Judge Timothy Williams, who found the city liable for the so-called government taking in late September, awarded the multimillion dollar judgment late last month to 180 Land Co. LLC., a company belonging to developer EHB Cos.

City lawmakers previously voted to appeal Williams' liability ruling, with the city attorney's office finding it to be "legally improper." It is the same justification that led the council on Wednesday to appeal the monetary judgment too, a move that was expected.

EHB had sought to construct housing on the closed golf course after its 2015 purchase of the 250-acre plot winding through the upscale Queensridge neighborhood near Summerlin.

But after nearly all of its plans stalled in City Hall, it accused the city of illegally interfering with development to the point that it made the land impossible to build upon and wiped out its economic value.

Government-taking cases that involve parcels of 133, 65 and 17 acres remain undecided, raising concerns that the damages to city taxpayers may significantly grow.

"I, along with the Las Vegas taxpayers, are getting more frustrated by the day," Councilwoman Victoria Seaman said.

"We must get this settled once and for all."

Seaman sought assurances that the city was involved in active negotiations with the developer.

City Manager Jorge Cervantes said the city met with EHB Cos. representatives two weeks ago, noting that "those conversations are ongoing."

The city has spent more than $4 million defending itself in at least a dozen lawsuits and in staff expenses related to the politically charged Badlands dispute since fiscal year 2015, according to city-provided figures.

Councilwoman Michele Fiore, the lone dissenter to both appeals, has claimed the real costs are about $10 million.

Contact Shea Johnson at sjohnson@reviewjournal.com or 702-383-0272. Follow @Shea_LVRJ on Twitter.

13 INVESTIGATES

First financial verdict dealt to City of Las Vegas in years-long Badlands battle

Judge awards $34 million to developer

KTNV LAS VEGAS

The first financial verdict has been dealt to the City of Las Vegas in its ongoing battle over the Badlands golf course, and as it's a big one: $34 million. 13 Investigates' Darcy Spears has been on top of this long-running legal fight and as she reports, this is just the beginning.

By: Darcy Spears

Posted at 11:47 PM, Oct 28, 2021 and last updated 12:04 AM, Oct 29, 2021

LAS VEGAS (KTNV) — $1 million an acre. That's what a judge awarded the developer for one parcel of land on the vast Badlands golf course.

Land the judge ruled the City of Las Vegas took illegally. Now, we're all paying for it.

The Badlands golf course, now a wasteland, was supposed to have been converted to luxury homes years ago. Developer Yohan Lowie owns it. It's zoned for residential development.

But, the city essentially seized it by blocking development plans.

As a result, it's been locked up in a court battle for five years. But as of Thursday, there's light at the end of the tunnel.

"It's been a long road, so we were really happy that justice prevailed over politics," said Elizabeth Ghanem, an attorney for the developer. "We always knew we had the law on our side, so it was nice to see the court's

RELATED: **Battle over Badlands reaches boiling point**

The politics behind the city's battle involves a handful of wealthy Queensbridge homeowners who didn't want development on the shuttered golf course behind their homes. Some have since sold their mansions and moved, but the battle rages on.

"It was a nice decision from the court to sort of lay out in more detail what the city's actions were and to confirm that we've always had rights," Ghanem said.

The judge's ruling involves the parcel of land at the southeast corner of Alta drive and Hualapai way.

Judge Tim Williams said the City of Las Vegas prevented the legally permitted use of the property and required the property to remain vacant. Due to the government's unlawful taking of the land, he ruled the city must pay $34,135,000.

"The judgment we received from the court is just the beginning," said Ghanem. "There will be costs associated with that and interest starting from the date of value, so we expect that amount to be substantial on top of the judgment."

PREVIOUS: **Taxpayers will continue to foot multi-million-dollar bill as city votes to appeal Badlands ruling**

KTNV LAS VEGAS

> *13 Chief Investigator Darcy Spears: "A lot of people ask us, 'What's going to happen with that land? What can you tell them and what kind of a message do you want taxpayers to hear from your side of the fence?'*
>
> *Attorney Elizabeth Ghanem: "Well, we're hopeful that this court's decision will encourage the city to come to a final resolution of all matters, which will be beneficial to everyone, including the community."*

The city wouldn't talk about the court ruling, citing its practice of not commenting on ongoing litigation.

Thursday's court ruling covers just one 35-acre parcel on the 250-acre Badlands property. There are three more pending lawsuits on the other parcels, so this may just be the tip of the iceberg.

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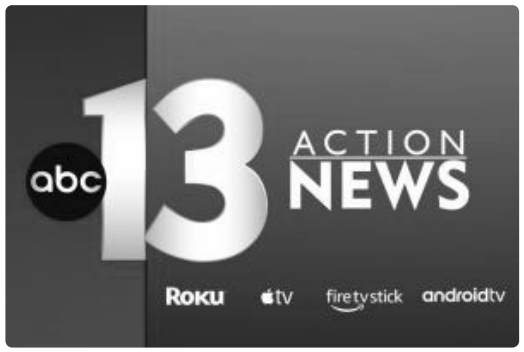

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The Las Vegas Review-Journal reported Friday the city could be on the hook for much more.

The civil judgment involves a nearly 35-acre (14-hectare) parcel, in just one of four lawsuits related to large slices of the disputed 250 acres (101 hectares) including the golf course. It does not count attorney fees.

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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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 **PLAINTIFF LANDOWNERS' OPPOSITION TO CITY OF LAS VEGAS' MOTION TO RETAX MEMORANDUM OF COSTS** **Hearing Date: January 18, 2022** **Hearing Time: 9:05 AM**

Plaintiffs 180 Land Co LLC ("180 Land") and Fore Stars, LTD. ("Fore Stars") (collectively "Landowners") hereby oppose Defendant City of Las Vegas' ("City") Motion to Retax Memorandum of Costs. This Opposition is made and based on the following Memorandum of Points and Authorities, the papers and pleadings on file herein, and any oral argument the Court may entertain on the matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Absent from the City's Motion to Retax Memorandum of Costs is any reference to the two specific eminent domain and inverse condemnation laws that provide an owner with an absolute right to have her ***reasonable costs actually incurred*** reimbursed by the government. Accordingly, the only inquiry this Court must make is whether the costs the Landowners submitted for reimbursement were ***actually incurred*** and whether the costs were ***reasonable***.

The City's continued punitive litigation strategy cannot go ignored. A two-page appraisal report of a 1,200 sq/ft single family home costs more than $1,500, yet the City argues that the Landowners should be limited to $1,500 in reimbursement for their expert appraiser whose report was 136 pages and whose work file (the documents he reviewed in preparing his report) was 7,049 pages. *Exhibit 12 at 23, Landowners Expert Disclosures*. No MAI appraiser in Las Vegas would have taken this assignment for $1,500 - such a proposition is irrational.

For ease of the Court's review, a chart has been created with the Landowners' costs and whether the same are disputed, withdrawn or amended. *See Exhibit 11*. *Exhibits 1-10* are found in the Landowners' Memorandum of Fees and Costs filed on November 24, 2021.

II. LAW

The Nevada Constitution provides that the Landowners' "just compensation" award "shall include … **all** reasonable costs and expenses actually incurred." Nev. Const. art. I § 22 (4). Emphasis added. This means that the reimbursement of the Landowners' costs in this matter are part of the constitutionally mandated "just compensation." Additionally, the federal Relocation Act, which the City is bound by pursuant to NRS 342.105, provides that an owner ***shall be***

reimbursed for any reasonable costs actually incurred in an inverse condemnation action.[1] Neither of these provisions limit the amount of costs that may be recovered for each expert; rather, they mandate reimbursement for "all" reasonable costs. The policy for this rule is to assure that Nevada landowners in inverse condemnation actions are paid "just compensation" that puts them back in "as good a position monetarily" as they would have been in had their property not been taken. Nev. Const. art. I § 22 (4). If successful landowners in inverse condemnation actions are not paid "all" of their reasonable costs, they will not be put back in "as good a position monetarily," because they will have had to bear all or part of the costs themselves. This is why the Nevada Constitution provides that recovery of "all" reasonable costs is part of the constitutionally mandated "just compensation" award.

The following shows that, with minor exceptions, the City should be ordered to pay "all" of the costs set forth in the Landowners' Memorandum of Costs and Disbursements in order to meet the constitutional standard of just compensation.

III. COSTS WITHDRAWN AND AMENDED

A. Item Number 10, Fed Ex – Withdrawn from $61.33 to $0

Item Number 10 is a Fed Ex charge to deliver a package to Denver, North Carolina. As discussed in other pleading in this matter, the City's litigation strategy was a punitive war of attrition, wherein the City hired two large law firms to try and litigate the Landowners into submission. This was evidenced by the mere length of some of the City's briefs - reaching in excess of 90 pages, multiple attempts to summarily dismiss the case, and multiple reconsideration motions to name a few. Item number 10 (Fed Ex) was necessary to overnight one of the City's 90

[1] "§ 24.107 Certain litigation expenses. The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if: …(c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding."

plus page briefs to Michael Schneider (an attorney at the Law Offices of Kermitt Waters) who was visiting his older parents in North Carolina for the first time since the pandemic. Mr. Schneider was not supposed to work during this time, but his assistance became necessary as the Law Office of Kermitt Waters is a small firm and thus, it frequently utilized all members of the firm to defend against the two large firms churning out work on the City's behalf against the Landowners. So, while this cost was reasonable, on closer review, the brief sent to Mr. Schneider was for the 65 Acre Case. Accordingly, this cost was not actually incurred in the 35 Acre Case, and therefore the Landowners withdraw this cost from consideration for reimbursement.

B. Item Number 11, E-filing Fees – Amended from $808.50 to $773.50

Item Number 11 is the E-filing fees. As noted by the City in its Motion, there are times when one filing fee is applied to several filings. Accordingly, the filing fees have been amended to reflect such occurrences. This would amend Item Number 11 from $808.50 to $773.50. *See Exhibit 22, Declaration of Evelyn Washington.*

IV. COSTS DISPUTED

A. Item Number 1, Holo Discovery and Item Number 2, NV Law Library

1. Item Number 1, Holo Discovery - $14,422.81

Item Number 1 is the bill, in the amount of $14,422.81, from Holo Discovery, an e-Discovery and litigation support company in town. These bills clearly state what they were for, color trial and exhibit boards, light assembly of documents and trial binders. *Exhibit 1 at 1, 3, 5,and 7*. It is shocking that the City would even contest these bills. The City saw the Law Offices of Kermitt L. Waters routinely bring color trial and exhibit boards into the Court and use the same during the hearings. Additionally, Mr. Leavitt routinely had packets that he utilized during the hearings which required light assembly. In fact, the City's counsel routinely clung onto Mr. Leavitt's packets in an attempt to rebut the same during the City's lengthy reply arguments. There

can further be no doubt that the Landowners prepared their trial binder exhibits as both the Court and the City saw the copies of the same in the court room. The City's only real objection is that the invoice for the trial binders reflects a delivery date of October 27, 2021. *Exhibit 1 at 7*. Staff at the Law Offices of Kermitt L. Waters contacted Holo Discovery to ask what the "Date of Delivered" references and were informed it is when the invoice is generated. However, because the City is trying to avoid paying this clearly reasonable and actually incurred cost, the Law Offices of Kermitt L. Waters asked Holo Discovery to prepare another invoice reflecting the date the exhibits were delivered to the Court - October 25, 2021. *See Exhibit 19*. Item number 1 are the costs for litigation documents consisting of color trial and exhibits boards, assembly of hearing packets and trial exhibit binders. These costs were reasonable and actually incurred. Accordingly, Item number 1 in the amount of $14,422.81 should be reimbursed to the Landowners.

2. Item Number 2, NV Law Library - $33.20

Item number 2 are costs in the amount of $33.20 from the Nevada Supreme Court Law Library. The Landowners ordered the briefs in the Kelly v. Tahoe case to review the same for any applicability to the subject case. There was none. As this Court will recall, the City heavily (and in error) relied on Kelly v. Tahoe. Given the City's heavy reliance, it was reasonable to order the briefs in the case to review. Attached hereto as *Exhibit 21*, is an email from the reference desk at the Law Library detailing the order and the costs. Item number 2 in the amount of $33.20 was a reasonable cost and it was actually incurred. Accordingly, the Landowners should be reimbursed for the same.

B. Items Number 3 and 4, Clark County Recorder and District Court Clerk

1. Item Number 3, Clark County Recorder - $171.00

Item Number 3 are Clark County Recorder costs in the amount of $171.00 for obtaining recorded documents related to the Queensridge Community which William Peccole designed. The

City spent 4 hours at the summary judgment hearing trying to rewrite Mr. Peccole's history and his state of mind when he was designing Queensridge (even showing up with a picture of Mr. Peccole), so it is perplexing how the City could argue now that "CC&R's for the Queensridge Community" "have no relevance to this case." City Mot. at 9:4-5. The City made the CC&Rs relevant. The CC&Rs for Queensridge were also Exhibit 36 (Volume 3) to the Landowners' Motion to Determine Take and For Summary Judgment on the First, Third and Fourth Claims for Relief filed on March 26, 2021. The Queensridge CC&Rs also appear in the Findings of Fact and Conclusions of Law Granting Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the First, Third and Fourth Claims for Relief filed October 25, 2021 at page 25. Accordingly, the costs to obtain documents from the Clark County Recorder related to the Queensridge CC&Rs were reasonable and actually incurred in this case. Therefore, Item number 3 in the amount of $171.00 should be reimbursed to the Landowners.

2. Item Number 4, District Court Clerk - $119.00

Item number 4 are the costs in the amount of $119.00 associated with pulling court records in a case between William Peccole and the City of Las Vegas in 1992. As the Court is well aware, the interaction between the City and Mr. Peccole was put at issue *by the City* in this case. The City represented a whole host of claims about what Mr. Peccole did and did not do with the City in the 1990s. Accordingly, the fact that these two parties were in litigation against one and other in 1992 was clearly something that was reasonable to investigate. These pleading were pulled to confirm if there was any reference to the story the City had invented about Mr. Peccole and there was not. The research was still reasonable and actually incurred in this case. Accordingly, Item number 4 in the amount of $119.00 should be reimbursed to the Landowners.

C. Items Number 5, 6, 7, and 8, Experts

1. Items Number 5 and 6 – Golf Course Expert - $11,162.41 & $67,094.00

Items number 5 ($11,162.41) and 6 ($67,094.00) are the golf course and golf industry experts that the Landowners retained in this matter. Their report was necessary to counter the City's baseless argument that the golf course on the Subject Property was an economically feasibly use of the Subject Property. Again, the City raised this baseless argument and it was absolutely necessary to rebut it. GGA Partners and Global Golf Advisors are the same entity, they just rebranded during the course of this litigation. They provided detailed studies and a report that established that a golf course use was not economical as of the relevant date of valuation in this case. Mr. DiFederico was given a copy of the GGA report; the GGA report was referenced in Mr. DiFederico's report (TDG Rpt 000013, 000061); and, GGA's report and work file were contained in Mr. DiFederico's work file (TDG WF 005979-6114), all of which was produced to the City during initial expert disclosures. Item numbers 5 and 6 were reasonable costs as the City continually challenged the viability of a golf course on the Subject Property and the costs were actually incurred in this matter. In fact, even after the GGA report was provided to the City and the City failed to obtain an expert report to rebut the GGA report, the City's counsel still argued up to the last day of liability hearings – "Well, this may not be the most economically efficient use of the space if it was used for a golf course and if a golf course is no longer viable, **and I don't think that's been established**." *Exhibit 20, 9.27.21 Transcr at 14:1-4*. Emphasis added. Therefore, Item numbers 5 and 6 – the GGA report was necessary and should be reimbursed to the Landowners.

2. Item Number 7 – Expert Appraiser The DiFederico Group - $114,250

Item number 7 is the invoices from Mr. DiFederico for his expert appraisal work in this case. This includes Mr. DiFederico's preparation of his appraisal report, which was 136 pages, his review of all the documents in his work file, which totalled 7,048 pages, and his market research and analysis, not to mention his trial preparation. The City stipulated to the admissibility of the

entire DiFederico report. *See Transcript of Bench Trial filed November 3, 2021 at 2:20-22, 4:8-9*. The judgment in this matter is Mr. DiFederico's exact conclusion of value. For the finder of fact to come down exactly on an expert appraiser's opinion of value is a strong affirmation of that expert's value. Accordingly, the City's efforts to minimize Mr. DiFederico's value in this case are meritless and should be resoundingly rejected.

It is further improper for the City's to opine as to what work is or is not necessary for an appraiser in the appraisal industry. Yet, that is exactly what the City does in its Motion. City Mot. At 5-7. If the City wanted to offer criticisms of Mr. DiFederico's appraisal work, the City could have done a number of things including deposing Mr. DiFederico, providing their own expert report or even producing a rebuttal appraisal. The City did not do that so its efforts to now criticize Mr. DiFederico's report are baseless. Attempting to take issue with the expert report after stipulating to it is wholly improper and must be disregarded by the Court.

The City's claim that Mr. DiFederico did not arrive at his own opinion of highest and best use is entirely without merit. Mr. DiFederico provides a 14 page detailed analysis of highest and best use wherein he references all of the data he relied upon to arrive at his highest and best use. TEG Rpt 000054-000068. Moreover, the Findings of Fact and Conclusions of Law on Just Compensation, entered on November 18, 2021 (FFCL Re: Just Compensation), cites extensively to and relies upon Mr. DiFederico's highest and best use finding in his report. See FFCL Re: Just Compensation, pp. 5-11. Specifically related to highest and best use, the FFCL Re: Just Compensation finds that the "DiFederico Report provides a detailed analysis of the 'highest and best' use of the 35 Acre Property, including the elements of legal permissibility, physical possibility, financial feasibility, and maximally productive." Id., at 6, finding 23. The FFCL Re: Just Compensation also concludes that the DiFederico Report "appropriately analyzed and arrived at a proper highest and best use of the 35 Acre Property." Id., at 13, finding 65. Therefore, any

after-the-fact criticism of Mr. DiFederico's highest and best use analysis by the City's retained attorneys is baseless.

With no basis whatsoever, the City claims that Mr. DiFederico merely read the Landowners' motion for summary judgment on the take issue and copied it as part of his report to determine the impact of the City's actions on the Landowners' 35 Acre Property. Again, the City is wrong. Although the Landowners' motion for summary judgment on the take was one of the documents Mr. DiFederico considered, he read and analyzed **all** of the City's actions in this case to determine the impact of the City's actions on the Landowners' 35 Acre Property. He dedicates five pages of his report summarizing these City actions that are based on the Landowners' motion and "other information I have been provided" – which are all of the documents proving the City's actions. TDG Rpt 000096-000101. This is part of the reason Mr. DiFederico's expert report is 136 pages and his work file is 7,048 pages. This impact analysis took an extremely long time to complete as the City's actions were extensive, systematic, and aggressive, spanning a 3-4 year period. And, this analysis was absolutely necessary. As the Court will recall, the City repeatedly argued during the hearings in this matter that there had to be an analysis of the impact of the City's actions on the Landowners' 35 Acre Property. The City even obtained a continuance on the Landowners' summary judgment hearing on the take issue so that it could obtain an expert report on the economic impact of the City's actions – which it never produced in this case (if it was done). Therefore, this City post factum argument lacks any merit whatsoever.

Finally, the City claims that it should not have to pay for Mr. DiFederico's Subdivision Development Method (SDM), because, according to the City, the SDM is not admissible. City Mot at 6-7. The City is wrong on three fronts. First, the City stipulated to the admissibility of the entire report, including the SDM (*Transcript of Bench Trial filed November 3, 2021 at 2:20-22, 4:8-9*), so this entire effort by the City to reduce payment to the Landowners for its egregious

actions is yet another waste of resources. Second, the FFCL Re: Just Compensation cites to the SDM approach used by Mr. DiFederico with approval. See FFCL Re: Just Compensation, pp. 9-10, findings 38-44. Third, the Nevada Supreme Court has found the SDM to be admissible. Tacchino v. Sate Department of Highways, 89 Nev. 150 (1973) (the appraiser should be allowed to testify to different factors, the SDM is a "factor and relevant to a determination of market value," and the reason for this rule is it assures the landowner "will receive a full and fair trial" on just compensation. Id., at 154). Therefore, this final City criticism of the DeFederico Report is without merit.

Mr. DiFederico's work and fees in this case were reasonable and actually incurred. Mr. DiFederico's fees are common in the eminent domain field in Nevada. *See Exhibit 23, Declaration of Autumn L. Waters, Esq. in Support of Plaintiff Landowners' Opposition To City of Las Vegas' Motion To Retax Memorandum of Costs*. In fact, Landowners (in 2019) included language in the Proposed Discovery Plan and Scheduling Order in federal court that "It is very likely that the expert appraisers in this case will each charge well in excess of $100,000." *Exhibit 24, Proposed Discovery Plan and Scheduling Order filed October 8, 2019 in Federal Court*. The City's attempt to minimize Mr. DiFederico's work or his value is without merit especially in light of the City's failure to conduct any discovery on this whatsoever. Therefore, item number 7 in the amount of $114,250.00 is reasonable and actually incurred and should be reimbursed to the Landowners.

3. Item Number 8 – Expert Appraisers Jones Roach and Caringella - $29,625.00

Jones Roach and Caringella were prepared to be rebuttal or surrebuttal experts, however, the City did not produce initial or rebuttal expert reports. The fact that the City made a litigation decision not to produce expert reports, thereby not giving the Landowners a vehicle to use their rebuttal experts, does not change the reasonableness of having rebuttal expert prepared in a case of this magnitude. Knowing the enormity of the record in this case and the decades involved, the

Landowners had no choice but to retain rebuttal experts and have them prepared with the background information about the property and the case before expert reports were exchanged. Given the short time period between initial expert disclosures and rebuttal expert disclosures this was extremely reasonable. Accordingly, even though a Jones Roach and Caringella report was not exchanged that does not change the reasonableness of the costs or the fact that it was actually incurred in this case. Therefore, the Landowners should be reimbursed for Item number 8 in the amount of $29,625.00.

D. Item Number 9, Legal Wings - $290.00

Item Number 9 is the Legal Wings bill for the application for subpoena of Clyde Spitze in the amount of $290.00. Mr. Spitze was deposed in this case in Utah and Legal Wings was needed to assist in effectuating that subpoena. *Exhibit 17, Application for Subpoena under the Utah Uniform Interstate Deposition and Discovery Act*. The City attended this deposition, so it is unknown why the City would object to this item. *Exhibit 18 first two pages of Spitze deposition showing City attended the deposition*. Legal Wings' assistance in issuing a subpoena to Mr. Spitze in Utah was reasonable and actually incurred in this case, accordingly Item Number 9 in the amount of $290.00 should be reimbursed to the Landowners.

E. Item Number 18, Oasis Court Reporting for the HOA Meeting - $1,049.00

Item Number 18 is the Oasis Court reporting bill for the transcription of the well-cited HOA meeting in which Commissioner Steve Seroka gave his infamous speech to the surrounding owners telling them that the Landowners' Property was their public property to use for recreation and open space. This transcript was Exhibit 136 (Volume 13) in the Landowners' Motion to Determine Take and For Summary Judgment on the First, Third and Fourth Claims for Relief filed on March 26, 2021. This transcript was also cited in the Findings of Fact and Conclusions of Law Granting Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the

First, Third and Fourth Claims for Relief filed October 25, 2021 at page 24. Therefore, it is undisputed that this transcript was reasonable and actually incurred in this case. The Landowners should therefore be reimbursed for Item Number 18 in the amount of $1,049.00.

F. Item Number 20, Westlaw billing - $50,669.02

Item Number 20 is the Westlaw billing in this matter. With confidence, it can be stated that every single Westlaw search was utilized in the 35 Acre Case, as the City has argued the same thing in all four cases, repeatedly. This has been the lead case so all of the legal research was utilized in this case. It must be noted that the City is the one that insisted on utilizing discovery in the 35 acre case for all matters, the legal research has been no different. Therefore, Item Number 20 in the amount of $50,669.02 is reasonable and actually incurred and should be reimbursed to the Landowners.

G. Item Number 21, In-House Office Copy Costs - $6,345.40

Item Number 21 is the in-house office copy costs which were actually incurred by the Law Offices of Kermitt L. Waters in this case. These costs reflect 33,452 copied pages. As identified in *Exhibit 13*, the City's vexatious pleading practice and litigation tactics required **2,009** pages of substantive pleadings and **29,977** pages of exhibits for a total of **31,986** pages that were actually filed with the Court. *Exhibit 13 and 14.* The City's pleading practice crescendoed with a 92-page brief. *See City Opp. to Motion to Determine Take filed August 25, 2021*. This total of **31,986** does not reflect the sheer volume of documents produced in discovery. Although largely a "document dump" the City produced more than 307,729 pages during discovery. The Landowners produced more than 43,604 pages (not including expert reports or work files). *Exhibit 15, Landowners 23rd Supplement to 16.1 Disclosures at 23 and Exhibit 16, City's 18th Supplement to 16.1 Disclosures at 7*. Accordingly, the fact that the Law Offices of Kermitt Waters only copied 33,452 pages is remarkable and extremely reasonable. And, the fee of $.25 per page for color copies and $.15

pages for b/w copies is also reasonable. As discussed above, the test is whether the costs were reasonable and actually incurred. Those two elements have been met for Item Number 21 and the Landowners should be reimbursed for the same in the amount of $6,345.40.

V. CONCLUSION

For the foregoing reasons the City's motion to retax should be denied. However, the Landowners do concede that the following should be amended or redacted/withdrawn from the costs:

Item Number 10, Fed Ex – Withdrawn from $61.33 to $0

Item Number 11, E-filing Fees – Amened from $808.50 to $773.50

With this redaction/withdrawal and amendment, the costs that should be reimbursed to the Landowners amount to $ 312,446.93.

DATED this 23rd day of December, 2021.

LAW OFFICES OF KERMITT L. WATERS

/s/ Autumn Waters

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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 23rd day of December 2021, pursuant to NRCP 5(b), a true and correct copy of the foregoing: **PLAINTIFF LANDOWNERS' OPPOSITION TO CITY OF LAS VEGAS' MOTION TO RETAX MEMORANDUM OF COSTS** 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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