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. 119

LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq.
Nevada Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq.
Nevada Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq.
Nevada Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq.
Nevada Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877

Attorneys for 180 Land Co., LLC and Fore Stars, Ltd.

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan K. Scott, Esq.
Nevada Bar No. 4381
bscott@lasvegasnevada.gov
Philip R. Byrnes, Esq.
pbyrnes@lasvegasnevada.gov
Nevada Bar No. 166
Rebecca Wolfson, Esq.
rwolfson@lasvegasnevada.gov
Nevada Bar No. 14132
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
Telephone: (702) 229-6629

Attorneys for City of Las Vegas

CLAGGETT & SYKES LAW FIRM
Micah S. Echols, Esq.
Nevada Bar No. 8437
micah@claggettlaw.com
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone

Attorneys for 180 Land Co., LLC and Fore Stars, Ltd.

McDONALD CARANO LLP
George F. Ogilvie III, Esq.
Nevada Bar No. 3552
gogilvie@mcdonaldcarano.com
Amanda C. Yen, Esq.
ayen@mcdonaldcarano.com
Nevada Bar No. 9726
Christopher Molina, Esq.
cmolina@mcdonaldcarano.com
Nevada Bar No. 14092
2300 W. Sahara Ave., Ste. 1200
Las Vegas, Nevada 89102
Telephone: (702)873-4100

LEONARD LAW, PC
Debbie Leonard, Esq.
debbie@leonardlawpc.com
Nevada Bar No. 8260
955 S. Virginia Street Ste. 220
Reno, Nevada 89502
Telephone: (775) 964.4656

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz, Esq.
schwartz@smwlaw.com
California Bar No. 87699
(admitted pro hac vice)
Lauren M. Tarpey, Esq.
ltarpey@smwlaw.com
California Bar No. 321775
(admitted pro hac vice)
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272

Attorneys for City of Las Vegas

OPPS
Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Rebecca Wolfson (NV Bar No. 14132)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101
Telephone: (702) 229-6629
Facsimile: (702) 386-1749
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

(Additional Counsel Identified on Signature Page)

Attorneys for Defendant City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD,, a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	Case No. A-17-758528-J DEPT. NO.: XVI **CITY'S OPPOSITION TO DEVELOPER'S MOTION TO DETERMINE PREJUDGMENT INTEREST** **AND** **DECLARATION OF GEORGE F. OGILVIE III** **(HEARING REQUESTED)**

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

The Developer's motion to determine prejudgment interest ("Motion") requesting $52,515,866.90 in "interest" is an improper grab for alleged consequential damages. The Court has already awarded the Developer $34,135,000 for land the Developer bought for $630,000, which is 54

times the Developer's investment.[1] To triple down on that enormous windfall by adding $52,515,866.90 for a total award of nearly $87 million—a profit of 13,800 percent on its investment—would be a further, and grave, blow to justice.

Under clear Nevada law, a taking claimant is entitled to a rate of prejudgment interest on a taking judgment higher than the statutory rate of prime plus two percent (NRS 37.175) only if the higher rate is necessary to put the claimant in the same monetary position it would have been without the taking. Because the Court has already awarded the Developer 54 times the Developer's investment in the 35-Acre Property, the Developer does not require *any* prejudgment interest, no less interest at the extraordinary rate of 23 percent per year, to be made whole. Without conceding the validity of the judgment, the City contends that the Motion is preposterous and should be denied. Even if the Court limits prejudgment interest to the statutory rate, the Developer will be made far more than whole.

Moreover, the Developer requests an award not of "interest" as defined in Nevada law, but rather "profit" from a hypothetical, and completely speculative, real estate investment. No authority supports this outlandish claim. The Developer wants money from the taxpayers equivalent to the gains it alleges it would have made had it invested the $34 million judgment in other real estate that the Developer claims would have appreciated during this litigation. The Developer ignores the facts and the law in arguing the City should pay 23 percent annual prejudgment interest on the judgment because the Developer was deprived of a real estate investment opportunity.

The Developer is not in the business of buying land and selling it for more than it paid. It is in the business of real estate development. The Developer, however, did not miss a real estate development opportunity, even if the City had paid the Developer $34,135,000 in 2017, because the Developer's actions reveal that it had no intention of developing any real estate. After the Developer bought the 250-acre Badlands in 2015, it segmented the property into four development sites. The City approved the Developer's application to develop 435 luxury housing units on the 17-Acre Property, yet the Developer has declined to build. Similarly, the Developer abandoned any attempt

[1] The Developer purchased the entire-acre Badlands for $4,500,000, or $18,000 per acre. 35 acres x $18,000 = $630,000.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

to develop the 35-Acre Property after filing only one application. (The Master Development Agreement the City denied was not an application to develop the 35-Acre Property standing alone.) The Developer also abandoned its proposal to develop the 133-Acre Property without obtaining a City decision on the merits of any application. And the Developer failed to file ***any*** application to develop the 65-Acre Property. Accordingly, the Developer's claim that it needed the $34 million judgment in 2017 to engage in real estate development is wholly meritless, given that the Developer has displayed no interest in actually developing the Badlands.

The Developer claims that Nevada eminent domain law governs an award of prejudgment interest. Even if that were the case, the Developer should be limited to prejudgment interest at a rate of prime plus two percent as provided by the eminent domain law.

Argument

I. A rate of prejudgment interest higher than the statutory rate is not necessary to put the Developer in the same position monetarily as if the City had not taken the property.

The Developer has consistently contended that the eminent domain law provides the rules and standards for judicial review for this regulatory taking action. *See*, *e.g.*, Motion at 3-4; Landowner's Motion for Summary Judgment To Determine Take Etc. filed 3/26/21 at 36. The City disagrees with that contention. Even assuming, however, that the Developer is correct, prejudgment interest here would be governed by NRS 37.175, which provides, in relevant part:

> 4. The court shall determine, in a posttrial hearing, the award of interest and award as interest the amount of money which will put the person from whom the property is taken in as good a position monetarily as if the property had not been taken. The district court shall enter an order concerning:
>
> (a) The date on which the computation of interest will commence;
>
> (b) The rate of interest to be used to compute the award of interest, which must not be less than the prime rate of interest plus 2 percent; and
>
> (c) Whether the interest will be compounded annually.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

The Developer also claims that prejudgment interest at 23 percent per year is required to make the Developer "whole" *i.e*., in the same position monetarily as before the alleged taking, under Nevada Constitution Article 1, Section 22(4). This section provides:

> In all eminent domain actions, just compensation shall be defined as that sum of money, necessary to place the property owner back in the same position, monetarily, without any governmental offsets, as if the property had never been taken. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred.

The Developer relies on *State ex rel. Dept. of Transp. v. Barsy*, 113 Nev. 172, 718, 941 P.2d 971 (1997), applying an earlier version of NRS 37.175, for the proposition that prejudgment interest should not be the prime rate plus two percent as required by the statute, but rather 23 percent, to make the Developer whole. An interest rate of 23 percent is not remotely necessary to put the Developer in the same position as before the City's alleged taking. Neither *Barsy* nor the evidence supports this sky-high rate of interest.

In *Barsy*, the defendant in an eminent domain action owned a building occupied by two tenants. In 1988, the Nevada Department of Transportation ("NDOT") identified Barsy's property for acquisition by eminent domain for a highway construction project. In late 1988 or early 1989, a representative of NDOT informed Barsy's tenants "of the imminent project and of the relocation costs and benefits which NDOT would pay them. Due to NDOT's inability to indicate an accurate time frame for the acquisition of the property, the tenants refused to renew their leases upon expiration." 113 Nev. at 715-16, 941 P.2d at 974. "Barsy was unable to attract new tenants because of the uncertainty surrounding the acquisition by NDOT." *Id*. Barsy presumably had no income from his building after the tenants vacated. The NDOT delayed filing a condemnation action against Barsy until 1992, after Barsy's two tenants had vacated the premises. 113 Nev. at 716, 941 P.2d at 974. During the entire eminent domain action, Barsy was unable to attract new tenants and suffered lost income. *Id*.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

The District Court awarded Barsy prejudgment interest of eight percent, two percent above the prime rate, rather than the rate specified in the eminent domain law at the time,[2] to account for Barsy's lost rental income during the eminent domain litigation. 100 Nev. at 178-19, 941 P.2d at 975-76. The higher rate was required, according to the Court, because the award of just compensation did not account for Barsy's total damages due to the loss of his tenants and hence his income from the property prior to and during the pendency of the eminent domain action. The Court found that if the compensation had been paid before the judgment, Barsy could have used it to extend his mortgage, presumably at a lower rate, or invest in other property that would produce a return that would have made up for Barsy's lost income from before and during the litigation. In sum, the higher interest rate was necessary to put Barsy in the same position monetarily as he would have been but for the blight of the eminent domain action on his property. *See* NRS 37.175(4).

This case presents the opposite facts to *Barsy*. Here, the Developer has already been made more than whole by the award of just compensation of $34,135,000, which is 54 times the amount the $630,000 the Developer paid for the 35-Acre Property (35 x $18,000/acre = $630,000; $34,135,000/$630,000 = 54).[3] This windfall is on top of the City's lifting the PR-OS designation and

[2] At the time *Barsy* was decided, NRS 37.175 set prejudgment interest at the rate of interest paid on one year's United States Treasury bills. NRS 37.175 was later amended to require prejudgment interest at the prime rate plus two percent.

[3] Under the Membership Purchase and Sale Agreement between the Peccoles and the Developer, the Developer purchased the 250-acre Badlands golf course for $7,500,000. Ex. AAA at 966. The City established from the Developer's own records and from the deposition of the representative of the Peccoles who sold the Badlands to the Developer that $3,000,000 of that purchase price was consideration for other real estate interests, putting the price paid for the Badlands at less than $4,500,000, or less than $18,000 per acre. Ex. FFFF at 1591-95; Ex. SSSS at 3787-88. This price is not surprising given that both the Developer and the seller knew that the Badlands was subject to the PR-OS designation. Ex. Y at 420; Ex. SSSS at 3780. Although the Developer alleges that the purchase price was $45 million (Ex. 12 at 456; Ex. 57 at 2-3), it concedes that it has no documents or other objective evidence to support that claim. Ex. UUU at 1300; Ex. FFFF at 1595-97; Ex. FFFF-34 at 1998 ("[T]here are no documents within the Plaintiffs custody and control that state that the aggregate of consideration given to the Peccole family for the former Badlands golf course property was $45 million."). In sum, the Developer has no evidence to refute the very clear documentation and the seller's testimony under oath that the purchase price for the entire 250-acre Badlands was less than $4.5 million, putting the purchase price of the 35-Acre Property at less than $630,000. Even if the Developer paid $45 million for the Badlands, the judgment would be 5.5 times
(footnote continued on next page)

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

upzoning the 17-Acre Property to allow the construction of 435 luxury housing units, which, by the Developer's own evidence, increased the value of the Badlands by $26 million. Ex. VVV at 1319; Ex. CCCC at 1496.[4] Accordingly, requiring the City to pay any prejudgment interest, no less $52 million, would only compound the injustice of the $34,135,000 award and is not required to make the Developer whole monetarily. The Developer has already been made whole *95 times over* ($34,135,000 + $26,000,000 = $60,135,000/$630,000 = 95). *Barsy*, therefore, provides no support to the Developer.

The Developer's claim that a rate of prejudgment interest higher than the statutory rate is necessary to put it in the same position monetarily before the City's alleged taking fails not only because the City changed the law to the Developer's significant benefit with regard to the 17-Acre Property and awarded the Developer $34,135,000 for the alleged value of the 35-Acre Property, but also because the Developer's remaining 233 acres has potential for additional development.[5] Nevertheless, the Developer has declined to attempt to make any use of this property. 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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the purchase price for the 35-Acre Property alone ($45,000,000/250 acres = $180,000/acre x 35 acres = $6,300,000; $34,135,000/$6,300,000 = 5.5).

[4] The Nevada Supreme Court reinstated the City's approval of 435 luxury housing units on the 17-Acre Property in August 2020. Ex. DDD at 1014. The City notified the Developer in September 2020 that the City's approval of construction of 435 luxury housing units on the 17-Acre Property is valid and extended the approval for two years. Ex. GGG at 1021. The City notified the Developer again on December 23, 2021, that the approvals for the 435-unit project are valid and that the Developer can start building as soon as it obtains ministerial building permits. *See* Letter attached hereto as **Exhibit A** (unless otherwise noted, all exhibit references in this opposition refer to the City's Appendix of Exhibits). As Judge Herndon found, the Developer's contention that the City has nullified the 17-Acre approvals is frivolous. Ex. CCCC at 1508.

[5] The Developer admitted in its appeal of its tax assessment that even after the Developer voluntarily closed the golf course in December 2016 (Ex. HHHH at 2181), the Badlands has continuing use, and therefore value, for golfing or golf practice. Ex. LLLL at 2210-11. Even if the Badlands had no use for golf after the Developer shut the golf course down, the Badlands had value as an open space amenity for the parcel as a whole, which is the Peccole Ranch Master Plan area. *See* Ex. XXX at 1392.

that it was free to refile the 133-Acre 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 that 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 develop the 133-Acre Property. The Developer even vigorously opposed the City's request, made after the Nevada Supreme Court overturned the Crockett Order, 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).

Similarly, after 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 has not filed any applications to develop the 65-Acre Property) and a second application for the 35-Acre Property. Exs. OOO, PPP.[6] The City recently reiterated its notice to the Developer that it is free to file applications to develop the 65-Acre, 133-Acre, and 35-Acre Properties. *See* Letter attached hereto as Exhibit A. The Developer ignored all such requests. It is clear, therefore, that not only has the Developer been placed in a significantly better position than it occupied prior to the City's alleged taking, but also that it has the potential to be put in a still better position merely by applying for additional development.

Thus, the Developer's claim rings hollow that it was harmed during this litigation by not having on hand either the $4.5 million it paid for the Badlands or the $34,135,000 judgment to ostensibly develop an alternative real estate project. The Developer has repeatedly made it clear that it has no interest in developing anything on the Badlands; its only interest is in receiving a massive gift from the public treasury for doing nothing other than litigating. Although the City handed the

[6] The Developer filed only one application to develop the individual 35-Acre Property. After the City denied that application, the Developer failed to file a second application to develop the 35-Acre Property standing alone. *See* City's Supp. App. Vol. 24 Ex. DDDDD. Accordingly, the Developer's categorical and *Penn Central* regulatory taking claims are unripe. *See State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419-20, 351 P.3d 736, 742 (2015)

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Developer a permit for 435 luxury units, the Developer has elected instead to attempt to try to extort $386 million—the Developer's total damages claim—from the taxpayers, and now, an additional $52 million for prejudgment interest. If the Developer had elected to develop the Badlands instead of filing these regulatory taking actions, it would have no complaint that it was denied access to the City's funds in 2017.

II. No Nevada Court has awarded prejudgment interest at rate higher than prime plus two percent

There is no Nevada precedent for an award of annual prejudgment interest in a taking case greater than two percent above the prime rate and no precedent that prejudgment "interest" could be set by the speculative profit from an investment of the award of just compensation in another property or business venture. Twenty three percent would be three times the statutory rate and would be unconscionable.

In *County of Clark v. Alper*, 100 Nev. 381, 685 P.2d 943 (1984), the District Court awarded prejudgment interest of seven percent per year, which was the rate provided in NRS 37.175 at the time. 100 Nev. at 393, 685 P.2d at 950. The Nevada Supreme Court remanded the case to the District Court for an evidentiary hearing to determine whether a different rate of interest was warranted to make the property owners whole. 100 Nev. at 394, 685 P.2d at 951. The Court indicated that the proper rate of prejudgment interest should be based "on the actual market rate of interest during the years in question." There is no suggestion in *Alper* that the rate of prejudgment interest could be the profit the condemnee could make by investing the award of just compensation during the litigation.

In *City of Sparks v. Armstrong*, 103 Nev. 619, 748 P.2d 7 (1987), the Court ordered that prejudgment interest should be at the statutory rate under NRS 37.175, even though the subject property was "vacant, unimproved, and held for investment purposes at the time of the taking." 103 Nev. at 623. There is no suggestion that prejudgment "interest" could be interpreted as the value of the profit from a speculative investment of the judgment.

Finally, in *Barsy*, the Court affirmed an award of prejudgment interest of eight percent, which was two percent above the prime rate. The Court found that a rate higher than the statutory rate (at that time) was warranted to make up for Barsy's precondemnation and condemnation damage;

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

namely, the loss of his tenants. The Court found that that loss was not fully compensated in the award of just compensation and therefore it was necessary to restore Barsy to his monetary position before NDOT caused his tenants to move out. 100 Nev. at 178-19, 941 P.2d at 975-76. Because the statutory prejudgment interest rate has been increased to prime plus two percent after *Barsy*, the Court should find that that rate is consistent with all Nevada authority.

III. The Developer does not seek interest on the judgment, but rather a windfall profit from a speculative investment

As demonstrated above, the exorbitant rate of prejudgment interest claimed by the Developer is not necessary to put the Developer in its prior monetary position. Moreover, it is clear that the Developer's lack of access to the judgment in 2017 did not prevent its development of the Badlands, because the Developer has no intention of actually developing the Badlands. The Developer's objective is to use the courts to effect a massive transfer of funds from the public treasury to the Developer. Putting aside these facts, however, the Developer's claim to 23 percent annual prejudgment interest is based on a perversion of the concept of interest. The Developer seeks lost profits from a speculative investment under the guise of "interest." No authority supports the Developer's claim.

"Interest" is defined by Oxford Languages as "money paid regularly at a particular rate for the use of money lent, or for delaying the repayment of a debt." "Profit" is defined by Oxford Languages as "a financial gain, especially the difference between the amount earned and the amount spent in buying, operating, or producing something." "Interest" in this case, therefore, is the return the Developer would have earned if it had received the judgment in 2017 and loaned it to others. The interest rate would logically be a rate competitive with the rates charged by other lenders. That rate would be close to the prime rate. In Nevada, the legislature has set that rate for eminent domain actions at two percent above the prime lending rate of large banks. Profit, by contrast, would be money that the Developer could earn if it invested the money in a real estate venture. In that case, the investment would "produce" something of value that the Developer could then sell or rent, hence, "profit." Interest, by its definition, is a known amount that must be paid by contract; profit, in contrast, is speculative, and depends on a myriad of factors.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Here, the Developer relies on portions of the market data obtained by its consultants to concoct a hypothetical real estate investment project that, if started in 2017, would have made it a profit of 23 percent in every year between 2017 and the present day. This claim is pure speculation. But more important, it is not "interest." It is "profit." It has no place in determination of prejudgment interest.

If the Court were to conflate "interest" with "profit" in the manner proposed by the Developer, in every case of a money judgment in Nevada, the plaintiff could (a) contend that if it had been paid the money at the time of the damage, it could have invested the money in real estate, the stock market, its uncle's business, or any other unidentified business venture; (b) obtain the testimony of an "expert" predicting that the investment in the hypothetical and unidentified venture would yield a profit of a certain amount; and (c) call the profit prejudgment "interest." Profits from real estate investment and other businesses, however, are uncertain and generally too speculative to be admitted in evidence. *See Sargon Enterprises, Inc. v. University of S. Cal.*, 55 Cal.4th 747, 776 (2012) (excluding an expert's lost profit estimates based on a hypothetical increased share of the market). Profit from a business investment is nowhere close to the certainty of the prime rate of interest, which is publicized by the federal government. The Nevada Supreme Court has determined that property owners are entitled to prejudgment "interest" on takings judgments, not prejudgment "profit" from speculative business ventures.

In the instant case, the Developer has submitted opinions of its consultants dated December 8, 2021, that if the Developer had access to the judgment in 2017 and invested in land in Las Vegas, the Developer would have made a profit of almost double the amount of the judgment by December 2021, and would continue to make a profit in the future. This opinion is rank speculation and should not be considered. If the Court considers the opinions of the Developer's consultants to be relevant, however, the City should be given the opportunity to retain its own consultants to rebut their testimony.

IV. The prejudgment interest rate should be limited to $10,632,369.64

As stated in the attached Declaration of George F. Ogilvie III, the prejudgment interest on the judgment of $34,135,000 at the statutory rate prescribed by NRS 37.175 and NRS 99.040 calculated over the period August 2, 2017 through February 1, with interest compounded annually,

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

would be $10,730,468.22. *Id.* ¶ 4 and Exs. A and B. Without conceding the erroneous award of damages in this matter, the City submits the Court should deny the Developer's motion and award $10,730,468.22 in prejudgment interest.

Conclusion

The Developer's Motion should be denied. The prejudgment interest on the $34,135,000 judgment should be $10,730,468.22.

Dated this 23rd day of December, 2021.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III (NV Bar No. 3552)
Christopher Molina (NV Bar No. 14092)
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
gogilvie@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Rebecca Wolfson (NV Bar No. 14132)
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz (CA Bar No. 87699)
(Admitted *pro hac vice*)
Lauren M. Tarpey (CA Bar No. 321775)
(Admitted *pro hac vice*)
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
schwartz@smwlaw.com
ltarpey@smwlaw.com

Attorneys for City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

DECLARATION OF GEORGE F. OGILVIE III IN SUPPORT OF CITY OF LAS VEGAS' OPPOSITION TO DEVELOPER'S MOTION TO DETERMINE PREJUDGMENT INTEREST

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 Opposition to the Developer's Motion to Determine Prejudgment Interest.

3. NRS 99.040 provides, in relevant part:

> When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1 or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due.

4. Attached hereto as **Exhibit B** is the table of prime rates as ascertained by the Nevada Commissioner of Financial Institutions required to be used in accordance with NRS 99.040(1).

5. NRS 37.175 governs the prejudgment rate of interest in eminent domain actions. Applying the NRS 37.175 and NRS 99.040.(1) statutory rate that would accrue on $34,135,000 judgment in this case, at an annual rate of prime plus two percent, compounded annually, from August 2, 2017 through February 1, 2022, the total prejudgment interest is $10,730,468.22, as reflected in the spreadsheet attached hereto as **Exhibit C**.

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

DATED this 23rd day of December, 2021.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 23rd day of December, 2021, I caused a true and correct copy of the foregoing **CITY'S OPPOSITION TO DEVELOPER'S MOTION TO DETERMINE PREJUDGMENT INTEREST AND DECLARATION OF GEORGE F. OGILVIE III** 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

EXHIBIT “A”

By Certified Mail and Email

December 23, 2021

Kermitt L. Waters, Esq.
James J. Leavitt, Esq.
Autumn L. Waters, Esq.
Law Offices of Kermitt L. Waters
704 South Ninth Street
Las Vegas, Nevada 89101
jim@kermittwaters.com

RE: Entitlements on 17-Acre Property; Applications for development of other segments of former Badlands Golf Course

Dear Mr. Leavitt:

17-Acre Entitlements

On March 26, 2020, the City sent you a letter concerning the Nevada Supreme Court's Order of Reversal in *Seventy Acres, LLC v. Binion, et al.*, Case No. 75481 ("Order"). The Order reversed a decision by Judge Crockett of the Eighth Judicial District in Case No. A-17-752344-J, which had concluded that your client, Seventy Acres, LLC, was required to submit a major modification application along with its other entitlement requests to develop 435 housing units on a 17-acre portion of the former Badlands golf course in the Peccole Ranch Master Plan ("PRMP") area. On September 1, 2020, the City sent you a letter noting that the remittitur in *Seventy Acres, LLC v. Binion* had been issued on August 24, 2020. The September 1, 2020 letter notified you that (a) the discretionary entitlements the City approved for your client's 435-unit project on February 15, 2017 (GPA-62387, ZON-62392, and SDR-62393) were reinstated, (b) the City Council's February 2017 action approving all discretionary entitlements required for your client's 435-unit project on the 17-acre portion of the Badlands are valid and will remain so for two years after the date of the remittitur, and (c) because no more discretionary entitlements are required to develop your client's project, the City will accept applications for any ministerial permits required to begin construction pursuant to the approved discretionary entitlements and the conditions included in them.

Since the City's March 26, 2020 letter, the City has received no applications for ministerial permits or other communications from you regarding the 435-unit project. This is to notify you, again, that the City will accept applications for any ministerial permits required to begin construction of the 435-unit project pursuant to the approved discretionary entitlements and the conditions included in them. As indicated in the City's September 1, 2020 letter, however, the entitlement to build the 435-unit project will expire two years from September 1, 2020, on August 31, 2022.

133-Acre Applications

While Judge Crockett's Order was in effect, the City followed the Court's directive and required a major modification of the PRMP to redevelop any part of the former Badlands golf course. This included approximately 133 acres of land owned by one of EHB's other subsidiaries, 180 Land Company, LLC, for which the City Council considered entitlement applications on May 16, 2018 ("the 133-Acre Applications"). The 133-Acre Applications consisted of GPA-72220, WVR-72004, SDR-72005, TMP-72006, WVR-72007, SDR-72008, TMP-72009, WVR-72010, SDR-72011, and TMP-72012. The City Council struck the 133-Acre Applications from its agenda as incomplete for two reasons. First, the 133-Acre Applications did not include an application for a major modification, as Judge Crockett's Order required. Second, the application for a general plan amendment violated the City's Unified Development Code §19.16.030(D) because it was duplicative of one that had been filed within the previous 12-month period and was therefore time-barred.

On March 26, 2020, the City sent you a letter notifying you that the Supreme Court has reversed Judge Crockett's Order, more than a year had passed from the original GPA request, and the City Council was then permitted by law to consider the 133-Acre Applications on their merits. Since March 2020, the City has received no applications or communication from your client regarding reconsideration of the 133-Acre Applications by the City Council on the merits. For the City Council to consider the 133-Acre Applications on the merits, 180 Land needs to contact the Department of Planning and request that the 133-Acre Applications be heard on the next available City Council agenda. No major modification need be filed. The City will waive any applicable fees for the reconsideration of your application.

65-Acre Property

On March 26, 2020, the City sent you a letter notifying you of the Reversal Order and that your client had not submitted any applications or requests for entitlements to redevelop 65 acres of land owned by 180 Land Company, LLC, a subsidiary of your client EHB Properties ("65-Acre Property"). If your client wishes to file applications to redevelop the 65-Acre Property, your client may submit the applications to the City Planning Department. As a result of the reversal of the Crockett Order, your client does not need to submit a major modification application as part of its entitlement package.

35-Acre Property Applications

The City also sent you a letter dated April 15, 2020 regarding entitlements to redevelop 35 acres of land owned by one of EHB Properties, LLC's other subsidiaries, 180 Land Company, LLC ("35-Acre Property"). 180 Land filed one set of applications for entitlements to develop the 35 Acres (WVR-68480, SDR-68481, TMP-68482), which the City Council denied. Under the Reversal Order, and because 180 Land only submitted a single set of requests for entitlements, the City is now able to consider new applications to develop the 35 Acres without any requirement for a major modification application. If your client wishes to file additional applications to redevelop the 35-Acre Property, your client may submit the applications to the City Planning Department.

If you have any questions about the application process for development of any of the four Badlands parcels, please do not hesitate to contact me at (702) 229-6184. You or your client may also contact the appropriate City department with specific questions about the permits your client will need to develop the 435-unit project or to apply to develop the other three development sites in the Badlands.

Sincerely,

Seth T. Floyd, Esq.
Director of Community Development

STF:mre

CERTIFIED MAIL NO. 7021-2720-0001-0127-9513

cc: Elizabeth Ham, Esq. (via email to eham@ehbcompanies.com)
Phil Byrnes, Deputy City Attorney

EXHIBIT “B”

PRIME INTEREST RATE

NRS 99.040(1) requires:
*"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . . "**
Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2021	3.25%		
January 1, 2020	4.75%	July 1, 2020	3.25%
January 1, 2019	5.50%	July 1, 2019	5.50%
January 1, 2018	4.50%	July 1, 2018	5.00%
January 1, 2017	3.75%	July 1, 2017	4.25%
January 1, 2016	3.50%	July 1, 2016	3.50%
January 1, 2015	3.25%	July 1, 2015	3.25%
January 1, 2014	3.25%	July 1, 2014	3.25%
January 1, 2013	3.25%	July 1, 2013	3.25%
January 1, 2012	3.25%	July 1, 2012	3.25%
January 1, 2011	3.25%	July 1, 2011	3.25%
January 1, 2010	3.25%	July 1, 2010	3.25%
January 1, 2009	3.25%	July 1, 2009	3.25%
January 1, 2008	7.25%	July 1, 2008	5.00%
January 1, 2007	8.25%	July 1, 2007	8.25%
January 1, 2006	7.25%	July 1, 2006	8.25%
January 1, 2005	5.25%	July 1, 2005	6.25%
January 1, 2004	4.00%	July 1, 2004	4.25%
January 1, 2003	4.25%	July 1, 2003	4.00%
January 1, 2002	4.75%	July 1, 2002	4.75%
January 1, 2001	9.50%	July 1, 2001	6.75%
January 1, 2000	8.25%	July 1, 2000	9.50%
January 1, 1999	7.75%	July 1, 1999	7.75%
January 1, 1998	8.50%	July 1, 1998	8.50%
January 1, 1997	8.25%	July 1, 1997	8.50%
January 1, 1996	8.50%	July 1, 1996	8.25%
January 1, 1995	8.50%	July 1, 1995	9.00%
January 1, 1994	6.00%	July 1, 1994	7.25%
January 1, 1993	6.00%	July 1, 1993	6.00%
January 1, 1992	6.50%	July 1, 1992	6.50%
January 1, 1991	10.00%	July 1, 1991	8.50%
January 1, 1990	10.50%	July 1, 1990	10.00%
January 1, 1989	10.50%	July 1, 1989	11.00%
January 1, 1988	8.75%	July 1, 1988	9.00%
January 1, 1987	Not Available	July 1, 1987	8.25%

*** Attorney General Opinion No. 98-20:**

If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is

EXHIBIT “C”

Interest Calculator / COMPOUNDING

Begin Date: **8/2/2017**

Judgment Amount **$34,135,000.00**

Amount	Start date	End date	Days	Rate	Daily Rate	Interest	Daily Accrual
$34,135,000.00	August 2, 2017	December 31, 2017	152	5.25%	0.01%	$746,293.97	$4,909.83
$34,135,000.00	January 1, 2018	June 30, 2018	181	6.50%	0.02%	$1,100,269.25	$6,078.84
$34,135,000.00	July 1, 2018	August 1, 2018	32	7.00%	0.02%	$209,486.03	$6,546.44
$36,191,049.25	August 2, 2018	December 31, 2018	152	7.00%	0.02%	$1,054,993.87	$6,940.75
$36,191,049.25	January 1, 2019	June 30, 2019	181	7.50%	0.02%	$1,346,009.57	$7,436.52
$36,191,049.25	July 1, 2019	August 1, 2019	32	7.50%	0.02%	$237,968.54	$7,436.52
$38,830,021.23	August 2, 2019	December 31, 2019	152	7.50%	0.02%	$1,212,773.27	$7,978.77
$38,830,021.23	January 1, 2020	June 30, 2020	182	6.75%	0.02%	$1,306,922.77	$7,180.89
$38,830,021.23	July 1, 2020	August 1, 2020	32	5.25%	0.01%	$178,724.48	$5,585.14
$41,528,441.75	August 2, 2020	December 31, 2020	152	5.25%	0.01%	$907,936.89	$5,973.27
$41,528,441.75	January 1, 2021	June 30, 2021	181	5.25%	0.01%	$1,081,161.69	$5,973.27
$41,528,441.75	July 1, 2021	August 1, 2021	32	5.25%	0.01%	$191,144.61	$5,973.27
$43,708,684.94	August 2, 2021	February 1, 2022	184	5.25%	0.01%	$1,156,783.28	$6,286.87
Judgment Balance	$44,865,468.22					$10,730,468.22	

OPPS
Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Rebecca Wolfson (NV Bar No. 14132)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101
Telephone: (702) 229-6629
Facsimile: (702) 386-1749
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

(Additional Counsel Identified on Signature Page)

Attorneys for Defendant City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No. A-17-758528-J

Dept. No..: XVI

CITY'S OPPOSITION TO DEVELOPER'S MOTION FOR ATTORNEY'S FEES

The City of Las Vegas, by and through the undersigned counsel, hereby opposes the Motion for Attorney's Fees ("Motion") filed by Plaintiffs 180 Land Co LLC and Fore Stars Ltd. (collectively, the "Developer"). This opposition is based upon the following memorandum of points and authorities, the exhibits attached hereto, the existing record in this action, and any argument the Court may entertain at any hearing on the Motion.

. . .

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Developer's Motion for $3,410,755.00 in attorney's fees should be summarily denied in its entirety. The Nevada Supreme Court rejected all of the same arguments the Developer is making in the Motion in *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. 1, 4, 341 P.3d 646, 648 (2015). *See* Excerpt of Petition for Rehearing filed 10/28/2014 by the Law Offices of Kermitt L. Waters attached as **Ex. A** (claiming that district court's failure to apply eminent domain statutes and Nev. Const. Art. 1, § 22 in non-eminent domain case was "plain error"); *see also* Excerpt of Appellant's Opening Brief filed 4/12/2011 by the Law Offices of Kermitt L. Waters attached as **Ex. B** (accusing city of unethical conduct for correctly arguing that the Uniform Relocation Assistance and Real Property Acquisition Policies Act does not apply); *see also* Excerpt of Appellant's Reply Brief filed October 5, 2011 by the Law Offices of Kermitt L. Waters attached as **Ex. C** (claiming that non-existent violation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act was "prima facie evidence of improper conduct" requiring a new trial).[1]

Even if the Court finds some basis to award the Developer any attorney's fees in this matter, the Developer has failed to comply with the requirements of NRCP 54 and relevant case law to establish the reasonableness of the requested fees, which exceed the amount of fees the Developer claims to have actually incurred by more than $1.3 million. This request for unreasonable fees is based upon the Developer's outrageous claim that it is entitled to "enhanced fees" at rates ranging from $800/hour to $1,500/per hour. Such rates are 3-4 times higher than the prevailing market rates in Las Vegas, Nevada and clearly unreasonable. *See* Excerpt of Walter Kluwer's Real Rate Report attached as **Ex. D**. The Developer submitted no documentation to justify the rates the Developer's

[1] The *Buzz Stew* court dismissed the landowner's arguments regarding the Uniform Relocation Assistance and Real Property Acquisition Policies Act because the landowner failed to show that federal funds were used for the project. 131 Nev. at 8–9, 341 P.3d at 651. Additionally, the court held that Nev. Const. Art. 1, § 22 applied only to eminent domain actions and did not prevent an award of costs to the government. *Id.* (citing *Locklin v. City of Lafayette*, 7 Cal.4th 327, 27 Cal.Rptr.2d 613, 867 P.2d 724, 756 (1994) [holding that an inverse condemnation plaintiff who did not prevail on a takings claim was not shielded by the law against awarding costs in eminent domain actions]).

attorneys claimed to have billed, let alone these "enhanced fees" that are $1.3 million greater than the fees the Developer actually incurred.

II. LEGAL ARGUMENT

A. Nevada follows the American Rule and there is no statute, contract, or rule that authorizing an award of attorney's fees in this case

"Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). The Developer claims there are three grounds for recovering the excessive fees requested: (i) the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601 to 4655; (ii) Article 1, § 22(4) of the Nevada Constitution; and (iii) NRS 18.010(2)(b). None of these laws apply to this case.

1. The Uniform Relocation Assistance and Real Property Acquisition Policies Act does not apply because this case does not involve a federally assisted project or program

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601 et seq. (the "Relocation Act") is intended to ensure consistent treatment for all owners affected by *federal* land acquisition practices. 42 U.S.C. § 4651. It prohibits federal agencies from approving any program, project, or grant to a state agency under which federal funds are available to pay all or part of the cost of any program or project which will result in the acquisition of real property *unless* the acquiring state agency provides satisfactory assurances that (1) in acquiring real property, it will be guided, to the greatest extent practicable under state law, by the land acquisition policies of the Relocation Act; and (2) property owners will be paid or reimbursed for expenses incidental to transfer of title or litigation as specified by statute. 42 U.S.C. § 4655(a); 49 C.F.R. § 24.4(a)(1).

Section 4654(a) of the Relocation Act allows for recovery of attorney's fees in two very narrow situations: "(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or (2) the proceeding is abandoned by the United States." Numerous courts across the country have found that Congress clearly intended to create only a narrow exception to the general rule of nonrecovery of litigation expenses in condemnation actions. *United States v. 243.538 Acres of Land, More or Less, In Maui County, State of Hawaii*, 509 F. Supp. 981, 985 (D. Haw. 1981); *see*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

also United States v. 4.18 Acres of Land, More or Less, in Idaho County, State of Idaho, 542 F.2d 786, 788 (9th Cir. 1976); *United States v. 410.69 Acres of Land, More or Less in Escambia County, State of Fla.*, 608 F.2d 1073, 1076 (5th Cir. 1979).[2]

The Developer claims that because the plaintiffs in *Sisolak* and *Hsu* were awarded attorney's fees under the Relocation Act, the City is required to pay the Developer's attorneys fees. This argument ignores the fact that both *Sisolak* and *Hsu* involved air space takings caused by the airport transition zone height restrictions that the County was required to establish in order to obtain funding for airport projects. As the *Sisolak* court explained, "the Relocation Act entitles Sisolak to an award of attorney fees because the County received federal funding for numerous improvements at McCarran Airport, including runway reconstruction and land acquisition." 122 Nev. 645, 674, 137 P.3d 1110, 1129 (2006). In fact, to demonstrate that the Relocation Act applied to Sisolak's takings claim, Sisolak filed copies of the grant agreements between the County and the FAA in which the County agreed to be bound by the Relocation Act's provisions. *See* Sisolak's Supplemental Exhibit Concerning Application of URA Requirements attached as **Ex. E**; *see also* Sisolak's Second Supplemental Exhibit Concerning Application of URA Requirements attached as **Ex. F**.

Nevertheless, the Developer claims that all governmental agencies that receive federal funds are required to pay attorney's fees in inverse condemnation actions, citing 49 C.F.R. § 24.107(c). Section 24.107(c) lacks the limiting language of 42 U.S.C. § 4654, but that cannot somehow expand the remedies available under the Relocation Act. An enabling regulation cannot provide greater rights or remedies than authorized by its implementing statute. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 96, 122 S. Ct. 1155 (2002). In any event, the Developer's reliance on § 24.107(c) is clearly misplaced because § 24.101 expressly limits § 24.107(c) to acquisitions of real property for "a direct Federal program or project" and acquisitions of real property "where there is Federal

[2] The report of the Public Works Committee of the House of Representatives makes it clear that the attorney's fees provision in the Relocation is not to be construed broadly. After paraphrasing the section, the report states: "Ordinarily the Government should not be required to pay expenses incurred by property owners in connection with condemnation proceedings. The invitation to increased litigation is evident." H.R. Rep. No. 91-1656, 91st Cong., 2d Sess., contained in 3 U.S.Code Cong. & Admin. News 5875 (1970).

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

financial assistance in any part of project costs." 49 CFR §24.101(a), (b).

The Developer's interpretation of the Relocation Act and the regulations thereunder cannot be squared with our Supreme Court's decisions in *Buzz Stew* and *County of Clark v. Alper,* 100 Nev. 382, 396, 685 P.2d 943, 952 (1984). In *Alper*, the Supreme Court reversed an award of attorney fees to the owner of property taken by the county to widen a public street because the owner failed to show that the county received federal financial assistance to pay for all or any part of the project, implying that some nexus is required. *Id.* And, as previously noted, in *Buzz Stew* the Court rejected arguments that the Relocation Act applied, holding that "the district court did not err in excluding [expert testimony regarding the Relocation Act], as Buzz Stew failed to show that federal funds were used for the project." 131 Nev. 1, 8–9, 341 P.3d 646, 651 (2015).

The Developer suggests that *Sisolak* potentially overruled or distinguished *Alper* in holding a "specific nexus" is not required. *See* Motion at 3:20-22. Indeed, the *Sisolak* court rejected Clark County's argument that, "in order for the Relocation Act to apply, there must be a specific nexus between the federal funding and the taking at issue as well as landowner displacement." 122 Nev. at 674, 137 P.3d at 1129. However, if a specific nexus is not required, it does not necessarily follow that no nexus is required. The Developer's arguments fail to appreciate the nuance created by the *Sisolak* court's use of the term "specific."

The district court's decision regarding Sisolak's request for attorneys fees explains that Sisolak and the County had taken diametrically opposite positions with respect to the nexus issue, as Judge Denton explained in his order granting Sisolak's motion for attorney's fees:

> In a nutshell, the positions of the parties can be condensed to that of Plaintiff, which is that there is a broad swath of applicability to federally funded projects with no displacement requirement in inverse condemnation cases, versus that of Defendants, which is that there is a requirement of a specific nexus between the federal funding and the taking at issue, with a displacement requirement.

See Order granting Sisolak's motion for attorney's fees attached as **Ex. G**. Judge Denton went on to explain "[t]he Court is persuaded that the record demonstrates that Defendants are "subject to" the URA and that <u>*a*</u> nexus exists to the extent necessary." *Id.* at p. 3, ln 9-10 (emphasized added). Furthermore, Judge Denton explained that this conclusion was not inconsistent with *Alper*'s holding

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

that the plaintiff was not entitled to recover fees under the Relocation Act because it failed to show any nexus. *Id.* at ln. 14-20.

Thus, in order for the Developer to claim the benefits of the Relocation Act, it must demonstrate at least *some* nexus between the taking at issue and a federally assisted project or program. The Developer, like the landowners in *Alper* and *Buzz Stew*, failed to establish a threshold connection between the taking at issue and any program or project "where there is Federal financial assistance in any part of project costs."[3]

2. Article I, Section 22 of the Nevada Constitution does not authorize fee awards in inverse condemnation cases

It is well-established that "a landowner has no constitutional right to recover attorney fees as a part of the just compensation for land taken by eminent domain." *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673, 137 P.3d 1110, 1128 (2006); *see Dohany v. Rogers*, 281 U.S. 362, 386, 50 S.Ct. 299, 302 (1930) ("Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain."). The reason being is that for purposes of the Fifth Amendment, "just compensation is for the property, and not the owner." *U. S. v. Bodcaw Co*., 440 U.S. 202, 99 S. Ct. 1066, 1066 (1979) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 13 S.Ct. 622, 626, (1893).

Compensation to a landowner for indirect costs incurred in a condemnation action "is a matter of legislative grace." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 9, 106 P.3d 1198, 1199 (2005) (quoting *United States v. Bodcaw Co.*, 440 U.S. 202, 204, 99 S.Ct. 1066 (1979)). And absent an authorizing statute, courts may not grant a judgment against the government for costs or expenses. *United States v. Worley*, 281 U.S. 339, 344, 50 S.Ct. 291 (1930); *Citizens Committee v. Callaway*, 494 F.2d 124, 126 (9th Cir. 1974).

---

[3] Although a moot issue because there is no federally assisted program or project with any nexus to the alleged taking at issue, it is worth noting that other states have determined that the Relocation Act does not, by itself, authorize attorney's fees in state law inverse condemnation proceedings. *See* 8A Patrick J. Rohan & Melvan A. Reskin, Nichols on Eminent Domain § G.20.05[3] (3d ed. 2015) ("[T]he provisions of 42 U.S. C. 4654, entitling successful plaintiffs to litigation expenses, apply only to takings by a federal agency, not to an inverse condemnation action by a city redevelopment authority, nor to an award under a state condemnation.").

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

The Developer claims that the constitutional amendments brought about by the voter's imitative "People's Initiative to Stop the Taking of Our Land" (PISTOL) created an exception to the American Rule allowing attorney's fees in inverse condemnation actions. *See* Motion 5:1-7. Several of the PISTOL amendments, however, were stricken from the initiative before it was approved and ratified by the voters because they violated the single subject rule. *See Nevadans for the Prot. of Prop. Rts., Inc. v. Heller*, 122 Nev. 894, 141 P.3d 1235 (2006). As approved in 2008, the PISTOL amendments became Section 22 of Article I of the Nevada Constitution, which states as follows:

> Sec. 22. **Eminent domain proceedings: Restrictions and requirements**. Notwithstanding any other provision of this Constitution to the contrary:
>
> 1. Public use shall not include the direct or indirect transfer of any interest in property taken in **an eminent domain proceeding** from one private party to another private party. In all **eminent domain actions**, the government shall have the burden to prove public use.
>
> 2. In all ***eminent domain actions***, prior to the government's occupancy, a property owner shall be given copies of all appraisals by the government and shall be entitled, at the property owner's election, to a separate and distinct determination by a district court jury, as to whether the taking is actually for a public use.
>
> 3. If a public use is determined, the taken or damaged property shall be valued at its highest and best use without considering any future dedication requirements imposed by the government. If private property is taken for any proprietary governmental purpose, then the property shall be valued at the use to which the government intends to put the property, if such use results in a higher value for the land taken.
>
> 4. In all ***eminent domain actions***, just compensation shall be defined as that sum of money, necessary to place the property owner back in the same position, monetarily, without any governmental offsets, as if the property had never been taken. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred.
>
> 5. In all ***eminent domain actions*** where fair market value is applied, it shall be defined as the highest price the property would bring on the open market.
>
> 6. Property taken in ***eminent domain*** shall automatically revert back to the original property owner upon repayment of the original purchase price, if the property is not used within five years for the original purpose stated by the government. The five years shall begin running from the date of the entry of the final order of condemnation.
>
> 7. A property owner shall not be liable to the government for attorney fees or costs in any ***eminent domain action***.

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> 8. For all provisions contained in this section, government shall be defined as the State of Nevada, its political subdivisions, agencies, any public or private agent acting on their behalf, and any public or private entity that has the power of eminent domain.
>
> 9. Any provision contained in this section shall be deemed a separate and freestanding right and shall remain in full force and effect should any other provision contained in this section be stricken for any reason.

The PISTOL amendments only describe eminent domain actions. They never mention inverse condemnation actions. Moreover, the PISTOL amendments refer to procedural matters unique to eminent domain actions.[4] Thus, on its face, the PISTOL amendments do not apply to inverse condemnation actions, which is significant because many states have similar provisions that protect property owners in eminent domain actions but not inverse condemnation actions. See, e.g., *Buzz* Stew, 131 Nev. at 8–9, 341 P.3d at 651 (citing *Locklin v. City of Lafayette*, 7 Cal.4th 327, 27 Cal.Rptr.2d 613, 867 P.2d 724, 756 (1994), which held that an inverse condemnation plaintiff who did not prevail on a takings claim was not shielded by the law against awarding costs in eminent domain actions.)

The provision that supposedly requires the government to pay attorney's fees in inverse condemnation actions is expressly limited by the prefatory clause "in all eminent domain actions." *See* Nev. Const. Art. I, § 22(4). More importantly, it does not mention attorney's fees. One could argue that the omission was intentional, given that another PISTOL amendment states: "A property owner shall not be liable to the government for ***attorney fees*** or costs in any eminent domain action." Nev. Const. Art. I, § 22(7). This provision protects property owners from having to pay attorney's fees, but nothing in the PISTOL amendments mandates or authorizes an award of attorney's fees against the government.

Next the Developer argues that the drafters of the argument opposing the PISTOL amendments that was put on the ballot were "so certain that the government would have to pay for the landowners attorney fees in an eminent domain action under Article 1, Section 22, that they even added an exclamation point "!" at the end of that sentence to denote its major significance to all

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[4] See e.g. Nev. Const. Art. I, § 22(1) (government's burden to prove public use), Nev. Const. Art. I, § 22(2) (requiring delivery of appraisals prior to filing motion for immediate occupancy)

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Nevada voters." Motion at 6:3-5. However, the Nevada Supreme Court has explained that ballot initiative descriptions should not be interpreted like laws adopted by the legislature. *Educ. Init. v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 48, 293 P.3d 874, 883 (2013) ("Given the limited function ascribed to an initiative's description of effect and the fact that these descriptions are relevant only at the early stages of the initiative process, we conclude that it is inappropriate to parse the meanings of the words and phrases used in a description of effect as closely as we would statutory text.")

Finally, the Developer suggests that because NRS 37.120 excepts inverse condemnation actions from the blanket prohibition on attorney fee awards in eminent domain cases, that somehow means that the government must pay attorney's fees in inverse condemnation actions. However, a law prohibiting fee awards in eminent domain cases is not the same as a law authorizing fee awards in inverse condemnation cases.

3. A fee award pursuant to NRS 18.010(2)(b) is not justified

The last group upon which the Developer seeks to recover fees is NRS 18.010(2)(b), which provides that the court may make an allowance of attorney's fees to a prevailing party if the court finds that a claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. This rule is intended to punish and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

The Developer's arguments lack citations to authority, are replete with assertions that have no factual basis, contain blatant misrepresentations. Nevertheless, none of the accusations that the Developer makes about the City's defense of this matter, even if true, would rise to the level of sanctionable conduct. The Developer claims that the City reargued issues that had already been decided, argued contrary to long standing Nevada eminent domain law, and repeatedly argued "petition for judicial review law." While the Developer may disagree with the City's legal arguments, that does not make them irrelevant. And, although this Court may disagree with the City's position, the developer cannot claim that the City's positions did not have a basis in fact or law. The fact that a sitting Nevada Supreme Court justice agreed with the City's arguments demonstrates that they are

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more than substantially justified.

B. Even if the Developer is entitled to attorney's fees, the Developer failed to satisfy the requirements of NRCP 54(d) or establish the reasonableness of the requested fees.

An award of attorney's fees and costs lies within the district court's discretion. *RTTC Communications, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 40, 110 P.3d 24, 28 (2005). The determination of what is reasonable is within the discretion of the trial court. *Parodi v. Budetti*, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999). In evaluating the reasonableness of a request for attorney's fees, the district court is required to consider the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 354, 349-50, 455 P.2d 31, 33 (1969). Thus, regardless of the method chosen as the starting point for evaluating fees (i.e. lodestar method, contingency fee arrangement, etc.), the trial court must continue its analysis by considering the requested amount in light of the factors enumerated in *Brunzell*. *Schuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (internal citations omitted). Those factors are as follows:

> (1) the advocate's qualities, including ability, training, education, experience, professional standing, and skill;
>
> (2) the character of the work, including its difficulty, intricacy, importance, as well as the time and skill required, the responsibility imposed, and the prominence and character of the parties when affecting the importance of the litigation;
>
> (3) the work performed, including the skill, time, and attention given to the work; and
>
> (4) the result – whether the attorney was successful and what benefits were derived.

Brunzell, 85 Nev. at 349-50, 455 P.2d at 33.

The Developer has the burden to establish that the requested fees "'were actually and necessarily incurred and were reasonable.'" *Stefonich v. Bautista*, 487 P.3d 389, 2021 WL 2178577, at *1 (Nev. May 27, 2021). That showing must be "supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266–67, 350 P.3d 1139, 1143 (2015).

1. The Court cannot determine reasonableness of the requested fees based on the documentation submitted

The developer provided no documentation to support the reasonableness of the fees it claims

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it actually incurred. Although billing records are not necessarily required to establish the reasonableness of a fee award where the attorney is hired under a contingency fee arrangement, according to the affidavits submitted by the Developer's four attorneys, this is the first and only case in which such attorney's have billed their time on an hourly basis.

The lack of supporting documentation such as billing records is particularly concerning in this case as the Developer is claiming that its attorneys took detailed records of the number of hours worked but the number hours they claim to have worked in this case is rounded to the nearest hundredth, which indicates that they did not use a professional time-keeper system. Any professional time-keeping system would round the time spent to the nearest billing increment.

2. The fees claimed are excessive and unreasonable

When determining whether an hourly rate is reasonable, this tribunal must consider "the prevailing market rate ***in the relevant community***." *Blum v. Stenson*, 465 U.S. 886, 895(1984) (emphasis added). The relevant community here is Las Vegas, Nevada. The prevailing market rate in Las Vegas, Nevada, is roughly $450/hour for a partner and $250-$300/hour for an associate. See *Topolewski v. Blyschak*, 2018 WL 1245504, at *4 (D. Nev. Mar. 8, 2018) (explaining that "rate determinations in other cases in the District of Nevada have found hourly rates as much as $450 for a partner and $250 for an experienced associate to be the prevailing market rate in this forum"). These rates are confirmed by the 2020 Real Rate Report published by Wolters Kluwers, which identifies the average rates for partners and associates in Las Vegas over the previous three years. *See* Ex. D, Rate Report.

In 2017, when this case began, the average rate charged by partners in the Las Vegas market was $410 per hour while the average rate for associates was $264 per hour. The following year, in 2018, the average rate for partners in the Las Vegas market was $444 and the average rate for associates was $279. In 2019, the average rate for partners actually dropped slightly to $438 while the average rates for associates rose slightly to $281.

In its Motion, the Developer claims that all four of the Developer's attorneys billed at the same rate of $450/hour from August 2017 through June 2019. During that same period, $450 was above market. Then, from June of 2019 to October 2021, the Developer's counsel apparently raised

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the blended rate to $675/hour. This is also well above the average rates charged in the Las Vegas market.

Now, the Developer is requesting an enhanced fee which is higher than the average rate for partners in New York. This isn't just unreasonable, its unsupportable. In attempt to make its fees request seem legitimate, the Developer compares itself to the attorney who represented Governor Sisolak in the airport case, who the court awarded substantial fees under a contingency fee agreement. While an increased fee might be justifiable if the Developer's counsel had taken this case on a contingency fee, none of the factors that justify such an enhanced fee are present in an hourly structure. The Developer's counsel did not assume the great financial risk that typically justifies larger contingency awards. The Developer's attorneys are not waiting an extended period of time without payment. The requested fees are unreasonable and unsupportable, even if the Developer had grounds to recover the.

III. CONCLUSION

For the foregoing reasons, the Developer's Motion for Attorney's Fees should be denied in its entirety.

DATED this 23rd day of December, 2021.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III (NV Bar No. 3552)
Christopher Molina (NV Bar No. 14092)
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Rebecca Wolfson (NV Bar No. 14132)
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz (CA Bar No. 87699)
(Admitted *pro hac vice*)
Lauren M. Tarpey (CA Bar No. 321775)
(Admitted *pro hac vice*)
396 Hayes Street
San Francisco, California 94102

Attorneys for City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 23rd day of December, 2021, I caused a true and correct copy of the foregoing **CITY'S OPPOSITION TO DEVELOPER'S MOTION FOR ATTORNEY'S FEES** 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

EXHIBIT “A”

IV. Facts and Law Overlooked in Regards to Application of Chapter 37

A. Facts

The district court refused to allow and/or apply eminent domain rules and principles in this action. (Order p.2)(see also 13 JA 3019). In fact, the district court even charged Buzz Stew with the City's costs, a clear violation of Nev. Const. Art. 1, § 22(7). In this Court's Order it finds that costs may be levied against a landowner in an "unsuccessful action for precondemnation damages wherein the City prevailed on its defenses." (Order p. 8). As will be discussed below, this position is irreconcilable with this Court's opinion in 5th and Centennial.

B. Law

In 5th and Centennial this Court applied eminent domain case law and statutes. For example, this Court ruled that NRS 37.175, an eminent domain statute, was more appropriate than a general statute. "Furthermore, we conclude that NRS 37.175(4) is more appropriate than NRS 17.130(2), the general prejudgment interest statute, for calculating precondemnation damages because NRS 37.175 is **specific to eminent domain cases**." 5th and Centennial at 899 (emphasis added). If eminent domain case law and statutes apply in 5th and Centennial (a precondemnation damages case), then they must also apply here.

It is difficult to rationalize how eminent domain statues and principles apply to one precondemnation damages case, but not another. The same would violate stare decisis and the equal protection clause. Accordingly, it was plain error for the district court to "decline" to apply eminent domain principles in this case. It can simply not stand that in 5th and Centennial it was an abuse of discretion for the district court to fail to apply chapter 37, while the district court's failure to apply NRS 37 and Nev. Const. Art 1, § 22(7) here was not an abuse of discretion. Either applying eminent domain rules and principles in a precondemnation damages case is an abuse of discretion or it is not. The rule can not be changed depending upon the parties. This inconsistent position will cause a legal quagmire in the future if not corrected. Furthermore, it is important to note that Buzz Stew's property is one parcel to the east

of 5th and Centennial. As can be seen from Exhibit 1, these are neighboring parcels.

The time frames for the City's conduct is nearly identical for 5th and Centennial and Buzz Stew. The City's behavior did not change between 5th and Centennial and Buzz Stew, however in 5th and Centennial the conduct was deemed improper and in Buzz Stew it was not. The only difference between these two cases is that 5th and Centennial received a fair trial from Judge Denton, while Buzz Stew did not receive even a semblance of a fair trial from the Judge it was assigned. It would be a gross injustice to allow such vastly different results simply due to the department the parties happen to land.

Moreover, this Court entirely overlooked or misapprehended one of the principle purposes behind the 5th & Centennial holding that a precondemnation damage claims is an "eminent domain" claim, which is to assure that all landowners receive the protections afforded in eminent domain cases, most importantly, that the government will not be permitted to "threaten" Nevada landowners that, if they seek their constitutional right to protect their property, then the government will force them to pay attorney fees and costs. This Court's Order has already prompted these threats from the City in its motion to publish wherein it states it wants the Order published so it can impose a "risk" (payment of costs) and "consequences" on Nevada landowners to "deter" them from bringing claims to protect their property. (City mot to publish 3-4). The ink had not even dried on this Court's Order and the threats from the government have already been made.

Accordingly, a rehearing is necessary to ensure equal application and protection of the law.

V. Facts and Law Overlooked in Regards to "Benefits"

A. Facts

This Court states that "[b]ecause the jury did not reach the issue of precondemnation damages and because the question before the jury was whether Buzz Stew was entitled to precondemnation damages we reject Buzz Stew's argument that the district court abused its discretion (1) in admitting evidence ***that the project***

EXHIBIT “B”

(26 JA 6190:19-21), even though there was an order excluding this same information (source of funds). (15 JA 2516). The City had Ms. Walker testify that "[e]verybody benefits from it [the Project], because as that water is channeled off and out of the area, it gives an opportunity for the whole area to start developing"(26 JA 6190:25-6191:1-2), even though there was an order excluding all general benefits. (15 JA 2516). This kind of conduct is not uncommon for the City and its counsel. In fact, in another eminent domain action, the City itself had requested and obtained a pretrial order excluding any reference to offers to purchase property as being legally inadmissible (26 JA 6082:7-16; 6085:15-16) and then, during trial, the City had its appraiser, Gary Kent, blurt out an offer (26 JA 6072:1-3). After trial, it was then discovered that the testimony was completely false. (26 JA 6076-6080). This unacceptable conduct by the City violates the rules of professional conduct and its duty in eminent domain proceedings.

5. The City Violated the Requirement of Candor to the Court by Arguing that it is Not Bound by the Uniform Relocation Assistance and Real Property Acquisition Policies Act.

The City also incorrectly represented to the lower court that the City is not subjected to the Uniform Relocation Assistance and Real Property Acquisition Policies Act,[125] adopted by the state per statute, including NRS 342.105 ("Relocation Act"). (30 JA 7093-70098, 7102-7108). Even JoMar Alwes, the City's right-of-way agent, admitted that he follows the Relocation Act as an employee of the City. (31 JA 7381:18-24). To counter this the City argued that "[t]he fact that Mr. Alwes likes to abide by the laws in his personal business doesn't mean as a matter of law that Title 23 applies to the city." (27 JA 6261:5-7). Mr. Alwes is an employee of the City. Clearly, Mr. Alwes would not claim to follow these rules, if the City were not bound by the same. The City's representations to the lower court regarding the Relocation Act violate the duties imposed by NRPC 3.3.

6. The City Further Violated the Requirement of Candor to the Court by Arguing that this Court Did Not find that the Landowner was Entitled to Pursue Just Compensation.

The City represented to the lower court that this Court did not hold that the Landowner was entitled to pursue "just compensation" and that even using the words "just compensation" in this

[125] 42 U.S.C. § 4651.

EXHIBIT “C”

provided at trial. (AOB 52-56). In fact, the Landowner even informed the City during Mr. Cagle's deposition that if there was additional information Mr. Cagle was going to testify to that the Landowner had a right to receive the same before trial. The City clearly had no intention of complying with the rules of discovery.[89]

Preventing the Landowner from utilizing admitted exhibits used by the City, because it deals with inevitable but recurring flooding, when the Landowner's Property is suffering from inevitable but recurring flooding caused specifically by the City is beyond logic.[90] Furthermore, preventing the Landowner from utilizing an admitted exhibit because it deals with inverse condemnation, in an inverse condemnation action, is unheard of, unconstitutional, and deprived the Landowner of a fair trial.

F. The City's Violation of the Relocation Act Was Prima Facia Evidence of Its Improper Conduct, and The Lower Court's Exclusion of the Same was Reversible Legal Error and an Abuse of Discretion.

The City's violation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act adopted by Nevada under NRS 342.105[91] ("Relocation Act") was prima facie evidence of its improper conduct and the lower court's exclusion of the same was reversible legal error and an abuse of the lower court's discretion. "The provisions of the Relocation Act apply to all Nevada

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[89] **Q**: "I want to make sure that during this deposition we get all of the facts and circumstances at issue in this case that you may have knowledge or information regarding, okay? A: That I can recall today
Mr. Titus [City counsel]: And that you're asked
Mr. Leavitt [landowner's counsel]: Well, that you're asked, understood that. But what I don't want to happen he's –I believe discovery requires you guys to disclose, I mean the City of North Las Vegas to disclose any and all information that he may be asked to testify to at trial. If we don't get that during this deposition, I think you guys, the City of North Las Vegas has a duty to disclose what his testimony may be.
Mr. Titus: I think you know the issues in the case as outlined in the pleadings. You have an obligation to ask whatever questions you want to. If you neglect to ask a question, I don't think we have to volunteer what our trial strategy is."(22 JA 5032-5033)(emphasis added)

[90] This was the same exhibit the City used to solicit legal opinions from an unqualified lay witness regarding the constitutionality of exactions. (32 JA 7407-8409).

[91] 42 U.S.C. §§ 4601-4655.

political subdivisions and agencies."[92] The City is a municipal corporation of the State of Nevada and is, therefore, bound by the Relocation Act. (1 JA 0114:24-25). The Relocation Act provides that the City shall in no event defer "condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property."[93] However, that is exactly what the City did here. The City deferred condemnation of the Landowner's Easement in order to force him to take the City's unconstitutionally low value.

The City has made the strange legal argument that the Relocation Act only applies if the Project itself received federal funding.[94](RAB 38:26). For this strange legal position the City's only legal authority is Sisolak. However, any plain reading of the language the City selected from Sisolak disproves the City's position. Specifically, the Relocation Act applies if "***[t]he public body administering the programs or projects [is] funded in whole or in part by the federal government.***'"(RAB 38). For the City's legal position to be accepted "***the public body***" has to be eliminated from this quote and the remainder must be mangled to read *if the public project is funded in whole or in part*, clearly this is not what Sisolak says and the City's efforts to argue the same is simply bewildering.

What is clear here is that "the public body administering" the Project, here the City, was "funded in whole or in part by the federal government." In fact, the Landowner even did an offer of proof to establish that the City, the public body administering the Project, was funded by the federal government. (15 JA 3559-16 JA 3543). Clearly, the City is funded in part by the federal government and as such it is bound by the Relocation Act. The City has unsuccessfully attempted to argue that it is the "project' not the "public body" that is to be analyzed, but that is simply not how the law reads and to accept the City's position one must distort the clear language of the law.

The City additionally argues that the Relocation Act does not apply because the City did not

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[92] Sisolak at 674.

[93] 42 U.S.C. § 4651(7).

[94] It is inconceivable that the City actually believes this argument, it appears to simply be an avenue around the fact that it violated NRPC 3.3, when it represented to the lower court that it was not bound by the Relocation Act. (30 JA 7093-70098, 7102-7108).

relocate anyone.(RAB 38:18). Again, this is a very strange position as it completely distorts the plain language of the law. Specifically, NRS 342.105 reads as follows:

> "***Any*** department, agency, instrumentality or ***political subdivision of this State,*** or any other public or private entity, which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, 42 U.S. C §§ 4601-4655, and the regulations adopted pursuant thereto, and ***which undertakes any project that results in the acquisition of real property*** or in a person being displaced from his or her home, business, or farm, shall provide relocation assistance and make relocation payments to each displaced person and ***perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements.***" (emphasis added)

To adopt the City's reading of this law this Court would have to eliminate all the above highlighted language. The City argues that it would need to remove people from their homes or businesses for the Relocation Act to apply. There is simply no support for the City's argument in the law and in fact the plain language of the law provides the exact opposite. The Relocation Act applied to this matter and the City's violation of the same was prima facia evidence of its improper conduct.

The Landowner retained the former head of the Nevada Department of Transportation ("NDOT"), Garth Dull P.E., to discuss the Relocation Act, how it is followed by the State of Nevada and its political subdivisions, and whether the City's action in this matter violated the Relocation Act. Mr. Dull, concluded that the City's conduct violated the Relocation Act, an issue well within his area of expertise. (15 JA 3508). In fact, NRS 342.105 (2) specifically provides that "[t]he Director of the Department of Transportation shall review the federal act and all amendments and regulations adopted pursuant thereto and adopt such regulations as the Director finds are necessary to enable the State of Nevada to comply with those federal requirements." Therefore, not only was the City's compliance or lack thereof within Mr. Dull's area of expertise, when he was the head of NDOT it was a requirement that he make sure Nevada and accordingly its political subdivisions (municipal corporations) were in compliance with the Relocation Act.

However, the lower court precluded Mr. Dull from testifying that the City violated the Relocation Act[95] and ordered that the Relocation Act did not apply to the City, despite the strenuous

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[95] The lower court also precluded Mr. Dull from testifying that the City's conduct was unreasonable and oppressive. As will be discussed below, the lower court excluded all of the Landowner's expert testimony regarding unreasonable delay and oppressive conduct.

objections by the Landowner. (30 JA 7087-7106, 7113. 7119; 27 JA 6261-6262). The City's failure to comply with its own statutory requirements is prima facia evidence of its improper conduct and excluding this evidence was legal error and an abuse of the lower court's discretion requiring reversal of the verdict and a remand for a new trial.

G. The Lower Court Erred as a Matter of Law and Abused its Discretion by Excluding all Evidence of the City's Improper Conduct - A Required Element of Precondemnation Damages.

In Buzz Stew-I, this Court provided the elements required for a precondemnation damages claim. One of the required elements is that the Landowner must establish that the City engaged in "improper conduct" following the announcement of intent to condemn.[96] The Landowner had significant expert testimony and facts to support a finding of improper conduct by the City and the lower court excluded all of the expert testimony and nearly all of the facts showing improper conduct, which precluded the Landowner from establishing one of the required elements in this case.

The Landowner retained four experts, two appraisers, a real estate broker and the former head of NDOT, who all investigated the facts in this case and formulated opinions regarding the City's improper conduct, unreasonable delay, and oppressive conduct. The lower court excluded all of this expert testimony. (14 JA 3324-3326, 31 JA 7247-7252). The lower court additionally ordered that the Landowner's experts could not even state the words unreasonable delay or oppressive conduct. (14 JA 3204, 3324; 31 JA 7247-7252).

This was gross and reversible error. In Nevada, an expert is permitted to testify if "the expert's specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute."[97] Each and every expert offered by the Landowner had specialized knowledge that would have assisted the trier of fact in understanding the issues in this matter. For example, as the former head of an agency with the power of eminent domain (NDOT), Mr. Dull has specialized knowledge of the rules and guidelines the City must follow when in the "precondemnation" phase of a public

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[96] Buzz Stew-I, 124 Nev. 224, 181 P.3d 670 at 673, the lower court however required a showing of unreasonable delay or oppressive conduct (even though this Court only provided those as examples of improper conduct). (11 JA 2467:11-12).

[97] Yamaha Motor Company v. Arnoult, 114 Nev. 233, 243, 955 P.2d 611, 667 (1998).

EXHIBIT “D”

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Report Editor

Jeffrey Solomon
Senior Director, Product Management Legal Analytics, Wolters Kluwer's ELM Solutions

Lead Data Analysts

Gary Clark
Data Engineer
Wolters Kluwer's ELM Solutions

Pankaj Saha
Data Engineer
Wolters Kluwer's ELM Solutions

ELM Solutions Creative

David Andrews
Senior Graphic Designer
Wolters Kluwer's ELM Solutions

Contributing Analysts and Authors

Joel Surdykowski
LegalVIEW Product Manager
Wolters Kluwer's ELM Solutions

Deniece Bushell
Senior Product Marketing Manager
Wolters Kluwer's ELM Solutions

Executive Sponsor

Jonah Paransky
Executive Vice President and General Manager
Wolters Kluwer's ELM Solutions

ELM Solutions, a Wolters Kluwer business
20 Church Street
Hartford, CT 06103 United States
ATTN: Marketing
+1-860-549-8795

Section I: High-Level Data Cuts

Cities

2019 -- Real Rates for Partners and Associates						Trend Analysis (Mean)		
City	Role	n	First Quartile	Median	Third Quartile	2019	2018	2017
Knoxville TN	Partner	15	$230	$250	$335	$318	$256	$263
	Associate	12	$185	$200	$224	$204	$210	$210
Lafayette LA	Partner	14	$150	$150	$205	$184	$195	$217
Las Vegas NV	Partner	42	$300	$400	$575	$438	$444	$410
	Associate	45	$250	$278	$324	$281	$279	$264
Lexington KY	Partner	15	$295	$325	$371	$333	$319	$313
Little Rock AR	Partner	24	$215	$238	$261	$261	$281	$263
Los Angeles CA	Partner	902	$482	$740	$1,015	$767	$730	$704
	Associate	1311	$395	$576	$770	$591	$559	$540
Louisville KY	Partner	21	$322	$350	$418	$369	$331	$356
	Associate	22	$190	$210	$245	$214	$215	$207
Madison WI	Partner	23	$374	$418	$525	$432	$394	$383
Memphis TN	Partner	36	$275	$330	$414	$340	$342	$347
	Associate	23	$212	$225	$245	$226	$232	$225
Miami FL	Partner	240	$325	$500	$684	$514	$489	$443
	Associate	171	$255	$330	$473	$373	$335	$304
Milwaukee WI	Partner	77	$304	$386	$470	$416	$390	$371
	Associate	54	$238	$277	$314	$282	$265	$264
Minneapolis MN	Partner	268	$380	$529	$675	$530	$490	$446
	Associate	224	$295	$370	$439	$374	$362	$328
Nashville TN	Partner	90	$360	$430	$473	$419	$405	$408
	Associate	91	$225	$257	$288	$262	$244	$247
New Haven CT	Partner	23	$385	$450	$519	$445	$396	$390
	Associate	24	$230	$290	$335	$290	$276	$282
New Orleans LA	Partner	105	$285	$347	$425	$358	$347	$296
	Associate	103	$220	$238	$315	$268	$246	$210
New York NY	Partner	2384	$602	$975	$1,284	$962	$931	$887
	Associate	3382	$425	$615	$847	$638	$613	$585
Oklahoma City OK	Partner	31	$200	$340	$360	$316	$292	$283
	Associate	18	$165	$203	$239	$221	$209	$196
Omaha NE	Partner	44	$310	$375	$404	$355	$355	$330
	Associate	20	$186	$249	$255	$236	$215	$208
Orlando FL	Partner	99	$385	$450	$513	$461	$466	$454
	Associate	90	$230	$276	$335	$284	$270	$282

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EXHIBIT “E”

ORIGINAL

FILED

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CLERK

SUPP
LAURA WIGHTMAN FITZSIMMONS
Nevada Bar No. 1263
509 South Seventh Street
Las Vegas, Nevada 89101
(702) 382-5333

Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

STEVE SISOLAK,

Plaintiff,

vs.

McCarran International Airport and Clark County, a political subdivision of the State of Nevada,

Defendants.

Case No. A434337
Department No. XIII

Date of Hearing: 5/5/03
Time of Hearing: 9:00 a.m.

PLAINTIFF'S SUPPLEMENTAL EXHIBIT CONCERNING APPLICATION OF URA REQUIREMENTS TO THIS CASE

Plaintiff, through counsel, submits the attached grant agreement as merely one example of the assurances and obligations made by Clark County, and certified by Lee Thomson, counsel fo record for the County in this action.

The attached document is one of many dozens of similar grant agreements which have been entered into between the County and the FAA. In this instance, the FAA agreed to provide 9.5 million dollars to McCarran for pavement and taxiways. As a condition of receiving those funds, the airport sponsor (McCarran) agreed to:

1) Comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Title 42 U.S.C. 4601 et seq. (CCAP38437)

2) Comply with 49 CFR Part 24, Uniform relocation assistance and real property acquisition for Federal and federally assisted programs. (CCAP 38438)

3) Take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise mitigating existing airport hazards *and by preventing the establishment or creation of future airport hazards.* CCAP 38440 (emphasis added)

4) Take appropriate action, the the extent reasonable, including the adoption of zoning laws to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including the landing and taking off of aircraft. CCAP 38440.

In its application, Clark County specifically assured the FAA that it had taken action to assure compatible land use in the vicinity of the airport by adopting Chapter 29.20 of the Clark County Code. (CCAP 38449).

LAURA WIGHTMAN FITZSIMMONS
Nevada Bar No. 1263
509 South 7th Street
Las Vegas, Nevada 89101
(702) 382-5333

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I am employed by Laura FitzSimmons, and delivered a true copy of the foregoing supplement to Jones Vargas, counsel for the defendants, on May 6, 2003.

Julie Destito

DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

GRANT AGREEMENT

Part I - Offer

Date of Offer AUG 31 2000

McCarran International Airport/Planning Area

Project No. 3-32-0012-46

Contract Nc. DTFA08-00-C-31042

TO: Clark County
(herein called the "Sponsor")

FROM: The United States of America (acting through the Federal Aviation Administration, herein called the "FAA")

WHEREAS, the Sponsor has submitted to the FAA a Project Application dated May 30, 2000, for a grant of Federal funds for a project at or associated with the McCarran International Airport/Planning Area which Project Application, as approved by the FAA, is hereby incorporated herein and made a part hereof; and

WHEREAS, the FAA has approved a project for the Airport or Planning Area (herein called the "Project") consisting of the following:

Phase IV reconstruct/rehabilitate a portion of terminal aircraft apron pavements including the apron/ramp surrounding the charter international terminal (Terminal Two); the apron/ramp surrounding the "A", "B" and "C" concourse at Terminal One; the taxilane/taxiway complex serving Concourse "C" (approx. 616,597SY)

all as more particularly described in the Project Application.

CCAP38432

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NOW THEREFORE, pursuant to and for the purpose of carrying out the provisions of Title 49, United States Code, as amended, and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Project Application and its acceptance of this Offer as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and compliance with the assurances and conditions as herein provided, THE FEDERAL AVIATION ADMINISTRATION, FOR AND ON BEHALF OF THE UNITED STATES, HEREBY OFFERS AND AGREES to pay, as the United States share of the allowable costs incurred in accomplishing the Project, 75.00 percent of the allowable project costs.

The Offer is made on and subject to the following terms and conditions:

Conditions

1. The maximum obligation of the United States payable under this offer shall be $9,468,675.00. For the purposes of any future grant amendments which may increase the foregoing maximum obligation of the United States under the provisions of Section 512(b) of the Act, the following amounts are being specified for this purpose:

   $0.00 for planning

   $9,468,675.00 for airport development or noise program implementation.

2. The allowable costs of the project shall not include any costs determined by the FAA to be ineligible for consideration as to allowability under the Act.

3. Payment of the United States share of the allowable project costs will be made pursuant to and in accordance with the provisions of such regulations and procedures as the Secretary shall prescribe. Final determination of the United States share will be based upon the final audit of the total amount of allowable project costs and settlement will be made for any upward or downward adjustments to the Federal share of costs.

4. The sponsor shall carry out and complete the Project without undue delays and in accordance with the terms hereof, and such regulations and procedures as the Secretary shall prescribe, and agrees to comply with the assurances which were made part of the project application.

5. The FAA reserves the right to amend or withdraw this offer at any time prior to its acceptance by the sponsor.

6. This offer shall expire and the United States shall not be obligated to pay any part of the costs of the project unless this offer has been accepted by the sponsor on or before **September 30, 2000**, or such subsequent date as may be prescribed in writing by the FAA.

CCAP38433

7. The sponsor shall take all steps, including litigation if necessary, to recover Federal funds spent fraudulently, wastefully, or in violation of Federal antitrust statutes, or misused in any other manner in any project upon which Federal funds have been expended. For the purposes of this grant agreement, the term "Federal funds" means funds however used or disbursed by the sponsor that were originally paid pursuant to this or any other Federal grant agreement. It shall obtain the approval of the Secretary as to any determination of the amount of the Federal share of such funds. It shall return the recovered Federal share, including funds recovered by settlement, order or judgment, to the Secretary. It shall furnish to the Secretary, upon request, all documents and records pertaining to the determination of the amount of the Federal share or to any settlement, litigation, negotiation, or other efforts taken to recover such funds. All settlements or other final positions of the sponsor, in court or otherwise, involving the recovery of such Federal share shall be approved in advance by the Secretary.

8. The United States shall not be responsible or liable for damage to property or injury to persons which may arise from, or be incident to, compliance with this grant agreement.

9. The attached new Part V Assurances dated 9/99, are hereby substituting in lieu of those submitted as a part of the Sponsor's Project Application dated May 30, 2000, and are made a part hereof.

10. **Buy American Requirement.** Unless otherwise approved by the FAA, it will not acquire or permit any contractor or subcontractor to acquire any steel or manufactured products produced outside the United States to be used for any project for airport development or noise compatibility for which funds are provided under this grant.

11. The sponsor agrees to perform the following:

    1. Furnish a construction management program to FAA prior to the start of construction which shall detail the measures and procedures to be used to comply with the quality control provisions of the construction contract, including, but not limited to, all quality control provisions and tests required by the Federal specifications. The program shall include as a minimum:

        a. The name of the person representing the sponsor who has overall responsibility for contract administration for the project and the authority to take necessary actions to comply with the contract.

        b. Names of testing laboratories and consulting engineer firms with quality control responsibilities on the project, together with a description of services to be provided.

        c. Procedures for determining that testing laboratories meet the requirements of the American Society of Testing and Materials standards on laboratory evaluation, referenced in the contract specifications (D 3666, C 1077).

        d. Qualifications of engineering supervision and construction inspection personnel.

        e. A listing of all tests required by the contract specifications, including the type and frequency of tests to be taken, the method of sampling, the applicable test standard, and the acceptance criteria or tolerances permitted for each type of test.

f. Procedures for ensuring that the tests are taken in accordance with the program, that they are documented daily, and that the proper corrective actions, where necessary, are undertaken.

2. Submit at completion of the project, a final test and quality control report documenting the results of all tests performed, highlighting those tests that failed or did not meet the applicable test standard. The report shall include the pay reductions applied and reasons for accepting any out-of-tolerance material. An interim test and quality control report shall be submitted, if requested by the FAA.

3. Failure to provide a complete report as described in paragraph 2, or failure to perform such tests, shall, absent any compelling justification, result in a reduction in Federal participation for costs incurred in connection with construction of the applicable pavement. Such reduction shall be at the discretion of the FAA and will be based on the type of types of required tests not performed or not documented and will be commensurate with the proportion of applicable pavement with respect to the total pavement constructed under the grant agreement.

4. The FAA, at its discretion, reserves the right to conduct independent tests and to reduce grant payments accordingly if such independent tests determine that sponsor test results are inaccurate.

12. It is understood and agreed by and between the parties hereto that this Grant Offer is made and accepted upon the basis of preliminary plans and specifications; and the parties agree that within 180 days from the date of acceptance of this Grant Offer, the Sponsor shall furnish final plans and specifications to the FAA, that no construction work will be commenced hereunder, and that no contract will be awarded for the accomplishment of such work until the said final plans and specifications have been approved by the FAA; and the parties do further agree that any reference made in this Grant Offer or in the aforesaid Application to plans and specifications shall be considered as having reference to said final plans and specifications as approved.

13. The sponsor agrees to request cash drawdowns on the letter of credit only when actually needed for its disbursements and to timely reporting of such disbursements as required. It is understood that failure to adhere to this provision may cause the letter of credit to be revoked.

e Sponsor's acceptance of this Offer and ratification and adoption of the Project Application incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and this Offer and Acceptance shall comprise a Grant Agreement, as provided by the Act, constituting the contractual obligations and rights of the United States and the Sponsor with

respect to the accomplishment of the Project and compliance with the assurances and conditions as provided herein. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer.

APPROVED AS TO FORM:
Stewart Bell, District Attorney

BY: _____
Deputy

UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION
WESTERN-PACIFIC REGION

_____
John L. Pfeifer
Manager, Airports District Office

Part II - Acceptance

The Sponsor does hereby ratify and adopt all assurances, statements, representations, warranties, covenants, and agreements contained in the Project Application and incorporated materials referred to in the foregoing Offer and does hereby accept this Offer and by such acceptance agrees to comply with all of the terms and conditions in this Offer and in the Project Application.

Executed this 15th day of September, 2000.

(SEAL)

Clark County
(NAME OF SPONSOR)

By _____
(SPONSOR'S DESIGNATED OFFICIAL REPRESENTATIVE)

Title Randall H. Walker
Director of Aviation

Attest: _____

Title: Shirley Barraguirre, Clerk

CERTIFICATE OF SPONSOR'S ATTORNEY

I, Lee Thomson, acting as Attorney for the Sponsor do hereby certify:

That in my opinion the Sponsor is empowered to enter into the foregoing Grant Agreement under the laws of the State of Nevada. Further, I have examined the foregoing Grant Agreement and the actions taken by said Sponsor and Sponsor's official representative has been duly authorized and that the execution thereof is in all respects due and proper and in accordance with the laws of the said State and the Act. In addition, for grants involving projects to be carried out on property not owned by the Sponsor, there are no legal impediments that will prevent full performance by the Sponsor. Further, it is my opinion that the said Grant Agreement constitutes a legal and binding obligation of the Sponsor in accordance with the terms thereof.

Dated at Las Vegas, Nevada this 15th day of September, 2000.

_____
SIGNATURE OF SPONSOR'S ATTORNEY

Lee Thomson, Deputy

CCAP38436

PART V
ASSURANCES
Airport Sponsors

A. General.

1. These assurances shall be complied with in the performance of grant agreements for airport development, airport planning, and noise compatibility program grants for airport sponsors.

2. These assurances are required to be submitted as part of the project application by sponsors requesting funds under the provisions of Title 49, U.S.C., subtitle VII, as amended. As used herein, the term "public agency sponsor" means a public agency with control of a public-use airport; the term "private sponsor" means a private owner of a public-use airport; and the term "sponsor" includes both public agency sponsors and private sponsors.

3. Upon acceptance of the grant offer by the sponsor, these assurances are incorporated in and become part of the grant agreement.

B. Duration and Applicability.

1. **Airport development or Noise Compatibility Program Projects Undertaken by a Public Agency Sponsor.** The terms, conditions and assurances of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, but in any event not to exceed twenty (20) years from the date of acceptance of a grant offer of Federal funds for the project. However, there shall be no limit on the duration of the assurances regarding Exclusive Rights and Airport Revenue so long as the airport is used as an airport. There shall be no limit on the duration of the terms, conditions, and assurances with respect to real property acquired with federal funds. Furthermore, the duration of the Civil Rights assurance shall be specified in the assurances.

2. **Airport Development or Noise Compatibility Projects Undertaken by a Private Sponsor.** The preceding paragraph 1 also applies to a private sponsor except that the useful life of project items installed within a facility or the useful life of the facilities developed or equipment acquired under an airport development or noise compatibility program project shall be no less than ten (10) years from the date of acceptance of Federal aid for the project.

3. **Airport Planning Undertaken by a Sponsor.** Unless otherwise specified in the grant agreement, only Assurances 1, 2, 3, 5, 6, 13, 18, 30, 32, 33, and 34 in section C apply to planning projects. The terms, conditions, and assurances of the grant agreement shall remain in full force and effect during the life of the project.

C. Sponsor Certification. The sponsor hereby assures and certifies, with respect to this grant that:

1. **General Federal Requirements.** It will comply with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance and use of Federal funds for this project including but not limited to the following:

Federal Legislation

a. Title 49, U.S.C., subtitle VII, as amended.
b. Davis-Bacon Act - 40 U.S.C. 276(a), et seq.[1]
c. Federal Fair Labor Standards Act - 29 U.S.C. 201, et seq.
d. Hatch Act - 5 U.S.C. 1501, et seq.[2]
e. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 Title 42 U.S.C. 4601, et seq.[1] [2]
f. National Historic Preservation Act of 1966 - Section 106 - 16 U.S.C. 470(f).[1]
g. Archeological and Historic Preservation Act of 1974 - 16 U.S.C. 469 through 469c.[1]
h. Native Americans Grave Repatriation Act - 25 U.S.C. Section 3001, et seq.
i. Clean Air Act, P.L. 90-148, as amended.
j. Coastal Zone Management Act, P.L. 93-205, as amended.
k. Flood Disaster Protection Act of 1973 - Section 102(a) - 42 U.S.C. 4012a.[1]
l. Title 49 ,U.S.C., Section 303, (formerly known as Section 4(f))
m. Rehabilitation Act of 1973 - 29 U.S.C. 794.
n. Civil Rights Act of 1964 - Title VI - 42 U.S.C. 2000d through d-4.
o. Age Discrimination Act of 1975 - 42 U.S.C. 6101, et seq.
p. American Indian Religious Freedom Act, P.L. 95-341, as amended.
q. Architectural Barriers Act of 1968 -42 U.S.C. 4151, et seq.[1]
r. Power plant and Industrial Fuel Use Act of 1978 - Section 403- 2 U.S.C. 8373.[1]
s. Contract Work Hours and Safety Standards Act - 40 U.S.C. 327, et seq.[1]
t. Copeland Antikickback Act - 18 U.S.C. 874.[1]
u. National Environmental Policy Act of 1969 - 42 U.S.C. 4321, et seq.[1]
v. Wild and Scenic Rivers Act, P.L. 90-542, as amended.
w. Single Audit Act of 1984 - 31 U.S.C. 7501, et seq.[2]
x. Drug-Free Workplace Act of 1988 - 41 U.S.C. 702 through 706.

Executive Orders

Executive Order 11246 - Equal Employment Opportunity[1]
Executive Order 11990 - Protection of Wetlands
Executive Order 11998 – Flood Plain Management
Executive Order 12372 - Intergovernmental Review of Federal Programs.
Executive Order 12699 - Seismic Safety of Federal and Federally Assisted New Building Construction[1]
Executive Order 12898 - Environmental Justice

Federal Regulations

a. 14 CFR Part 13 - Investigative and Enforcement Procedures.
b. 14 CFR Part 16 - Rules of Practice For Federally Assisted Airport Enforcement Proceedings.
c. 14 CFR Part 150 - Airport noise compatibility planning.
d. 29 CFR Part 1 - Procedures for predetermination of wage rates.[1]
e. 29 CFR Part 3 - Contractors and subcontractors on public building or public work financed in whole or part by loans or grants from the United States.[1]
f. 29 CFR Part 5 - Labor standards provisions applicable to contracts covering federally financed and assisted construction (also labor standards provisions applicable to non-construction contracts subject to the Contract Work Hours and Safety Standards Act).[1]
g. 41 CFR Part 60 - Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Federal and federally assisted contracting requirements).[1]
h. 49 CFR Part 18 - Uniform administrative requirements for grants and cooperative agreements to state and local governments.[3]
i. 49 CFR Part 20 - New restrictions on lobbying.
j. 49 CFR Part 21 - Nondiscrimination in federally-assisted programs of the Department of Transportation - effectuation of Title VI of the Civil Rights Act of 1964.
k. 49 CFR Part 23 - Participation by Disadvantage Business Enterprise in Airport Concessions.
l. 49 CFR Part 24 - Uniform relocation assistance and real property acquisition for Federal and federally assisted programs.[1 2]
m. 49 CFR Part 26 – Participation By Disadvantaged Business Enterprises in Department of Transportation Programs.
n. 49 CFR Part 27 - Nondiscrimination on the basis of handicap in programs and activities receiving or benefitting from Federal financial assistance.[1]
o. 49 CFR Part 29 – Government wide debarment and suspension (non-procurement) and government wide requirements for drug-free workplace (grants).
p. 49 CFR Part 30 - Denial of public works contracts to suppliers of goods and services of countries that deny procurement market access to U.S. contractors.
q. 49 CFR Part 41 - Seismic safety of Federal and federally assisted or regulated new building construction.[1]

Office of Management and Budget Circulars

a. A-87 - Cost Principles Applicable to Grants and Contracts with State and Local Governments.
b A-133 - Audits of States, Local Governments, and Non-Profit Organizations

[1] These laws do not apply to airport planning sponsors.

[2] These laws do not apply to private sponsors.

[3] 49 CFR Part 18 and OMB Circular A-87 contain requirements for State and Local Governments receiving Federal assistance. Any requirement levied upon State and Local Governments by this regulation and circular shall also be applicable to private sponsors receiving Federal assistance under Title 49, United States Code.

Specific assurances required to be included in grant agreements by any of the above laws, regulations or circulars are incorporated by reference in the grant agreement.

2. Responsibility and Authority of the Sponsor.

a. **Public Agency Sponsor:** It has legal authority to apply for the grant, and to finance and carry out the proposed project; that a resolution, motion or similar action has been duly adopted or passed as an official act of the applicant's governing body authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.

b. **Private Sponsor:** It has legal authority to apply for the grant and to finance and carry out the proposed project and comply with all terms, conditions, and assurances of this grant agreement. It shall designate an official representative and shall in writing direct and authorize that person to file this application, including all understandings and assurances contained therein; to act in connection with this application; and to provide such additional information as may be required.

3. **Sponsor Fund Availability.** It has sufficient funds available for that portion of the project costs which are not to be paid by the United States. It as sufficient funds available to assure operation and maintenance of items funded under the grant agreement which it will own or control.

4. **Good Title.**

a. It, a public agency or the Federal government, holds good title, satisfactory to the Secretary, to the landing area of the airport or site thereof, or will give assurance satisfactory to the Secretary that good title will be acquired.

b. For noise compatibility program projects to be carried out on the property of the sponsor, it holds good title satisfactory to the Secretary to that portion of the property upon which Federal funds will be expended or will give assurance to the Secretary that good title will be obtained.

5. **Preserving Rights and Powers.**

   a. It will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor. This shall be done in a manner acceptable to the Secretary.

   b. It will not sell, lease, encumber, or otherwise transfer or dispose of any part of its title or other interests in the property shown on Exhibit A to this application or, for a noise compatibility program project, that portion of the property upon which Federal funds have been expended, for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary. If the transferee is found by the Secretary to be eligible under Title 49, United States Code, to assume the obligations of the grant agreement and to have the power, authority, and financial resources to carry out all such obligations, the sponsor shall insert in the contract or document transferring or disposing of the sponsor's interest, and make binding upon the transferee all of the terms, conditions, and assurances contained in this grant agreement.

   c. For all noise compatibility program projects which are to be carried out by another unit of local government or are on property owned by a unit of local government other than the sponsor, it will enter into an agreement with that government. Except as otherwise specified by the Secretary, that agreement shall obligate that government to the same terms, conditions, and assurances that would be applicable to it if it applied directly to the FAA for a grant to undertake the noise compatibility program project. That agreement and changes thereto must be satisfactory to the Secretary. It will take steps to enforce this agreement against the local government if there is substantial non-compliance with the terms of the agreement.

   d. For noise compatibility program projects to be carried out on privately owned property, it will enter into an agreement with the owner of that property which includes provisions specified by the Secretary. It will take steps to enforce this agreement against the property owner whenever there is substantial non-compliance with the terms of the agreement.

   e. If the sponsor is a private sponsor, it will take steps satisfactory to the Secretary to ensure that the airport will continue to function as a public-use airport in accordance with these assurances for the duration of these assurances.

   f. If an arrangement is made for management and operation of the airport by any agency or person other than the sponsor or an employee of the sponsor, the sponsor will reserve sufficient rights and authority to insure that the airport will be operated and maintained in accordance Title 49, United States Code, the regulations and the terms, conditions and assurances in the grant agreement and shall insure that such arrangement also requires compliance therewith.

6. **Consistency with Local Plans.** The project is reasonably consistent with plans (existing at the time of submission of this application) of public agencies that are authorized by the State in which the project is located to plan for the development of the area surrounding the airport.

7. **Consideration of Local Interest.** It has given fair consideration to the interest of communities in or near where the project may be located.

8. **Consultation with Users.** In making a decision to undertake any airport development project under Title 49, United States Code, it has undertaken reasonable consultations with affected parties using the airport at which project is proposed.

9. **Public Hearings.** In projects involving the location of an airport, an airport runway, or a major runway extension, it has afforded the opportunity for public hearings for the purpose of considering the economic, social, and environmental effects of the airport or runway location and its consistency with goals and objectives of such planning as has been carried out by the community and it shall, when requested by the Secretary, submit a copy of the transcript of such hearings to the Secretary. Further, for such projects, it has on its management board either voting representation from the communities where the project is located or has advised the communities that they have the right to petition the Secretary concerning a proposed project.

10. **Air and Water Quality Standards.** In projects involving airport location, a major runway extension, or runway location it will provide for the Governor of the state in which the project is located to certify in writing to the Secretary that the project will be located, designed, constructed, and operated so as to comply with applicable air and water quality standards. In any case where such standards have not been approved and where applicable air and water quality standards have been promulgated by the Administrator of the Environmental Protection Agency, certification shall be obtained from such Administrator. Notice of certification or refusal to certify shall be provided within sixty days after the project application has been received by the Secretary.

11. **Pavement Preventive Maintenance.** With respect to a project approved after January 1, 1995, for the replacement or reconstruction of pavement at the airport, it assures or certifies that it has implemented an effective airport pavement maintenance-management program and it assures that it will use such program for the useful life of any pavement constructed, reconstructed or repaired with Federal financial assistance at the airport. It will provide such reports on pavement condition and pavement management programs as the Secretary determines may be useful.

12. **Terminal Development Prerequisites.** For projects which include terminal development at a public use airport, as defined in Title 49, it has, on the date of submittal of the project grant application, all the safety equipment required for certification of such airport under section 44706 of Title 49, United States Code, and all the security equipment required by rule or regulation, and has provided for access to the passenger enplaning and deplaning area of such airport to passengers enplaning and deplaning from aircraft other than air carrier aircraft.

13. **Accounting System, Audit, and Record Keeping Requirements.**

   a. It shall keep all project accounts and records which fully disclose the amount and disposition by the recipient of the proceeds of the grant, the total cost of the project in connection with which the grant is given or used, and the amount or nature of that portion of the cost of the project supplied by other sources, and such other financial records pertinent to the project. The accounts and records shall be kept in accordance with an accounting system that will facilitate an effective audit in accordance with the Single Audit Act of 1984.

   b. It shall make available to the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, for the purpose of audit and examination, any books, documents, papers, and records of the recipient that are pertinent to the grant. The Secretary may require that an appropriate audit be conducted by a recipient. In any case in which an independent audit is made of the accounts of a sponsor relating to the disposition of the proceeds of a grant or relating to the project in connection with which the grant was given or used, it shall file a certified copy of such audit with the Comptroller General of the United States not later than six (6) months following the close of the fiscal year for which the audit was made.

14. **Minimum Wage Rates.** It shall include, in all contracts in excess of $2,000 for work on any projects funded under the grant agreement which involve labor, provisions establishing minimum rates of wages, to be predetermined by the Secretary of Labor, in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5), which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for bids and shall be included in proposals or bids for the work.

15. **Veteran's Preference.** It shall include in all contracts for work on any project funded under the grant agreement which involve labor, such provisions as are necessary to insure that, in the employment of labor (except in executive, administrative, and supervisory positions), preference shall be given to Veterans of the Vietnam era and disabled veterans as defined in Section 47112 of Title 49, United States Code. However, this preference shall apply only where the individuals are available and qualified to perform the work to which the employment relates.

16. **Conformity to Plans and Specifications.** It will execute the project subject to plans, specifications, and schedules approved by the Secretary. Such plans, specifications, and schedules shall be submitted to the Secretary prior to commencement of site preparation, construction, or other performance under this grant agreement, and, upon approval of the Secretary, shall be incorporated into this grant agreement. Any modification to the approved plans, specifications, and schedules shall also be subject to approval of the Secretary, and incorporated into the grant agreement.

17. **Construction Inspection and Approval.** It will provide and maintain competent technical supervision at the construction site throughout the project to assure that the work conforms to the plans, specifications, and schedules approved by the Secretary for the project. It shall subject the construction work on any project contained in an approved project application to inspection and approval by the Secretary and such work shall be in accordance with regulations and procedures prescribed by the Secretary. Such regulations and procedures shall require such cost and progress reporting by the sponsor or sponsors of such project as the Secretary shall deem necessary.

18. **Planning Projects.** In carrying out planning projects:

    a. It will execute the project in accordance with the approved program narrative contained in the project application or with the modifications similarly approved.

    b. It will furnish the Secretary with such periodic reports as required pertaining to the planning project and planning work activities.

    c. It will include in all published material prepared in connection with the planning project a notice that the material was prepared under a grant provided by the United States.

    d. It will make such material available for examination by the public, and agrees that no material prepared with funds under this project shall be subject to copyright in the United States or any other country.

    e. It will give the Secretary unrestricted authority to publish, disclose, distribute, and otherwise use any of the material prepared in connection with this grant.

    f. It will grant the Secretary the right to disapprove the sponsor's employment of specific consultants and their subcontractors to do all or any part of this project as well as the right to disapprove the proposed scope and cost of professional services.

    g. It will grant the Secretary the right to disapprove the use of the sponsor's employees to do all or any part of the project.

    h. It understands and agrees that the Secretary's approval of this project grant or the Secretary's approval of any planning material developed as part of this grant does not constitute or imply any assurance or commitment on the part of the Secretary to approve any pending or future application for a Federal airport grant.

19. **Operation and Maintenance.**

    a. The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary.

    In furtherance of this assurance, the sponsor will have in effect arrangements for-

    (1) Operating the airport's aeronautical facilities whenever required;

    (2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and

    (3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.

    Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

    b. It will suitably operate and maintain noise compatibility program items that it owns or controls upon which Federal funds have been expended.

20. **Hazard Removal and Mitigation.** It will take appropriate action to assure that such terminal airspace as is required to protect instrument and visual operations to the airport (including established minimum flight altitudes) will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

21. **Compatible Land Use.** It will take appropriate action, to the extent reasonable, including the adoption of zoning laws, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. In addition, if the project is for noise compatibility program implementation, it will not cause or permit any change in land use, within its jurisdiction, that will reduce its compatibility, with respect to the airport, of the noise compatibility program measures upon which Federal funds have been expended.

LAS VEGAS
McCARRAN INTERNATIONAL AIRPORT

Department of Aviation
RANDALL H. WALKER
DIRECTOR
ROSEMARY A. VASSILIADIS
DEPUTY DIRECTOR
POSTAL BOX 11005
LAS VEGAS, NEVADA 89111-1005
(702) 261-5211
FAX (702) 597-9553
E-MAIL: webmaster2@mccarran.com

May 30, 2000

FAA GRANT # 3-32-0012-46 McCarran Airport

Mr. John Pfeifer, P.E.
Manager, Airports District Office
Federal Aviation Administration
831 Mitten Road
Burlingame, CA 94010

Dear Mr. Pfeifer:

Enclosed are the original and two copies of Clark County's Application for Federal Assistance under the Airport Improvement Program for capital improvements at McCarran International Airport.

This application covers the allocation of $9,468,675 in total Federal Fiscal Year (FFY) 2000 funding comprised of $4,468,675 in FFY 2000 entitlement funds and $5 million in FFY 2000 discretionary funds. The application is Phase Four of the work, which is of an immediate priority, contributing to the rehabilitation and reconstruction of a portion of the terminal apron pavement surrounding the "A", "B" and "C" Concourses at Terminal One.

The application package includes the following:

- Standard Form 424, Page 1
- FAA Form 5100-100, Parts II - IV
- Airport Sponsor Grant Assurances

Please let me or my staff know if there are any questions or comments regarding the enclosed information.

Sincerely,

RANDALL H. WALKER
Director of Aviation

RHW:ra

Enclosures

cc: Rosemary Vassiliadis
Tina Quigley
R. Ross Johnson
Russell Williams
Curtis Myles

CCAP38446

OMB Approval No 0348-0043

APPLICATION FOR FEDERAL ASSISTANCE

2 DATE SUBMITTED	Applicant Identifier
05/30/00	

1. TYPE OF SUBMISSION		3 DATE RECEIVED BY STATE	State Application Identifier
Application: ☒ Construction ☐ Non-Construction	Preapplication: ☐ Construction ☐ Non-Construction	4. DATE RECEIVED BY AGENCY	Federal Identifier

5. APPLICANT INFORMATION

Legal Name:	Organizational Unit:
Clark County	McCarran International Airport
Address (give city, county, state and zip code):	**Name and telephone of the person to be contacted on matters involving this application (give area code)**
P. O. Box 11005 Las Vegas, NV 89111-1005	Randall H. Walker 702-261-5150

6. EMPLOYER IDENTIFICATION NUMBER (EIN): 88-6000028

7. TYPE OF APPLICANT: (enter appropriate letter in box) B

A. State H. Independent School Dist.
B. County I. State Controlled Institution of Higher Learning
C. Municipal J. Private University
D. Township K. Indian Tribe
E. Interstate L. Individual
F. Intermunicipal M. Profit Organization
G. Special District N. Other (Specify):

8. TYPE OF APPLICATION

☒ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es) ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration E. Other (specify):

9. NAME OF FEDERAL AGENCY:
Federal Aviation Administration

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NO. 20-106

TITLE: Airport Improvement Program

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:
Continuation of reconstruction/rehabilitaitor of a portion of terminal apron pavements surrounding the A, B, & C concourses at Terminal 1

12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.):
Clark County, Nevada

13. PROPOSED PROJECT		14. CONGRESSIONAL DISTRICTS OF:	
Start Date	Ending Date	a. Applicant	b. Project
01/31/99	09/30/01	Nevada #1	Nevada #1

15. ESTIMATED FUNDING:	
a. Federal	9,468,675 .00
b. Applicant	3,156,225 .00
c. State	.00
d. Local	.00
e. Other	.00
f. Program Income	.00
g. TOTAL	$12,624,900 .00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON: DATE 02/02/98

b. NO. ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes. If "Yes", attach an explanation ☒ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a. Typed Name of Authorized Representative	b. Title	c. Telephone
Randall H. Walker	Director of Aviation	702-261-5150
Signature of Authorized Representative		**e. Date Signed**
		05/30/00

Previous Editions Not Usable

CCAP38447

Standard Form 424 (REV 4-88)
Prescribed by OMB Circular A-102

PART II - SECTION C

The Sponsor hereby represents and certifies as follows:

1. Compatible Land Use. - The Sponsor has taken the following actions to assure compatible usage of land adjacent to or in the vicinity of the airport:

Chapter 29.20 of the Clark County Code Controls development within three miles of the Airport. Additionally, the Clark County Board of Commissioners have adopted an Airport Environs Overlay District to regulate land use around the airport. The District overlays the underlying zoning to establish a range of uses compatible with airport hazard and noise exposure areas. These regulations go beyond use restrictions, incorporating requirements for noise attenuation in new construction and the use of avigation easements to further insure the compatibility of uses with airport activities. Lastly, the Airport has updated the FAR 150 Noise Study to examine additional ways of mitigating noise in the airport vicinity. Additionally, Clark County has adopted a new policy to restrict new residential development in the 60 Ldn.

2. Defaults. - The Sponsor is not in default on any obligation to the United States or any agency of the United States Government relative to the development, operation, or maintenance of any airport, except as stated herewith:

None

3. Possible Disabilities. - There are no facts or circumstances (including the existence of effective or proposed leases, use agreements or other legal instruments affecting use of the Airport or the existence of pending litigation or other legal proceedings) which in reasonable probability might make it impossible for the Sponsor to carry out and complete the Project or carry out the provisions of Part V of this Application, either by limiting its legal or financial ability or otherwise, except as follows:

None

4. Land. - (a) The Sponsor holds the following property interest in the following areas of land* which are to be developed or used as part of or in connection with the Airport, subject to the following exceptions, encumbrances, and adverse interests, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

Title, in fee, to all land outlined as shown on Exhibit "A" Property Map, except for those encumbrances or other adverse interests in title options/certification submitted in connection with prior projects. There has been no change in property interest since the last AIP Project No. 3-32-0012-43 (except if any land is approved by FAA).

---

*ate character of property interest in each area and list and identify for each all exceptions, encumbrances, and adverse interests of every kind .id nature, including liens, easements, leases, etc. The separate areas of land need only be identified here by the area numbers shown on the property map.

CCAP38449

21804

EXHIBIT “F”

SUPP
LAURA WIGHTMAN FITZSIMMONS
Nevada Bar No. 1263
509 South Seventh Street
Las Vegas, Nevada 89101
(702) 382-5333

Attorney for Plaintiff

ORIGINAL

FILED

MAY 14 12 07 PH '03

Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

STEVE SISOLAK,

Plaintiff,

vs.

McCarran International Airport and Clark County, a political subdivision of the State of Nevada,

Defendants.

Case No. A434337
Department No. XIII

PLAINTIFF'S SECOND SUPPLEMENTAL EXHIBIT CONCERNING APPLICATION OF URA REQUIREMENTS TO THIS CASE

Plaintiff, through counsel, submits the attached reporters transcript of proceedings for July 15, 1991 as an additional support for his claim that the imposition of the height restriction ordinances are a direct consequence of federally funded projects.

Specifically, on page 20, lines 9-23 of the attached transcript the airport director states that:

> Land acquisition, Runway 1 right protection zone, that's the area south of the airport. That is largely undeveloped, and we haven't been forced to do anything with that piece yet. We haven't spent any money on that, would not intend to do it until we're forced to, but if incompatible development comes along, certainly we would have to look at it. That runway is proposed for an ILS from the south and by putting in an ILS you extend the runway protection area out to the south some. So we've included the land. I think the money was appropriated in last year's federal budget for that ILS. It will take the government a couple of years to build it, but the money has been appropriated.

RECEIVED
COUNTY CLERK

Counsel for Mr. Sisolak first discovered this transcript at 10:40 a.m. this morning when she was going through files which have recently been provided to her in an unrelated case.

LAURA WIGHTMAN FITZSIMMONS
Nevada Bar No. 1263
509 South 7th Street
Las Vegas, Nevada 89101
(702) 382-5333

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I am employed by Laura FitzSimmons, and delivered a true copy of the foregoing supplement to Jones Vargas, counsel for the defendants, on May 14, 2003.

Julie Destito

COPY

Federal Aviation Regulation Part 158.23 Consultation with Air Carriers Meeting

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Taken on Monday, July 15, 1991

At one o'clock p.m.

At Commissioners Meeting Room

5th Floor Main Terminal Building

McCarran International Airport

Las Vegas, Nevada

Reported by: Margaret M. Harmon, RPR, CSR #274

APPEARANCES:

ROBERT N. BROADBENT, Director of Aviation

RANDY WALKER, Deputy Airport Director

ROSS JOHNSON, Director of Finance

TOM DONALDSON, Planner

RON TULIS, KPMG Peat Marwick

MIKE MORONEY, KPMG Peat Marwick

MR. BROADBENT: My name is Bob Broadbent, and I'm the Director of Aviation for McCarran International Airport, and with us on my left over here is Ron Tulis and Mike Moroney from Peat Marwick, our airport consultants; and on my far left is Tom Donaldson, our Planner; Ross Johnson, our Director of Finance; and Randy Walker, the Deputy Director of the airport.

We would like to point out that this is a meeting that is required under the federal regulations for the imposition of a PFC, a passenger facility charge. We have a court reporter here, and we would ask that any of you that wish to be recognized or to speak, come up here to the podium and identify yourself by name so that we can be sure and record this meeting because the copies of the minutes of this meeting have to be summitted to the Federal Aviation Agency.

At November 5th of last year, the President signed into law a budget reconciliation bill. That bill had in it the imposition, the allowance for airports to impose what is called a passenger facility charge, which is a departure -- head tax on departing passengers from airports. Many airports have been lobbying for this for many

years. Prior to the passage of this Act, there had been a federal prohibition from the imposition of passenger facility charges or head taxes.

As a condition of the levying of a passenger facility charge, Congress also passed two other pieces of legislation. One was a piece of legislation on noise, which set up certain noise standards for airlines and for airports and for communities around airports. A condition of being able to file an application for a passenger facility charge was conditioned on a rule being promulgated on the noise legislation by the Federal Aviation Administration.

The law said that that rule should be out by July 1st. The rule isn't out yet, and we would not be able to file a final application for passenger facility charges until the rule is released by the Federal Aviation Administration. We understand that will be in the next couple of weeks. It could be as early as this Wednesday, more probably sometime late next week.

Also, there was a law passed on airports that are slot controlled, slot-controlled airports. There are only four of those airports in the country, I think: Washington National, two

New York airports, and Chicago, which said that FAA had to agree to begin the process of discussions towards a proposed rule or towards proposed regulations on slots at those airports. We're not sure whether that's been done yet or not, but it's just a matter, I think, of the Federal Aviation taking the appropriate steps and releasing the right kind of a message that they do intend to consult on that issue.

The airport industry in general has about $50 billion worth of capital improvement needs, and it was at least the testimony in the hearings that there were not enough funds to allow airports to do what they needed to do with their present funding sources, and in conjunction with the airlines who wanted a noise policy, Congress did pass and authorize a passenger facility charge. They came out with their final rule on May the 28th, I think.

We, I think, are the first airport in the country to begin the process to impose a passenger facility charge. It's a long process. It will be well into probably the end of the first half or the second half of next year -- well into the first half of next year before we'd be able to

impose it. We were required by law to notice all of our airlines operating out of McCarran.

We took the latest list that we had from FAA and added other people to it and on the 14th of June noticed the airlines. I think many of you that are here, most of you have copies of those notices. It said we intended -- the notice required us to do four things. It required us to notice the carriers, that the notice should include a description of the projects, the PFC level, the proposed effective date, the estimated charge, expiration date, and the estimated total PFC revenue for a request by a public agency that any class of carriers not be required to collect the PFC.

We have specifically asked FAA to exclude one class of carrier from imposing a PFC. That class are Air Taxi/Commercial Operators filing FAA Form 1800-31. It is impossible for us, as I understand the statute, to exclude anybody who is over -- or any class who is over 1 percent of the passenger operations at our airport. So by law we felt we could not exclude anybody except those that amounted to less than 1 percent of our passenger traffic, as defined by FAA. These air taxi

operations in 1989 were about 5,000 passengers, which is less than .0005 of our total passenger count, a very small percentage.

Also, at the same time we had to advertise the date and location of this meeting in which we would present projects to the air carriers and foreign air carriers operating at the airport. This meeting, as I said, has been noticed to all the air carriers. We thought we covered everybody. We've advertised it in the newspaper, local newspapers, and have posted it at the FBO operations and at McCarran International Airport.

The meeting itself is scheduled to accomplish the following things: The airport is required to give a description of the projects, an explanation of the need for the projects, a detailed financial plan for the projects, estimated allowable project costs allocated to major project elements, amount of PFC revenue, and the source and amount of other funds.

We have attempted to do that in this book that we've handed out to you. The book includes all of these, and we will briefly cover most of these, and then we'd be happy to answer any questions. I know there are going to be a few

questions on some of the things we expect to do, and I'd like to briefly cover those, if I could.

We have on this airport what are called two public carriers, I think, who are contractors to the Federal Government and carry passengers to and from areas outside of McCarran Airport. It is our interpretation of the Act that those people would be required to pay a passenger facility charge.

The Act, if I could refer you to the comments -- and we'd be happy to pass this out -- the comments on the rules said numerous comments request that particular classes of persons or carriers not be subject to PFCs. These include military and government personnel traveling on official business, passengers of on-demand air taxi operations, and all international passengers, all charter passengers, people traveling on frequent-flyer discounts. None of these were accepted under the rule, and it's our interpretation of that that everybody is covered.

There's also a definition of, if I could, just to cover this one item, it could be said that these people don't have a ticket, but you have to look at what the definition of a "ticket"

is in the rule. An air travel ticket means any document pertaining to a passenger's complete itinerary necessary to transport a passenger by air including passenger manifest, and further on it says that an enplaned passenger means a domestic, territorial, or international revenue passenger enplaned in or is scheduled service in an airline interstate commerce -- a non-scheduled service on aircraft and interstate commerce.

I think it's the feeling of our people and our attorneys and consultants that those public carriers are covered. I'm sure we'll get comments from them. I'm sure we're going to hear from them, but it is a substantial amount of our operations, passenger operations at this airport.

Also, I'm sure there will be some discussion on whether our proposed airport access road is covered under this statute. I would again refer you to page 22 on the final rule, and these are just comments on the final rule. It said the text of the rule has not been changed from the NPRM in any material way. However, ground transportation projects are eligible if the public agency acquires the right-of-way and any necessary land. Ownership is also necessary for project

eligibility under AIP. In this case under the statute PFC eligibility is identical to AIP eligibility.

The final rule does not set any eligibility restrictions on the mode of transportation for airport access projects, nor does it impose any requirements on the geographical proximity of the project to the airport. These issues will be reviewed on a case-by-case basis as the administrator reviews and approves an application for a PFC.

Also, as I said, we have asked that certain people be exempt. The rule says that we have the right to request that those people be exempt. We have requested it, but we also noticed all those people. So in case FAA did not exempt them, we wouldn't have to go through another hearing process. We're telling them come to the meeting. If you get exempt, fine; if you don't get exempt, you ought to comment, and you ought to comment anyway. So we would hope that you might comment.

I think it would be well for you to recognize that you have until August 14th to comment, that those comments should be -- you can

oppose the rule or the imposition of a PFC, but you have to say why. If you don't say why, then it will be thrown out. So it's important for you if you're going to oppose the imposition of a PFC that you not only say you oppose it, but you have to say why you oppose it, and then we're forced to comment, of course, on those comments.

On February 14th we will gather all the comments we have, put together an application. The application will probably be about that high (indicating). We would intend that the application would probably be filed about the 1st of September, and it would include all the material you see here today plus whatever else is required in the rule plus all the comments and our comments on the comments.

If I could, I'd refer you to the first page that says "Introduction" on here. I'm not going to read it all, but these are the requirements that have to be carried out in order to impose a PFC; meetings of air carriers and foreign air carriers, which is going on right now. For the purposes of the financial plan, we have 37 individual project elements defined as part of one total project.

The brochure is divided into two parts. There is the part that is to impose and implement and to use a PFC, and the other one is to impose. The difference is that you have to have completed all the required environmental work and have it on your airport layout plan in order to impose and use.

So those cases where we say impose and use, we feel we have completed the environmental work. In a couple of cases, the environmental assessments are still pending before FAA. In almost all cases -- in all cases where it's impose and use, they are on our ALP, our Airport Layout Plan. Where we talk about imposing, we are talking about doing the necessary environmental and required FAA studies in order to complete the necessary work so that we can get it put on our Airport Layout Plan so we would be able to impose and use.

I would like to indicate also that because there are 37 projects in here totaling well over a billion dollars doesn't mean we'll build them all. It means that we would have the right to, in effect, pick and choose through the appropriate consultation those projects that are

necessary in order to improve the capacity, the noise compatibility, the security of the airport, which are essentially the guidelines in which you can impose a PFC.

In some cases we have in there, for instance, building another fourth air carrier runway. If we don't grow very fast or if it's not needed, certainly we aren't going to build it. But under our proposals, it's been indicated by both us and our planners and FAA and their planning documents that we will need a fourth air carrier runway sometime near the end of the '90s.

If I could, if you'd like to, you can -- project elements, I'm just going to -- it was necessary for us to give a description, a justification, the certification, and the estimated schedule on all of these projects, which we have attempted to do on all of them. You have drawings with all of them, there are drawings on the walls, and we'll try to go through them maybe one at a time here while we have a chance and go through them quickly.

The first one is an Aircraft Rescue and Fire Fighting Training Facility that's been on our Airport Layout Plan for a good long time. We

had one planned in Phase II of our development. New environmental regulations came along, the price went up about five times, the cost. Every airport is faced, I think, with now accomplishing and meeting a demand for an appropriate fire training facility that meets the EPA environmental regulations as it particularly pertains to what you do with fuel that's used when you burn it for an AAF building.

The next one is the airport connector. There are actually three projects that are part of this airport connector: 912, 913, and 914. As you see there, the green is the part that is to hook it into our present road structure as it comes out at about the corner of Paradise and Patrick Lane. The red is the tunnel underneath the two existing runways and their accompanying taxiways, and the white down below is the approximately two miles of limited access road that would hook it into the freeway. The description, justification, and certifications are there for all three of those projects.

We are pretty well along on the design of those projects, and will, in essence, be ready to award the first bids. If we are

successful in our application for a PFC and are able to sell the appropriate revenue bonds, we would hope to start this project about July of 1992.

I guess we could talk a little bit about the need for the projects. We've been over this a lot of times. Our capacity studies show us that the biggest constraint to growth at this airport is on the land side part of the airport, and it's in our airport runways that hook us into, in essence, the Las Vegas Strip, which is where most of our passengers come from, either traveling to the Strip for vacations and then from the Strip back home.

The next item, which is 901, is an expansion of the Concourse C, which would add four more gates. This expansion has been requested by -- one of the airlines has requested four more gates. This was our way of accomplishing that, was to add four gates. You can see there are a couple of them. Level one and level two really gives you a better idea about how it would hook into the present airport. And, again, our estimated schedule is that we will have the design documents done on this in about a month or two, and we'll be

ready to go to bid late sometime this year.

As we understand the final rule, any project that is eligible, if we have the amount of cash to carry us until we get a PFC, we would be able to start this project and accomplish it and reimburse ourselves for that project out of the PFC revenue that we would get in July of 1992. Now, we've talked to a lot of people about that, and that's certainly our understanding, and this would be one project.

By doing it this way, it would not be included in any of the rate base for the other airlines at this terminal and would be -- and that's the only other way we could build it, would be to include it in the rate base. True we'd probably get the money back by the charges on that airline, but if we don't have to build it into the rate base, then it might have an effect on the existing airlines here.

We have a terminal remodel project. We put this in here because anything we have spent since November 5th, it is eligible, would be eligible for reimbursement. Again, reimbursement would mean that we wouldn't have to build it into our airline rate base and would be a help, I think,

to our scheduled airlines at McCarran.

The next project is a Part 150 Program update. We did a Part 150 Study several years ago. We entered into an agreement with the City of Henderson that upon the completion of our runways, we would do an updated Part 150 Study, and this would allow us to do that. In essence, all of our construction will be done about October on our runways and taxiways. Ramps will be done about October of this year, and we would start another Part 150 Study at about that time.

A West Side Flood Control Study, we did a Flood Control Study once, but since then we have purchased about an additional 75 acres over on the west side of the airport, and this is an external study that would have to be looked at to look at where we would build the flood control structures that would be necessary to protect the west side of the airport. That site has been flooded out a couple of times, and we have some major building projects proposed for the west side primarily by our two major fixed-base operators including major hangar facilities and major new commuter terminal facilities.

Noise Mitigation Programs, it would

be what would come out of the Part 150 Study. In general, it would be things like insulation, soundproofing, property transaction assistance, those kind of areas for the appropriate property owners in noise-sensitive areas in order to bring them up to their homes or residences or whatever else it is in a noise compatibility with the airport.

Airfield Study and Environmental Assessment, at our last 139 certification by the Federal Aviation Agency, they listed several areas of concern on our airfield. This would be to look at those areas of concern. They were specifically concerned about the Part 77 problem that we might have with the railroad and with some other areas in the airport as far as clear zones go around our taxiways and runways. Then we would be looking specifically the extension of a couple of our runways, if possible, also mentioned by FAA and, of course, the new parallel runway.

Charter/International Terminal, that terminal, any expenses on that terminal that are eligible would be eligible under -- that have been obligated or spent since November 5, 1990, would be eligible under the PFC legislation, as we

understand it, and we would be looking at some of the costs that we have there. There are new gates that are specifically eligible under the law. Those gates, we think, will essentially be full from about the first day we start operation and would hope to be on our way to completing that facility by the end of the year.

We have a number of land acquisition projects. The first one is west of the fence. That's an area over there on the west side of the field that I talked about. We have purchased 55 acres, probably another 20 in the red area. About the only thing we haven't purchased -- and we would not purchase it until needed -- is an apartment complex, which would be a major acquisition when we go to acquire it, and maybe one or two other small pieces. Some of that land did not close and we did not complete the sale until after November 5th, and that might be eligible.

Land acquisition, Russell/Burnham Subdivision is 80 acres on the east side of the airport. We have acquired about half of those homes, 280 homes, I think, and then there is a commercial warehouse office complex that would probably be acquired. This is for future

development of the airport at some time. This is one of the few areas where we can expand and put that area in the airport operations part of the airfield. As I said, I think we purchased about half of it now and are in the process of gradually purchasing the rest of it. Part of that property is in noise contours, part of it is 75 Ldn, part of it is in 70, and the bulk of it is in 65 Ldn.

Land acquisition, Runway 1 right protection zone, that's the area south of the airport. That is largely undeveloped, and we haven't been forced to do anything with that piece yet. We haven't spent any money on that, would not intend to do it until we're forced to, but if incompatible development came along, certainly we would have to look at it. That runway is proposed for an ILS from the south, and by putting in an ILS, you extend the runway protection area out to the south some. So we've included the land. I think the money was appropriated in last year's federal budget for that ILS. It will take the government a couple of years to build it, but the money has been appropriated.

Next is land acquisition. This is for the beltway, the proposed access road. We're

in the process now of appraising and getting ready to buy all that property. The bulk of that property will probably be purchased under the general obligation of the bond that we just sold last month. So you probably won't see much of that in here, although we kept the flexibility to put it under a PFC if it looked like it was the appropriate thing to do. We got the liberty of that money from the bond money this morning, so I don't think we'll have to worry about it.

Land acquisition in Ldn 75 land. We have started the purchase of some of this property. We have purchased some of it under a bond issue that we sold back in 1990, and what we're doing is taking out all the residential development in those Ldn 75 areas, and anybody that wants to build a residential home, we're taking it out so that we protect the area. A lot of this is suitable for other types of zoning, and as we acquire pieces big enough and as the land is rezoned to compatible use for airport purposes, we'll sell it back to the community and recapture some of this money.

Paradise Shopping Center is the shopping center on the corner of Paradise and

Tropicana. We closed on a good part of that after November 5th. It's in Ldn 75 and in our hazard protection zone. FAA has encouraged us to take that out for quite a while. There are still businesses in there, but we have purchased the land. The agreement is there, all but one, and those people will gradually be moving out over the next six months, and that facility will be demolished and will be put into some kind of a non -- probably just left vacant, or maybe we can find some use that will be compatible. We don't know yet.

Land acquisition in the Gold Dust Area. This area is a piece above Russell Road, north of Russell Road. We were trying to buy that in accompany with the other piece of land which is just to the west. We've added for future airport expansion land-side facilities, which might be rental car areas, parking. We think we may have to put some satellite parking out there for awhile, any number of facilities that we might build, and that's what that's for, and we've purchased about -- we purchased some of it before November 5th, some of it after November 5th, and about a third of it is still yet to be purchased. We had a proposed

agreement with one of the airlines to use a good bit of that space, and I imagine that's on hold now.

Environmental assessments on future land acquisitions. In order to purchase land, you have to complete an environmental assessment, and we have other land purchases that we proposed to do that are in the part on an imposed PFC, but we do want to be able to impose and use a PFC to do these environmental assessments on these future land acquisition areas, and those are generally the ones in red that you see on Project 1020. Mostly they are to take out residential incompatible development.

Bond issuance costs are self-explanatory and are covered, I think, in a part of the -- what you can use a PFC. Debt service reserve funding, you can use that from a PFC.

We have one major reliever airport, North Las Vegas Airport, that has a control tower and about 30,000 operations a year. We are gradually improving that airport. We purchased the land and are trying to build a first-class facility that we hope will attract many of our smaller planes from McCarran to that area. We think we're

going to be successful in that because there's a lot of interest as soon as we get the new runways completed. The first runway will be completed in about another month or two, and then the other runway will take about until the end of the year, and there's a lot of ramp work and other work that it will be eligible under the PFC that could be done here.

Most of this we have federal funds on, and this would be for the part that isn't federally funded. You know, that part that would be eligible would be eligible here. Here is a picture of the North Las Vegas Airport.

Another airport that has been designated as a reliever by FAA is Sky Harbor. Sky Harbor is in the city of Henderson. It also has a sizeable number of operations and a number of planes, and both of these airports have commuter operations to the Grand Canyon at them. That airport is -- we have a letter from the City of Henderson and a resolution from the City, as well as a letter from the owner of that airport -- it's a private airport -- that have asked the County to look at the proposal of acquiring that airport.

Our Board of County Commissioners has

given us that authority, and we're now working with the Federal Aviation Administration and with the City and with the owner of the airport to see if it's possible to put together a proposal. Our Board, I think, is reluctant to spend much money there. They would expect FAA to fund the majority of that airport if they want us to take it. Under the law they can fund -- of eligible parts of it, they can fund about 93 percent of it, which they're doing at McCarran -- which they're doing at North Las Vegas. They won't fund terminal facilities and concessions and things like that, but they certainly will fund most of the pavement.

We propose at Sky Harbor to do a Master Plan and a Part 150 Program Study in order to be eligible for those federal funds. We think FAA is going to set aside a sizeable amount of cash next year for Sky Harbor, and we would hope, if it seems the right thing to do, to be able to take advantage of that.

We would propose a drastically different Sky Harbor Airport than what you see now. We would probably redo the present runway, but we would build an east/west runway generally in what is now county land ultimately, and that's the

runway that FAA is in favor of because it will not interfere with the operations of McCarran. The runway you see here is primarily north/south. The other one would be down below the red line, and that's just a study. We've got to do a lot of study, and we're a couple of years away from any major decisions except maybe land acquisition, which we hope would be federally funded.

The next part is the part to impose a PFC only. These projects would be only -- these are ones that we haven't finished all the work we need to do. We need to get busy and do these studies, and these are projects that would take a -- you'd have to look at the air-side of the operation as well as the land-side, and they're pretty self-explanatory. I'm not going to go over them.

There's a flood control project that we talked about on the west side of the field; a runway extension for 7 right, 25 left, which is presently blocked by the railroad; a Runway 1 left, 19 right air carrier upgrade, which is a new air carrier runway when and if it's needed; the railroad track relocation; the three -- one, two, three, four -- six land acquisition projects which we need to -- we have in there the impose and use to

do the environmental assessment. If we get an environmental assessment, then these projects would be eligible under the PFC.

We'd like to be able to impose the money. We think these are all noise-sensitive areas. What we want to do is get ourself in the position in this airport. As near as possible, we have taken care of the major noise incompatibilities around our airport and think we can do it. It just takes money.

And so then we can go maybe down to the Financial Plan. This is required under the statute. There is an error on the Financial Plan on the -- one, two -- third paragraph where it says three dollar PFC through 2002. It should be 2022. I think we corrected most of them, but some of you who got yours early may not have gotten that corrected.

The Financial Plan provides that we have to give you a summary of estimated allowable project costs, which we've attempted to do here, including scheduling the draw-down time when we would take the money, how we would hope to build it. That's the first exhibit, and it's two pages as you look at it, and it's divided into terminal

building, airfield area, apron area, general aviation airports, and financing costs, and then we escalate the project costs based on some guess of what's going to happen with inflation.

The next one is Exhibit B. This exhibit is based on our estimate of the number of enplanements at the airport, and our enplanement estimated is based on this chart right over here, which isn't a part of anything you have. The red line was the estimate of our consultants back in 1987, and it is pretty well on target. In fact, it is on target. The blue line that you see up there is FAA's estimate of what's going to happen at this airport, and it's a little more optimistic than our target.

Now, it shows us getting to be a very big airport, and if we get to be a very big airport, we collect a lot of PFC money, and we have a lot of demands. If we don't grow that fast, then, of course, everything is really targeted to passengers and operations, and so we would build as we get passengers and get operations. But in order to satisfy the requirements of what we thought the Act was, we ought to use our best available information, and this is the information that was

generated by our consultants and by the Federal Aviation Administration as they looked at our proposed passenger growth over the next 30 years.

It shows us getting to be bigger than Los Angeles right now. I don't know if that will happen, but I guess anything is possible. I might say that we're up 10 percent so far this year in passenger enplanements. We're well ahead of probably any other airport in the country, major airport. I don't know how long we'll stay there, but we are so far, and we were up 10 percent last year. If they build the MGM Theme Park and the rest of that, why our growth is really tied to hotel rooms, and if they build more hotel rooms, we're going to grow. It's just that simple. Our estimate is net PFC revenue, which had to show in the documents that we mailed to you, was a billion-four. This is where we got that number from; was right here.

The next exhibit is Exhibit C, which is the source of funds. We've attempted to spread the source of funds. I hope you realize that these at the best are our best guess. We are probably fairly fortunate at this airport to have a number of sources of funds not available to some other

airports. Now, other airports have funds that we don't have like major parking. Parking in most airports is far bigger than ours. Duty-free shops at many airports is far bigger than ours. But we have gaming, which is a revenue that's restricted to use on the airport, and then we have the Jet A fuel tax that just passed the last session of the legislature where they gave us back the penny that used to go into the general fund, and we levied two additional pennies of state tax for a total of three cents that we get for future development of transportation purposes at the airport, and then we have the regular general obligation -- the regular revenue bonds and the PFC back revenues that should stand us in good stead to meet the demands of this airport for the foreseeable future. Our challenge is to make sure that we spend it wisely and build those projects that are needed.

That, in essence, is this document. We'd be happy to try and answer any questions you might have. If you have comments that are in opposition to the imposition of the PFC, we'll be happy to hear them, but we would like to indicate to you that in order to be heard by FAA, you probably ought to respond in writing back to us on

this document.

Any questions?

(No response.)

MR. BROADBENT: Comments? Yes, sir.

MR. BROWNE: Tom Browne from the Air Transport Association. When the proposed rulemaking was out for comment, the airlines and the airports got together and put together some joint comments. One of the comments was that it would take about a year for the airlines to program their computers to be able to collect the PFC, and we recommended in the document that FAA allow about a year from the time the rule became final before PFCs begin collection. I noticed in your notice that you were proposing a start-up date of March 1st, 1992, which is about nine months from the issuance of the final rule.

Is there any leeway in that start-up date?

MR. BROADBENT: Yes.

MR. BROWNE: Would we be able to implore you to move that date back to about June 1st so that we can properly get all of our computers programmed?

MR. BROADBENT: When we talked to

Lowell Johnson about this when we went to that PFC seminar in Chicago, that was one of the questions. As I remember, they did not include that in the final rule --

MR. BROWNE: That's correct, they did not.

MR. BROADBENT: -- but certainly we recognize that March 1st or March 31st might not be the appropriate date, and as we understood what FAA told us at that date, that they were going to listen to the airlines on what their capability was as far as their computers were concerned, and we would certainly support that. If that's the time it takes, then certainly we're going to support it.

MR. BROWNE: The only reason I mention it is because it might be helpful if you request it at the same time that the carriers think that they may be able to get their computers in order.

MR. BROADBENT: We'll try and cover --

MR. BROWNE: Just to support the case the we have made to FAA and to the airports in the form of AOCI and AAAE.

MR. BROADBENT: I don't think we would have any objection to including that in our

comments to make sure that that's covered that way. We would say March 1 or the earliest possible date that the air carriers can accommodate it, but not later than June 1st or July 1st.

MR. BROWNE: Okay. Right now the carriers are saying that June 1st is probably going to be the earliest that they could accommodate it.

MR. BROADBENT: I don't think we'd have any objection to that. I think we recognize it.

MR. BROWNE: Thank you.

MR. BROADBENT: I would like to indicate this is the first time that I think that the airports and airlines were able to put in joint comments on a major rule, and Mr. Browne who just talked here was a representative for ATA in those joint comments, and our understanding in talking with our airport organizations is that they were tough negotiations, but it really set a new precedent for airports and airlines, and we don't want to break that precedent.

MR. BROWNE: I appreciate it.

MR. BROADBENT: If there are no other questions, let me say this: We are available over the next month. If it's a financial issue you want

to talk about, talk to Ross, Ross Johnson. If it's a matter of the appropriate planning or anything else, contact all of us. We'll be happy to try to do our best if you work through myself or Randy. We'll work with our consultants to see that you get the appropriate answers.

We want you to be able to respond according to your dictates. We aren't trying to -- but at the same time, we want to impose a PFC and expect to be able to do it under the statute that was passed by Congress, signed by the President, and the regulations are now out. We'd like to thank you for your attendance, and if there's no further comment, the meeting is adjourned.

(Thereupon the taking of the proceedings was adjourned.)

* * * * *

CERTIFICATE OF REPORTER

STATE OF NEVADA)
SS:
COUNTY OF CLARK)

I, Margaret M. Harmon, certified shorthand reporter, do hereby certify that I took down in shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated; and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 19th day of July, 1991.

Margaret M. Harmon

Margaret M. Harmon, RPR, CSR #274

EXHIBIT “G”

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED

MAY 23 4 19 PM '03

Shirley B. Parraguirre
CLERK

STEVE SISOLAK, Plaintiff(s),	
vs.	CASE NO. A434337
	DEPT. NO. XIII
McCARRAN INTERNATIONAL AIRPORT, and CLARK COUNTY, a political subdivision of the State of Nevada,	
	Date: May 14, 2003
	Time: 8:45 a.m.
Defendant(s).	

DECISION

THIS MATTER was the subject of further proceedings on May 14, 2003 pursuant to the Decision and Interim Order entered May 12, 2003. At that time, counsel indicated that they felt that there is ample support in the record for their respective positions concerning the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 USC §§ 4601-4655, and its support, or lack thereof, for fee/cost awards to Plaintiff under NRS Chapter 342.

Subsequently, the Court has received Plaintiff's Second Supplemental Exhibit Concerning Application of URA Requirements to This Case, filed May 14, 2003, and Defendants' Objection to Plaintiff's Second Supplemental Exhibit Concerning

RECEIVED

MAY 23 2003

COUNTY CLERK

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NEVADA 89155

Application of URA Requirements to This Case, filed May 16, 2003. In the latter document, Defendants object not to the fact that Plaintiff filed a further supplement, but to the content of the supplement, urging that the contention made by Plaintiff with respect to the supplemental exhibit is without basis.

In a nutshell, the positions of the parties can be condensed to that of Plaintiff, which is that there is a broad swath of applicability to federally funded projects with no displacement requirement in inverse condemnation cases, versus that of Defendants, which is that there is a requirement of a specific nexus between federal funding and the taking at issue, with a displacement requirement.

The pertinent language of NRS 342.105 is the following, to-wit:

> 1. Any department, agency, instrumentality, or political subdivision of this state...which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970...and the regulations adopted pursuant thereto, and which undertakes any project that results in the

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acquisition of real property...shall provide relocation assistance and make relocation payments...as are necessary to comply with those federal requirements (emphasis supplied)

...

The Court is persuaded that the record demonstrates that Defendants are "subject to" the URA and that a nexus exists to the extent necessary. Moreover, the use of the words "...any project that results in the acquisition of real property..." indicates that a specific nexus is not required. The case of *County of Clark v. Alper*, 100 Nev. 382, 685 P.2d 943 (1984) is not inconsistent with this observation: "In order for the provisions of this act [former NRS 342.320(2)] to apply, the public body administering the programs or projects must be funded in whole or in part by the federal government." (*Alper, supra*, at 396)

Moving to the "payments" that are properly to be considered, the Court notes, first, that there is indeed no requirement in the URA that actual displacement have been occasioned if an inverse condemnation proceeding is necessary to

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establish the occurrence of a taking.[1] In this regard, Title III of the URA makes it clear in its statement of policy, 42 USC §4651(8), that, "[i]f any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings..."

Furthermore, 42 USC §4654(c), regarding costs and fees, does not limit eligibility to persons who have actually been displaced and who have required relocation assistance. In other words, where an owner of property has successfully prosecuted an inverse condemnation action, he is, by the unambiguous language of the federal statute itself, entitled to claim fees and costs, and Chapter 342 NRS simply carries the concept over to acquisitions of property by political subdivisions and departments of the state of Nevada that are "subject to" the URA.

A. Costs.

Now, turning to the question of costs, it appears to the Court that, in embracing the URA as a reference point, NRS

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[1]The very title of the URA demonstrates that displacement is but one of its subjects: Uniform Relocation Assistance and Real Property Acquisition Policies Act (emphasis supplied.)

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342,105 is of necessity adopting the concept of "reimburse[ment]" for "...reasonable costs, disbursements, and expenses, including reasonable...appraisal...fees actually incurred because of such proceeding[ ]" that is used in 42 USC §4654(c). Accordingly, the limitations of NRS 37.190 are clearly inapplicable, and there is thus no need for the Court to reach Plaintiff's equal protection argument relative thereto.

However, just as NRS chapter 342 evinces a legislative intention to adopt a broader qualification for costs than is set forth in NRS 37.190, NRS 18.005 is a legislative pronouncement on what is deemed "reasonable," and a $1,500.00 ceiling is presumed to be applicable for expert witnesses unless the circumstances of necessity otherwise warrant. Moreover, the term "reasonable" is used in 42 USC §4654(c). In this vein, the Court determines that, while the existence of such ceiling shows a legislative intention that the issue of reasonableness should reflect that figure as a "governor," so to speak, there is cause to exceed the ceiling for witnesses Campa and Jack, and it will award $20,000.00 for Ms. Campa and $14,000.00 for Mr. Jack. To such extent, therefore, Defendants' Motion to Retax Costs is GRANTED in part. In making this ruling, the Court is not by any means expressing or implying that the fees charged by Ms. Campa

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and Mr. Jack were unreasonable. Rather, the Court is constrained by the referenced statute, NRS 18.005, to assess the term "reasonable" for purposes of a cost award.

The balance of Defendants' cost motion is DENIED.

B. Attorneys' Fees.

Plaintiff's Motion for attorneys' fees is GRANTED in part, and the Court will award fees commensurate with Plaintiff's contingency fee agreement upon the principal sum of the jury's verdict, per Plaintiff's contingency fee agreement. 42 USC §4654(c); NRS 342.105; *Osprey Pacific Corp. v. United States*, 42 Fed. Cl. 740, 172 A.L.R. Fed. 507 (1999) dismissed on other grounds, 215 F.3d 1344 (Fed. Cir. 1999); *Cf. Robinson v. State*, 20 P.3d 396 (Ut. 2001). However, the Court will not award a further contingency fee on the prejudgment interest to which Plaintiff is entitled.

The Court has no doubt that entering into a contingency fee arrangement in a case of this type and magnitude is to be considered commercially reasonable from the standpoint of the client and professionally reasonable from the standpoint of the lawyer, who is taking the risk of non-compensation after much effort and time and restraint upon other applications of those resources. Indeed, much more time and effort will have to

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be spent on the appeal that Defendants have alluded to, with Plaintiff's counsel continuing to be at risk of receiving no compensation depending upon the result of the appeal.

Furthermore, the contingency percentage applied is reasonable in the context of this case and is owed by the client if the amount adjudged by the jury to be just compensation is allowed to stand.

On the other hand, just because a fee arrangement between lawyer and client is reasonable for them does not mandate that a compulsory fee award payable by the client's adversary must mirror it in order to be deemed "reasonable" under the law that provides for the making of the award.

What tips the scale on this point is the fact that this was an inverse condemnation case that required not only a determination of just compensation, but also the extra effort to prove a taking in the first place. This is the meaning of cases such as *Osprey Pacific Corp., supra*. Indeed, some federal cases dealing with fee awards under the URA have approved awards in excess of applicable contingency fee agreements. *See e.g. Shelden v. United States*, 41 Fed. Cl. 347 (1998).[2]

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[2]The Defendants maintain that, if fees are awardable at all, the lodestar approach would be applicable and that, since

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Finally, a governmental entity in an inverse condemnation case should contemplate, in its handling of a case and formulating its settlement posture, that the contingency fee route may be the only one available to the Plaintiff and that a large contingency fee may be sought at the end. Maybe when this case gets to the Supreme Court settlement conference program, the exposure to the contingent fee will be taken into account by both sides.

C. In light of the foregoing fee disposition, Defendants' Motion for Protective Order is DENIED as moot.

. . . . .

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time records have not been maintained by Plaintiff's counsel, no fees can be awarded. As to time records, counsel was on a contingency, and so keeping track of her time as though she was billing on an hourly basis would not be expected. *Shelden, supra*. Moreover, if the Court were to apply the lodestar approach in this case, it would apply the highest hourly rate charged by Defendants' counsel, $300.00 per hour, multiplied by the number of hours billed by Defendants' counsel, 3,911.94 hours per Ex. E. attached to Plaintiffs' Reply to Opposition to Motion for Attorney's Fees (4/29/03), as the Court is satisfied that Plaintiff's counsel would have worked at least as many hours. This calculation alone would render a fee award of $1,173,582.00. To that, the Court would render a fifteen percent (15%) premium of $176,037.30 in accordance with the factors discussed in paragraphs 2), 3), 4), 8), 9), 11), and 12) of Plaintiff's said Reply to Opposition, for a grand total of $1,349.619.30. However, the fact that this figure is less than the contingency fee percentage does not negate the reasonableness of the latter in this case.

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CONCLUSION

Counsel for Plaintiff is directed to submit a proposed order with any requisite findings consistent with B. above.

Counsel for Defendants is directed to submit a proposed order with any requisite findings consistent with A. and C. above.

This Decision sets forth the Court's intended disposition on the subject but anticipates further order of the Court to make such disposition effective as an order.

DATED this 23rd day of May, 2003.

MARK R. DENTON
DISTRICT JUDGE

CERTIFICATE

I hereby certify that on the date filed, I placed a copy of this Decision in the attorney's folder in the Clerk's Office or mailed a copy to:

LAURA WIGHTMAN FITZSIMMONS, ESQ.

JONES VARGAS
Attn: R. Douglas Kurdziel, Esq.

Lorraine Tashiro
LORRAINE TASHIRO
Judicial Executive Assistant
Dept. No. XIII

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NEVADA 89155

OPP
LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq., Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq., Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq., Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq., Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiff Landowners

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 AMEND JUDGMENT (Rules 59(e) and 60(b)) AND STAY OF EXECUTION** **Hearing Date: February 8, 2022** **Hearing Time: 9:05 AM**

Plaintiff Landowners 180 Land Co LLC and Fore Stars, LTD. ("Landowners") hereby oppose Defendant City of Las Vegas' ("City") Motion to Amend Judgment (Rules 59(e) and 60(b)) and Stay of Execution. 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

The City's continued attempts to circumvent the law in every form is alarming.[1] Existing Nevada statutory law addresses all of the City's spurious concerns. As has been the City's *modus operandi*, the City believes it is above the law and thus, is unwilling to admit that said statutory law exists and is applicable here. The City's unwillingness to acknowledge Nevada law is neither the Landowners', nor the Court's concern. Nevada has been a state since 1864 and has been steadfast in enacting statutory laws to address the government's use and abuse of eminent domain. The Court certainly does not need to abandon all rules and procedure to help the City advance its erroneous legal position that inverse condemnation actions are somehow not the constitutional equivalent to eminent domain, when longstanding Nevada law provides quite the opposite. And, the City's repeated citations to inapplicable California or federal law is an exhausting waste of judicial resources.

Frankly, the City's Motion to Amend Judgment should never have been filed. There is a specific statutory provision that addresses when title vests in the condemning agency's name. And, instead of following this statutory law (which even has "when title vests" in its title), the City asks the Court to invent a method wherein a landowner who has just been forcibly removed from their property, is then forced to stomach signing a deed over to the Government, deeding their land to the same body that took their land. That has never been the process (this is an unworkable process as these are action *in rem* not *in persona*) and the City's attempt to force such a distasteful process on the Landowners here is further evidence of the City's ill will and bad faith towards these Landowners. NRS Chapter 37 applies here, so the City must deposit the judgment and thereafter

[1] From disavowing its own code, to ignoring Nevada statutes and case law, to violating Court orders, the City seems to have no fidelity to the law.

will receive title by way of a Final Order of Condemnation. NRS 37.140, 37.150, 37.160 and 37.170.

II. LAW

A. NRS 37.160 Provides When and How Title Vests To The City

Since 1911 Nevada has had law that provides the process by which title vests in the government's name when the government has utilized its eminent domain powers, whether by following the proper procedures and filing a condemnation action, or by failing to follow the proper procedure and inversely condemning private property. NRS 37.160 is that statutory provision and specifically provides when and how title vests in the government's name, accordingly, nothing in the Judgment needs to be amended. Rather, the City must follow Nevada law.[2]

> **NRS 37.160 Entry of final order of condemnation on deposit of award; recording; when title vests**
>
> When the award has been deposited as required by NRS 37.150 … the court shall enter a final order of condemnation describing the property condemned and the purpose of such condemnation. A copy of the order shall be recorded in the office of the recorder of the county, and thereupon the title to the property described therein shall vest in the [defendant] for the purpose therein specified, except that when the State is the plaintiff, the property shall vest in the State for any public use.

As the Court is well aware, "inverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." *Clark County v. Alper*, 100 Nev. 382, 391, 685 P.2d 943, 949 (1984). Accordingly, NRS 37.160 applies here and upon the City depositing the award in this matter, the Landowners will promptly prepare and submit a Final Order of Condemnation for the Court's review. Once said Final Order of Condemnation is signed and filed, the City is free to

[2] The fact that the City is arguing that the Landowners deed the property to the City while at the same time claiming that it does not have to pay for it is disturbing.

record it, like a deed, whereby vesting title to the City, subject, of course, to the Landowners' continued constitutional reversionary rights under Article 1 § 22 (1) and (6).

B. The City's Attempt to Limit the Holding of *Alper* is Contrary to *Alper's* Long Standing Precedence in Nevada Takings Jurisprudence - Having Been Cited <u>28 Times</u> by the Nevada Supreme Court Since 1984

The Nevada Supreme Court has cited *Alper* 28 times in a wide range of takings cases from inverse condemnation to eminent domain to precondemnation damages cases. Accordingly, the City's attempt to limit or diminish *Alper's* holding is astonishing. *Alper* is a bedrock takings opinion in Nevada jurisprudence, dealing with specific takings doctrines, including without limitation, prejudgment interest, the project influence rule, standards of highest and best use, and the award of attorney fees.

Alper has been cited and affirmed repeatedly by the Nevada Supreme Court for nearly 40 years. *City of North Las Vegas v. Robinson*, 122 Nev. 527, 533, 134 P.3d 705, 709 (2006) (*Alper* and the impact of government dedication requirements on highest and best use); *McCarran Airport v. Sisolak*, 122 Nev. 645, 674-675, 137 P.3d 1110, 1129-1130 (2006) (expanding *Alper* to award attorney fees when the taking agency receives federal funds and relying on *Alper* to support award of prejudgment interest); *State ex rel. Dept. of Transp. v. Barsy*, 113 Nev. 712, 718, 941 P.2d 971, 975 (1997) (overruled on unrelated grounds)(relies on *Alper* to support statutory rate of interest as the floor and should only be used if other evidence of a higher rate is not offered); ***City of Sparks v. Armstrong*, 103 Nev. 619, 621-622, 748 P.2d 7, 8-9 (1987) (cites *Alper* that inverse condemnation actions are the constitutional equivalent to formal condemnation proceedings** and relies on *Alper* for the project influence rule even calling the project influence rule the "*Alper* doctrine"); *Vacation Village, Inc. v. Clark County*, 244 Fed.Appx. 785, 787-788, 2007 WL 2292716 (2007) (unpublished 9th Circuit opinion) (citing in approval to *Sisolak*'s expansion of *Alper,* holding that no nexus between federal funds and the taking project is needed for the award

of attorney fees under the relocation act instead if the entity that took the property receives federal funds then that is sufficient for awarding attorney fees pursuant to the URA); *Belle Vista Ranch Co., LLC v. RTC of Washoe*, 2021 WL 1713288 at *1 (2021) (unpublished opinion) (citing *Alper* for the project influence rule); ***City of North Las Vegas v. 5th and Centennial*, 2014 WL 1226443 at *7 (2014) (unpublished opinion) (cites *Alper* that inverse condemnation actions are the constitutional equivalent to formal condemnation proceedings**); *Nevada Power co., v. 3 Kids. LLC*., 129 Nev. 436, 441, 302 P.3d 1155, 1158 (2013) (citing *Alper* for highest and best use and government dedication requirements as it relates to highest and best use); *Dvorchak v. McCarran Airport*, 2010 WL 4117257 at *2 (2010) (unpublished opinion)(citing *Alper* for the statute of limitations starting point); *Johnson v. McCarran Airport*, 2010 WL 4117218 at *2 (2010) (unpublished opinion) (citing *Alper* for the statute of limitations starting point); *Buzz Stew LLC v. City of North Las Vegas*, 124 Nev. 224, fn 20, 181 P.3d 670 (2008) (citing *Alper* for date of taking when considering prejudgment interest and severance damages); *ASAP Storage Inc., v. City of Sparks*, 123 Nev. 639, fn 8, 173 P.3d 734 (2007)(citing *Alper* that real property interest in land supports a takings claim); ***Nevadans for the Protection of Property Rights v. Heller*, 122 Nev. 894, fn 36, 141 P.3d 1235(2006) (citing *Alper* that inverse condemnation actions are the constitutional equivalent to formal condemnation proceedings**); *City of Las Vegas v. Bustos*, 119 Nev. 360, fns 6, 8 and 9, 75 P.3d 351 (2003) (citing *Alper* for highest and best use and import of the property's zoning); *County of Clark v. Sun State Properties*, Ltd., 119 Nev. 329, fn 35, 72 P.3d 954 (2003) (citing *Alper* for prejudgment interest); *County of Clark v. Buckwalter*, 115 Nev. 58, 62, 974 P.2d 1162, 1164 (1999) (overturned by constitutional amendment and statute as to most probable price) (citing *Alper* that the determination of just compensation is exclusively a judicial function and may not be impaired by statute); ***Argier v. Nevada Power Co*., 114 Nev. 137, fn 2, 952 P.2d 1390 (1998) (*citing Alper* that inverse condemnation actions are the**

constitutional equivalent to formal condemnation proceedings to reject Nevada Power's argument that an eminent domain case was not applicable to an inverse condemnation action); *Stagecoach Utilities, Inc., v. Stagecoach General Imp. Dist*., 102 Nev. 363, 366, 724 P.2d 205, 207 (1986) (citing *Alper* for prejudgment interest); *Manke v. Airport Authorities of Washoe County*, 101 Nev. 755, 759, 710 P.2d 80, 82 (1985) (citing *Alper* for prejudgment interest); *Iliescu v. RTC of Washoe*, 2021 WL 4933429 at *5 (2021) (unpublished opinion) (citing *Alper* for highest and best use).

The Nevada Supreme Court has repeatedly held that inverse condemnation proceedings are the constitutional equivalent to direct condemnation proceedings and that the same rules and procedures apply to both. Accordingly, NRS Chapter 37 applies here and therefore, pursuant to NRS 37.140, the City must deposit the just compensation award within 30 days and then pursuant to NRS 37.160 title vests in the City by way of a Final Order in Condemnation (not a deed).

C. The City Is Not Entitled to a Stay

The Landowners have fully addressed the impropriety of the City's request for a stay in Plaintiff Landowners' Opposition to The City's Motion for Immediate Stay Of Judgment And Countermotion To Order The City To Pay The Just Compensation Award, filed on January 5, 2022 and scheduled to be heard on January 11, 2022 - prior to the date set for the hearing on the City's pending Motion to Amend. Accordingly, the Landowners hereby incorporate their Opposition to The City's Motion For Immediate Stay Of Judgment And Countermotion To Order The City To Pay The Just Compensation Award filed on January 5, 2022 herein.

D. Correction of City's False Claims and Attempts to Rewrite History

1) The Only Reason there was a 1-Day Bench Trial is Because the City Produced No Experts.

The City's attempt to diminish the validity of the bench trial in this matter is shocking. (City Mot. at 2:3). Yes, the Court conducted a 1-Day bench trial, *because the City failed to produce*

experts in this case and stipulated to admit the Landowners' evidence of value. This is a field dominated by expert opinion,[3] yet the City produced none. Accordingly, the City is the party responsible for the brevity of the bench trial, not the Court, and certainly not the Landowners.

2) The Landowners Paid More than $4.5 Million for the Subject Property

The Landowners paid more than $4.5 Million for the Subject Property. (City Mot. at 2:6). Despite the City's attempt to advance a false narrative about the purchase price, the evidence at the pretrial hearings established that the purchase price of the Subject Property was not $4.5 Million. Furthermore, the City had no expert to testify to any of the City's claims about the alleged purchase price, instead the City simply advanced arguments of counsel, none of which are evidence. Accordingly, the Court properly found as follows:

> 1. The purchase price/transaction does not reflect the highest and best use of the 35 Acre Property on the date of valuation, which is September 14, 2017, pursuant to NRS 37.120 and *Clark County v. Alper*, 100 Nev. 382, 391 (1984).
>
> 2. The City has not identified an expert witness that can testify to the relevance of the purchase price/transaction as relates to the value of the 35 Acre Property, as of the September 14, 2017, date of valuation and the only expert to analyze the purchase price/transaction, appraiser Tio DiFederico, determined that it had no relationship to the value of the 35 Acre Property as of September 14, 2017.
>
> 3. The City has also failed to identify an expert witness that has adjusted the purchase price/transaction to the relevant September 14, 2017, date of valuation.
>
> 4. The purchase/transaction was not for substantially the same property at issue in this matter as it was for approximately 250 acres of land with the acquisition of Fore Stars, Ltd. and all of the assets and liabilities thereof, not just the 35 Acre Property at issue in this case.
>
> 5. The purchase price/transaction beginning in 2005 is too remote to the date of value (September 14, 2017) with changes in market fluctuations in values having occurred since the transaction. In fact, the City's own tax assessor did not use the purchase price/transaction when deciding the value of the 35 Acre Property for purposes of imposing real estate taxes on the property in 2016.
>
> 6. The evidence presented at the hearings showed that the purchase price/transaction arose out of a series of "complicated" transactions that had "a lot

[3] *City of Sparks v. Armstrong*, 103 Nev. 619, 622, 748 P.2d 7, 9 (1987)

of hair" on them and elements of compulsion, because the Queensridge Towers were being constructed on part of the 250 Acre property causing the operator of the golf course to demand a large pay off; and, the predecessor owners could not meet other underlying obligations.

7. The Landowners presented evidence of the sales of other similar properties in the area of the 35 Acre Property that sold near the September 14, 2017, date of valuation, demonstrating there was no need to turn to the purchase price/transaction.

8. Any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. The sole issue in this case is the value of the 35 Acre Property as of September 14, 2017, and introducing the purchase price/transaction will confuse the jury as the jury is not tasked with unraveling the terms of the purchase price/transaction to decide what may or may not have been paid for the property.

9. Allowing the purchase price/transaction would allow the City to communicate to the jury that, since the Landowners paid a lower value for the property, they should not be entitled to their constitutional right to payment of just compensation based on the value of the 35 Acre Property as of the September 14, 2017, date of value, which would be improper. And, the City has indicated this purpose having previously argued in this case that the Landowners made a windfall on their investment. *See 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. Argument that the Land Was Dedicated as Open Space/City's PRMP And PROS Argument Filed November 16, 2021 at 2:13-5:9.*

The City continues to misrepresent the facts and the law to the Court. The City's repeated arguments about an alleged purchase price are no different. This litigation strategy by the City has resulted in a great waste of judicial resources and extensive litigation costs for the Landowners. The Landowners filed a motion for attorney fees which is scheduled to be heard by this Court on February 3, 2022. The City's tactic in the pending Motion to Amend further supports a full award of attorney fees to the Landowners.

3) The City Has Taken Possession of the Landowners' Property

The City seems to be advancing under the theory that if it says something enough times, then it becomes true, as the City states in its pending Motion that "[t]he Developer does not claim that the City took physical possession of the property…" (City Mot. at 5:14-15). After four years

of litigation and a bench trial wherein it was held that the City has effectuated a "per se" taking of the Landowners' Property, it is hard to imagine how the City justifies repeating such a claim. The City has taken possession of the Landowners' Property and it did so for the use and enjoyment of the surrounding neighbors. *See Finding of Fact and Conclusions of Law Granting Plaintiffs Landowners' Motion to Determine Take and For Summary Judgment on the First, Third and Fourth Claims for Relief filed October 25, 2021 at § 114, 116-121, 131-136, 141-142, 154-175*.

III. CONCLUSION

The City's unwillingness to accept Nevada law deserves no favor from the Court. Accordingly, and for the foregoing reasons, the City's Motion to Amend must be denied in its entirety.

DATED this 4th day of January, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ Autumn Waters
Kermitt L. Waters, Esq. (NSB 2571)
James J. Leavitt, Esq. (NSB 6032)
Michael A. Schneider, Esq. (NSB 8887)
Autumn L. Waters, Esq. (NSB 8917)
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 4th day of January 2022, pursuant to NRCP 5(b), a true and correct copy of the foregoing: PLAINTIFF LANDOWNERS' OPPOSITION TO CITY OF LAS VEGAS' MOTION TO AMEND JUDGMENT (Rules 59(e) and 60(b)) AND STAY OF EXECUTION 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:

McDONALD CARANO LLP
George F. Ogilvie III, Esq.
Christopher Molina, Esq.
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan Scott, Esq., City Attorney
Philip R. Byrnes, Esq.
Rebecca Wolfson, Esq.
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz, Esq.
Lauren M. Tarpey, Esq.
396 Hayes Street
San Francisco, California 94102
schwartz@smwlaw.com
ltarpey@smwlaw.com

/s/ Sandy Guerra
an employee of the Law Offices of Kermitt L. Waters

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Steven D. Grierson
CLERK OF THE COURT

OPP/CTR
LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq., Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq., Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq., Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq., Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiff Landowners

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 THE CITY'S MOTION FOR IMMEDIATE STAY OF JUDGMENT** **AND** **COUNTERMOTION TO ORDER THE CITY TO PAY THE JUST COMPENSATION ASSESSED** **Hearing date: January 13, 2022** **Hearing time: 9:30 am**

COMES NOW Plaintiff Landowners, 180 LAND CO., LLC and FORE STARS Ltd. (hereinafter "the Landowners"), by and through their attorneys, the Law Offices of Kermitt L. Waters, and hereby files this Opposition to the City's Motion for Immediate Stay of Judgment and Countermotion to Order the City to Pay the Just Compensation Assessed immediately.

Case Number: A-17-758528-J

This Opposition and Countermotion 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.

DATED this 5th day of January, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ James J. Leavitt
Kermitt L. Waters, Esq. (NSB 2571)
James J. Leavitt, Esq. (NSB 6032)
Michael A. Schneider, Esq. (NSB 8887)
Autumn L. Waters, Esq. (NSB 8917)
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiffs Landowners

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a constitutional proceeding brought under Article 1, Section 8 of the Nevada State Constitution.[1] On November 24, 2021, an award of $34,135,000 was entered in favor of Plaintiff Landowners, 180 LAND CO., LLC and FORE STARS Ltd. (hereinafter "Landowners") and against the City of Las Vegas (hereinafter "City") as the value of the 35 Acre Property that was taken in inverse condemnation by the City in this case. *See* Notice of Entry of Findings of Fact and Conclusions of Law on Just Compensation, filed November 24, 2021 (hereinafter "FFCL Re: Just Compensation"). Very specific Nevada eminent domain and inverse condemnation law directly on point mandates that the City pay the $34,135,000 award within 30 days of final judgment and, if the City decides to appeal (rather than allow entry of final judgment), then it must pay the award as a precondition to appeal. There are no exceptions to this rule, meaning that no

[1] Nev. Const. art. I§§ 8, 22. *See also* U.S. Const. amend. V.

matter what course the City chooses in this case (to allow entry of final judgment or appeal), it must pay the award within 30 days. The City entirely ignores this eminent domain law directly on point in its motion to stay. Rather, the City has chosen to violate this specific law and, instead, has filed a motion to stay payment of the judgment – based on general civil procedure laws that do not trump the more specific eminent domain and inverse condemnation law directly on point. Accordingly, the City should be ordered to immediately comply with specific Nevada eminent domain and inverse condemnation law and pay the $34,135,000 award.

II. LAW APPLICABLE TO THE LANDOWNERS' COUNTERMOTION TO ORDER PAYMENT AND THE CITY'S MOTION TO STAY

A. Two sources of Nevada Law, directly on point, mandate that the City pay the $34,135,000 award within 30 days of final judgment

1. NRS 37.140

NRS 37.140 appears in Chapter 37 of the Nevada Revised Statutes. Chapter 37 contains Nevada's Eminent Domain statues, and, therefore, applies in the specific context of both eminent domain and inverse condemnation proceedings because "inverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." Clark County v. Alper, 100 Nev. 382, 391, 685 P.2d 943, 949 (1984). NRS 37.140 provides that any "sum of money assessed" against the government in an eminent domain or inverse condemnation action must be paid within 30 days of the final judgment – "The [government] must, within 30 days after final judgment, pay the sum of money assessed." NRS 37.140. This statute uses the mandatory "must" language and provides no exceptions.

2. NRS 37.170 and State v. Second Judicial District Court

NRS 37.170 also appears in Chapter 37 of the Nevada Revised Statutes, which, again, is the Chapter that contains Nevada's eminent domain statutes, and, therefore, also applies in the

specific context of eminent domain and inverse condemnation proceedings. NRS 37.170 mandates that, as a precondition to an appeal in an eminent domain or inverse condemnation case, the government must pay the award. NRS 37.170. This statute was clearly passed to strengthen the applicability of NRS 37.140 by mandating payment of the just compensation award – as a precondition to an appeal.

The Nevada Supreme Court addressed the applicability of NRS 37.170 over sixty years ago in the case of State v. Second Judicial District Court, 75 Nev. 200 (1959). In that case, the State of Nevada made the same exact arguments the City is making to this Court – the State argued that it does not need to pay an award in an eminent domain case as a condition to appeal. The district court denied the State's request and ordered payment of the award. Id., at 202. The State appealed. The Nevada Supreme Court affirmed, flatly rejecting the State's arguments (which the City reiterates to this Court). "The deposit provided by NRS 37.170 is a condition to the condemnor's right to maintain an appeal while remaining in possession." Id., at 205.

The Nevada Supreme Court then gave strong public policy reasons for its decision – which rejects all of the City's arguments to stay payment of the $34,135,000 award. **First**, the Court held "payment should not be unduly delayed in those cases where the condemnee (landowner) has already lost possession and use of his property." Id., at 205. This Court entered two detailed findings of fact and conclusions of law that provide a detailed analysis of how the Landowners have already lost possession and use of their property. *See 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 and Denying the City of Las Vegas' Countermotion for Summary Judgment on the Second Claim for Relief, filed October 25, 2021, specifically, pp. 10-29* (hereinafter **"FFCL Re: Take"**) and *Findings of Fact and Conclusions of law on Just Compensation, Bench Trial, October 27, 2021* (hereinafter **"FFCL Re: Just Compensation"**).

Second, the Supreme Court held "[t]he assurance of ultimate payment plus interest may not be sufficient to meet the immediate needs of a condemnee either to his property or to its cash equivalent." Id., at 205. This public policy reason rejects the City's argument that the promise of "interest" at the end of the litigation negates the duty to pay the funds within 30 days and prior to an appeal. *See City Motion, p. 16:21-26.* **Third,** the Court held that "[t]he power not only to take possession of another's property, but also to postpone indefinitely the payment of just compensation for it, is a power which may well have an oppressive effect." Id. The Court explained, "[i]t might well, through duress of circumstances, compel acceptance by a condemnee [landowner] of compensation felt not to be just." Id. This public policy reason rejects any other City arguments to delay payment.

In State v. Second Judicial District Court, the Nevada Supreme Court also rejected the argument that payment of the funds pending appeal would deprive the government of its right to appeal eminent domain and inverse condemnation awards – the same argument made by the City in this case. *See City Motion, p. 16:7-20.* In State v. Second Judicial District Court, the State claimed that mandating payment of the funds pending appeal "deprives it of its right to appeal," because this would amount to "a voluntary satisfaction of judgment which renders the appeal subject to dismissal as moot." Id., at 205. The Nevada Supreme Court disagreed, holding "[s]uch is not our view of the law" and reasoned that payment of the funds pending appeal is a "***condition to the condemnor's [government] right to maintain an appeal*** while remaining in possession. It is not an acceptance of the judgment rendered, but is the meeting of a condition by which that judgment may be disputed." Id., at 205, emphasis added.

In other words, all of the arguments the City is making now to stay payment of the funds were made by the State in the State v. Second Judicial District case, and the Nevada Supreme Court rejected every single argument and provided detailed policy reasons for rejecting the

arguments. Accordingly, the City "must" pay the $34,135,000 award within 30 day of final judgment and as a precondition to appeal pursuant to specific Nevada eminent domain and inverse condemnation law directly on point – NRS 37.140 an NRS 37.170.

B. The City Ignores NRS 37.140 and NRS 37.170 in its Opening Brief – And These Statutory Provisions Apply Equally to Direct Condemnation and Inverse Condemnation Actions.

The City clearly had an ethical duty to cite the Court to NRS 37.140, NRS 37.170, and State v. Second Judicial District as all three of these authorities are directly on point. It is anticipated, however, that the City will perpetuate the false argument it continually made to the Court during trial – that the statutes in Chapter 37 apply only to direct condemnation actions, not inverse condemnation actions, or, that eminent domain actions are different than inverse condemnation actions and are governed by a different set of rules. The Nevada Supreme Court has **repeatedly and consistently rejected** this City argument. In the inverse condemnation case of County of Clark v. Alper, 100 Nev 382 (1984), Clark County argued that NRS 37.120 does not apply to inverse condemnation actions and the Nevada Supreme Court rejected this argument, holding "[i]nverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the **same rules and principles that are applied to formal condemnation proceedings.**" Id., at 391. Emphasis added. In the direct condemnation case of Argier v. Nevada Power Co., 114 Nev. 137 (1998), Nevada Power argued that a rule adopted in an inverse condemnation case should not apply to its case, because, according to Nevada Power, there should be a different set of rules for inverse and direct condemnation cases. The Nevada Supreme Court rejected the argument, citing to the Rule in Alper, that the same rules and principles are applied to both direct condemnation and inverse condemnation cases. Argier, at fn.2. In the precondemnation action of City of North Las Vegas v. 5th & Centennial, LLC., 2014 WL 1226443 (2014)(unpublished), the Nevada Supreme Court again cited to Alper and held "inverse

condemnation proceedings are constitutionally equivalent to eminent domain actions." 5th & Centennial, at headnote 7. The 5th & Centennial Court then held that it was improper for the district court to apply the general NRS 17.130 interest calculation statute in that precondemnation action case rather than the interest calculation statute that applies specifically to eminent domain cases – NRS 37.175. *See also* City of Sparks v. Armstrong, 103 Nev. 619 (1987) and Nevadans for the Protection of Property Rights v. Heller, 122 Nev. 894 (2006) – both cases citing Alper for the rule that inverse condemnation actions are the constitutional equivalent to formal condemnation proceedings and are governed by the same rules and principles. Simply stated, the Nevada Supreme Court could not have been clearer – Chapter 37 statutes apply to all types of eminent domain actions – direct condemnation, inverse condemnation, and precondemnation type cases.

Moreover, the City's attempt to distinguish between eminent domain and inverse condemnation cases is troubling, at best. The City must admit that if this case was a direct eminent domain case – where the City complied with the Nevada Constitution and the NRS Chapter 37 requirements and properly filed an eminent domain action and properly paid just compensation for the taking of the Landowners' 35 Acre Property – the City would indeed be required to pay the $34,135,000 award within 30 days of final judgment and as a precondition to appeal under NRS 37.140 and NRS 37.170. But, the City essentially argues here that since the City violated the Nevada Constitution and violated the NRS Chapter 37 requirements and forced the Landowners to bring **and prevail** on an inverse condemnation case – the City is not required to pay the $34,135,000 award within 30 days under NRS 37.140 and NRS 37.170.

This makes no legal or common sense whatsoever. It rewards the government for violating the Nevada State Constitution and the NRS on eminent domain. There is no legal or public policy reasons for negating these mandatory deposit requirements where the government acts unconstitutionally and illegally. The inverse condemnation award is just as valid as a direct

eminent domain award. This Court held in the FFCL Re: Take and FFCL Re: Just Compensation that the City took the Landowners' 35 Acre Property, the effect of which is the same as if the City had filed a direct complaint in eminent domain. Accordingly, the mandatory 30 day payment statutes (NRS 37.140 and NRs 37.170) apply in this inverse condemnation case.

C. The More Specific Eminent Domain Statutes and Laws Apply Over the General Rules Cited by the City

The City's next attempt to avoid its constitutional duty to pay the $34,135,000 award is to cite to general rules that allow the Court to consider stays of judgments in other non-eminent domain and non-inverse condemnation cases – NRCP Rule 62 and NRAP Rule 8. These general rules have no application whatsoever in this inverse condemnation proceeding. As explained above, Nevada has adopted very specific rules that apply to the specific facts of this inverse condemnation case - NRS 37.140 and NRS 37.170. These statutes are unambiguous and, therefore, "must be given their ordinary meaning." City of Sparks v. Reno Newspapers, Inc., 133 Nev. 398 (2017) (when interpreting a statute, if the language is "facially clear," the Court will give that language its plain meaning. Id., at 400); State Dept. of Taxation v. Masco Builder Cabinet Group, 129 Nev. 775 (2013), the Court held statutory language that is unambiguous is given its "ordinary meaning." Id., at 778). The ordinary meaning of these statutes provide that all eminent domain and inverse condemnation awards "must" be paid within 30 days of final judgment and as a precondition to appeal – without exception. The Nevada Supreme Court has already applied the ordinary meaning of NRS 37.170 to mandate payment, rejecting every single one of the City's arguments it now makes to delay payment. *See* State v. Second Judicial District Court, supra.

And, the Nevada Supreme Court has been very clear that where there is a more specific rule adopted, the more specific rule will apply over the general rule. In Doe Dancer I v. La Fuente, Inc., 137 Nev. Adv. Op. 3, 431 P.3d 860, 871 (2021), the Nevada Supreme Court recognized the "general/specific canon" that when two statutes conflict, "the more specific statute will take

precedence, and is construed as an exception to the more general statute." In City of Sparks v. Reno Newspapers, Inc., 133 Nev. 398, 400, 401 (2017), the Court held, "it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally." In State Dept. of Taxation v. Masco Builder Cabinet Group, 129 Nev. 775, 778 (2013), the Court held, "[a] specific statute controls over a general statute." Finally, in In Re Resort at Summerlin Litigation, 122 Nev. 177, 181, 185 (2006), the Court held, "[i]mportantly, where a general statutory provision and a specific one cover the same subject matter, the specific provisions controls."

Therefore, NRS 37.140, NRS 37.170, and the holding in State v. Second Judicial District Court, are the specific eminent domain and inverse condemnation rules that apply over the more general NRCP Rule 62 and NRAP Rule 8 stay rule. Meaning that the City's lengthy briefing on NRCP Rule 62 and NRAP Rule 8 from pages 14-30 of its motion to stay is entirely irrelevant and should not be considered by the Court.

III. FACTS AND LAW REBUTTING CITY'S IRRELEVANT NRCP RULE 62 AND NRAP RULE 8 ARGUMENTS FOR A STAY

If this Court is inclined to consider the City's entirely irrelevant arguments regarding NRDP Rule 62 and NRAP Rule 8, the following rebuts all of these City arguments.

A. Rebuttal of the City's Private Attorney's Declaration

The City's private attorney submits a 5 ½ page "Declaration" purporting to outline the facts of this case and the findings of fact and conclusions of law (FFCLs) entered by this Court. *See City Motion, pp. 5-9.* The Declaration is replete with inaccuracies that attempt to create a false narrative of the facts and even a false narrative of the Court's findings. This Declaration is unnecessary and irrelevant as the City could have cited to the record for the facts and the Court's FFCLs; rather than trying to invent facts and FFCLs. Accordingly, the City's private attorney's Declaration should be ignored by the Court.

B. Rebuttal of The City's "Introduction" that Follows the City's Private Attorney's Declaration

The City also includes a 5 ½ page "Introduction" that largely follows the "Declaration" by its private counsel. *See City Motion, pp. 9-14.* The following further shows why the City's "Declaration" and "Introduction" are baseless.

The City claims in the "Introduction" that the Court held "the City has 'taken' the 35-Acre Property by denying a single set of applications to build 61 houses on the property." *See City Motion, p. 9:21-22.* The City, the Court, and the Landowners know this is a false statement. After four days of extensive argument and presentation of evidence, the Court entered its FFCL Re: Take, referenced above. The FFCL Re: Take sets forth the City's taking actions, which include: **1)** the surrounding property owners' representative bragging that his group is "politically connected" and promising to get in the way of the Landowners use of their 35 Acre Property; **2)** a City Councilman testifying the surrounding property owner representative contacted him to "get in the way" of the landowners' development rights; **3)** the City then **DENIED** the Landowners' applications to develop 61 lots (even though the City's own planning department confirmed the applications met every single City and State requirement to develop and should be approved), on the grounds that the City would accept only one application to develop – a Master Development Agreement (MDA); **4)** the Landowners then worked with the City for over two years on the MDA, the City drafted almost the entire MDA application, the City Attorney's Office and the City Planning Department confirmed the MDA met every single City and State requirement and should be approved, and, when the MDA was presented for approval, the City **DENIED** the MDA altogether without equivocation; **5)** the City **DENIED** the Landowners fence application in violation of the City's own Code, which allowed the surrounding property owners to access the 35 Acre Property; **6)** the City **DENIED** the Landowners' access application in violation of Nevada Supreme Court precedent that the Landowners had an absolute right to access their property; **7)** a

City Councilman announced that the surrounding property owners had the right to use the Landowners' property for their recreation and the City then, in furtherance of this announcement, adopted two City Bills that: a) targeted only the Landowners' property; b) made it impracticable or impossible to develop the property; and, c) preserved the property for use by the public and authorized the public to use the property by specifically stating in the body of the Bills, that the Landowners must "provide documentation regarding ongoing public access … and plans to ensure that such access [to the property] is maintained;" **8)** the significant communications by the City and its employees and representatives outlining in detail the City's intent and reasons for denying any and all use by the Landowners of the property and the City's actions to preserve the property for use by the public, including the surrounding owners; **9)** an expert report stating that "before" the City's actions, the 35 Acre Property had a value of $34,135,000 and "after" the City's actions, the 35 Acre Property value "would be zero;" and, **10)** the City did not exchange an expert report or rebuttal report to challenge this expert analysis conceding to it instead. These taking actions are set forth in detail in the Court's FFCL Re: Take – pages 11-29. And, during the four day trial on the take issue, the City never even disputed that it engaged in these actions. Therefore, the "Declaration" by the City's private attorney and the "Introduction" in the City's motion claiming that the Court entered a take based on the City "denying a single set of applications to build 61 house" is plainly and manifestly false.

The City also claims in its "Introduction" that the Court's property interest holdings turns Nevada "land use law on its head" and finds "local agencies no longer have discretion in the approval of land use permit applications;" that the R-PD7 zoning should not govern; and that all law states the master plan should trump zoning. *See City Motion, pp. 9-11.* These are also false representations. **First,** this is an inverse condemnation case that is governed by inverse condemnation cases, not "land use" or petition for judicial review cases and the Court's

FFCL Re: Take lays out in detail why the City's land use petition for judicial review cases are inapplicable here. *See* FFCL Re: Take, pp. 41-43. **Second,** the Court's FFCL Re: Take lays out in detail the Nevada inverse condemnation law, including three direct condemnation and three inverse condemnation Nevada Supreme Court cases right on point, which provides that the 35 Acre Property residential zoning (R-PD7), not any alleged master plan, must be used to determine the property rights of a Nevada landowner in the context of an inverse condemnation case. FFCL Re: Take, pp. 8:13-10:6. **Third,** the Court's FFCL Re: Take lays out in detail the due diligence the Landowners did prior to purchasing the property wherein **all City departments** confirmed the 35 Acre Property was zoned residential, this residential zoning trumps everything, there are no restrictions that could prevent this residential development, and the owner has the right to develop the property residentially. FFCL RE: Take, p. 4:10-5:14. The City even put this in writing in a Zoning Verification Letter to the Landowners. FFCL Re: Take, p. 5:7-14. **Third**, after acquiring the 35 Acre Property **all City departments** continued to confirm the Landowners' property rights with the head City Planner testifying – "a zone district gives a property owner property rights." FFCL Re: Take, p. 5:23-24. **Fourth**, the City's Planning Department issued a recommendation of approval on the MDA (that would allow residential development on the 35 Acre Property), because it "conforms to the existing zoning district requirements." FFCL Re: Take, p. 6:1-6. **Fifth**, the County Tax Assessor, which is the City Tax Assessor, determined the "lawful" use of the 35 Acre Property is "Residential" and has collected taxes in the amount of $205,227.22 per year based on this "lawful" residential use. FFCL Re: Take, pp. 6:13-7:2. **Sixth**, the uncontested evidence at trial proved that the City Attorney and the City's head planner stated zoning is of the highest order and trumps the master plan and the City Attorney's Office submitted two affidavits in another inverse condemnation case that a master plan has "no legal effect" on the use of property. FFCL Re: Take, p. 7:5-24. **Seventh**, the Court's FFCL Re: Take cites to two other findings of fact and

conclusions of law in another case brought by the Queensridge owners that also held the R-PD7 gives the Landowners the "right to develop." FFCL Re: Take, p. 26:7-15. **Finally,** the Nevada Supreme Court plainly rejected this City argument in the seminal Sisolak case, holding that government agencies have discretion to apply "valid zoning and related regulations **which do not give rise to a takings** claim." McCarran Intern. Airport v. Sisolak, 122 Nev. 645, fn 25 (2006). Therefore, the City does not have absolute "discretion" to deny any and all uses of property without being subject to an inverse condemnation case, as baselessly argued by the City. The City may apply "valid" zoning regulations, but if its actions rise to a "taking," then just compensation must be paid.

The City also claims in the "Introduction" that: 1) the Nevada Supreme Court, Case No. 75481, held the Landowners "must first" get the City's discretionary approval of an amendment to the City's Master Plan to develop on their 35 Acre Property; and, 2) the City's Master Plan is PR-OS. *See City Motion, p. 11:13-23.* First, the Nevada Supreme Court, in case No. 75481, held the exact opposite of the City's representation – the Court flatly rejected the exact same PR-OS argument the City continuously and repeatedly makes in this case. *See Reply in Support of Plaintiff Landowners' Motion to Determine "Property Interest," filed September 9, 2020, pp. 8:4-9:8.* Second, in regard to a master plan amendment, the Nevada Supreme Court never held the Landowners needed to get an amendment to the City's master plan to develop; it merely held that, **if** the City changes the master plan, it must "make specific findings." Nevada Supreme Court case No. 75481. Again, the Court never held there is a PR-OS on the property nor that an amendment to the master plan is required to develop the 35 Acre Property. Third, this Court has heard this PR-OS argument repeatedly presented by the City in this case and rejected it **every time**. *See FFCL Re: Take, p. 10:1-3. See also FFLC Re: Just Compensation, filed November 18, 2021, p. 4:18-21, 12:9-13.* Fourth, this PR-OS argument has been rejected by every

single other court that has considered it, other than the Crockett Order, and the Crockett Order was reversed by the Nevada Supreme Court in Case No. 75481, referenced above. As this Court will recall, the Landowners presented an outline of the 11 orders that rejected the City's PR-OS argument. *See e.g Landowners' Demonstrative Exhibits for Take Hearing, "Exhibit 5," filed October 4, 2021, 5:17 p.m. p. 62.* In fact, Judge Jones has also recently rejected this City PR-OS argument in the 17 Acre Case, holding the original master plan designation for the property was MED and ML (medium residential use) and "the City has failed to present the evidence showing that this original MED and ML City Master Plan land use designation was ever legally changed from MED and ML to PR-OS, pursuant to the legal requirements set forth in Chapter 278 and LVMC 19.16.030." *See FFCL Re: Plaintiff Landowners' Motion to Determine "Property Interest," case NO. A-18-773268-C, filed on September 16, 2021, p. 14:1-10.* And, as is the City's course of conduct, it challenged Judge Jones's PR-OS finding in a motion to reconsider and, again, lost the PR-OS argument. In all, there have been 5 district court judges and 8 Nevada Supreme Court Justices that have considered the City's PR-OS argument and flatly rejected it.

The City next claims in its "Introduction" that the Court "ignores" "authorities directly on point" and, instead, relies on Sisolak and Bustos to decide the property interest issue. First, the "authorities directly on point" the City cites to are all petition for judicial review cases. *See City Motion, p. 10:26-11:4.* This is not a petition for judicial review case; it is an inverse condemnation case. Second, the Sisolak and Bustos cases the Court relied on are direct condemnation and inverse condemnation cases where the Court adopted the rules for deciding the property interest issue in an inverse condemnation case - the exact issue that was before the Court in this proceeding. In fact, in the Bustos case, the Nevada Supreme Court rejected the exact same arguments the City of Las Vegas made to the Court during trial and in its pending motion. *See* City of Las Vegas v. Bustos, 119 Nev. 360 (2003). In Bustos, the City argued that Judge Porter

should ignore the potential zoning of Mr. Bustos' property for commercial use and, instead, should apply the City's master plan that prohibited commercial use on the Bustos' property. Id., at 361. The City cited the same exact petition for judicial review law that it now cites to the Court. Id., *361, see fn.1 wherein the Court references the PJR law the City proposed the Court follow.* Judge Porter rejected the City's argument that the master plan applies and, instead, held that the Court must follow the zoning on the property when deciding the property interest issue and the Nevada Supreme Court affirmed, holding, "the district court properly considered the current zoning of the property, as well as the likelihood of a zoning change." Id., at 363. Therefore, contrary to the City's argument, the Court did not "ignore" relevant authorities; it properly followed direct condemnation and inverse condemnation case law that is directly on point.

The City also claims in its "Introduction" that Judges Sturman and Herndon Ruled on the Property Interest Issue – Contrary to the Court's Holding. *See City Motion, p. 12:15-22.* This City argument is disturbingly misleading. **Judge Sturman** has not ruled on the property interest issue in the 133 Acre Case. There were two hours of oral argument on the property interest issue, Judge Sturman made a comment during that hearing (cited by the City), that comment was addressed extensively during the hearing as being incorrect, and, at the end of the hearing, Judge Sturman ruled for **the Landowners** and asked them to prepare the property interest order. That order was submitted to Judge Sturman and it has not yet been signed. **Judge Herndon** did enter an order in the 65 Acre Case that cites extensively to the Landowners' property rights, including the Landowners' due diligence and the City's confirmation of the property rights – "the City Planning Department reported that: 1) the 250-Acre Residential Zoned Land was hard zoned and had vested rights to develop up to 7 units an acre; 2) 'the zoning trumps everything;' and, 3) any owner of the 250 Acre Residential Zoned Land can develop the property." *Findings of Fact and Conclusions of Law, filed in the 65 Acre Case no. A-18-780184-C, on December 30, 2020, p. 8:24-*

27. Judger Herndon also cited to some of the statements the City made at the hearing. But Judge Herndon then specifically states in his order that he was **not** resolving the property interest issue. Id., at p. 35:4-14. Judge Herndon only ruled on the ripeness issue as it applied to the 65 Acre Case and the held "the court believes addressing the merits of any of the remaining issues would be unwise as there are three companion cases still pending with similar issues and any ruling by this court on the remaining issues could be construed as having preclusive effect in the other pending actions." Id., at 35:9-12. Yet, the City is unabashedly doing exactly what Judge Herndon held should not be done – citing to an issue that Judge Herndon specifically stated he was not deciding and should not be cited to.

The City next claims in its "Introduction" that only $4.5 million was paid for the entire 250 Acre Property and the Court incorrectly excluded the City's valuation evidence. *See Motion to Stay, p. 13:14-23.* The City's continual citation to a $4.5 million purchase price is plainly false - it is based on a self-serving affidavit by its own private attorney, who claims to know what was paid for the property back in 2005, even though he has no personal knowledge whatsoever of the facts. *See City Appendix of Exhibits, filed on August 25, 2021, Exhibit FFFF, vol. 9, pp. 1591-1605.* The Court property relied on the deposition testimony of both PMKs for the Peccole Family and the Landowners which confirmed that the purchase occurred in 2005, was a "complicated" deal with "a lot of hair" on it, and involved significant other consideration, with the Landowner PMK confirming the consideration way back in 2005 was in excess of $100 million. *See Landowners' Motion in Limine No. 1: To Exclude 2005 Purchase Price, pp. 3-10, filed September 7, 2021.* The Court properly excluded this 2005 purchase price evidence, because it was not representative of the value of the 35 Acre Property as of the relevant September 14, 2017, date of valuation and the City failed to identify an expert witness to testify to the purchase price, among other reasons. *See Order Granting Plaintiffs' Motions in Limine No. 1, 2, and 3, pp.*

2-5, filed on November 16, 2021. See also FFLC Re: Take, pp. 43-44 (explaining why the purchase price was not considered when deciding the take issue). The City then embarrassingly implies that these rulings by the Court excluded the City's valuation evidence. *See City Motion to Stay, p. 13:18-23.* As the Court will recall, the City did **not** retain a valuation expert and in fact stipulated to admit the value evidence presented by the Landowners' expert. Therefore, it was the City that chose not to present valuation evidence at trial and the City cannot now blame the Court for its lack of valuation evidence at trial.

Finally, the City's "Introduction" claims that a stay should be granted, because the Landowners improperly segmented the entire 250 Acre Property into separate parcels (17, 35, 65, and 133 acre parcels) and all parcels should be considered as a whole. *See City Motion, p. 13:24-14:8.* The Court properly entered detailed findings for why this City "segmentation" arguments lacks any merit whatsoever. FFCL Re: Take, p. 38:17-40:10. The Court properly cited Nevada law, directly on point, that expressly rejects this segmentation argument – City of North Las Vegas v. Eighth Judicial Dist. Court and NRS 37.039. Id. The Court properly held that the 35 Acre Property has its own Clark County parcel number and own independent legal owner and, accordingly, under Nevada eminent domain law, must be evaluated as a single parcel. Id. The City's segmentation argument has no legal basis whatsoever.

Conclusion regarding the City's "Declaration" and "Introduction." As the Court can see, the City continues its course of conduct - repeatedly re-arguing issues that have already been decided, making arguments contrary to the position of its own client (the City Attorney, Planning, Tax departments, and City Councilpersons), and ignoring long-standing Nevada eminent domain and inverse condemnation precedent. The City also continues to repeatedly argue petition for judicial review law, despite at least four orders from the Court rejecting the petition for judicial review law's application to this inverse condemnation case and a recent Nevada Supreme Court

decision directly on point that petition for judicial review law should not be used. City of Henderson v. Eighth Judicial District Court, 137 Nev. Adv.Op. 26 (June 24, 2021)(clarifying that judicial review and civil actions are distinct from each other and "like water and oil will not mix"). In its pending motion, the City even misrepresents the Court's orders and blames the Court for its own failure to retain a valuation expert. All of this should be remembered when the Court considers attorney fees in this matter. *See Landowners Motion for Attorney Fees, filed on December 9, 2021, and set for hearing on February 3, 2022.*

C. Rebuttal of the City's NRAP Rule 8 Analysis

As explained above, NRAP Rule 8's stay provisions have no application whatsoever in this inverse condemnation case, because Nevada has adopted specific laws that state the City "must" pay the $34,135,000 award within 30 days of the final judgment – without exceptions. The Landowners will, however, very briefly address each of the City's baseless NRAP 8 arguments.

1. Rebuttal of the City's Claim the Object of the Appeal Would be Defeated and the City Would Suffer Irreparable Harm if a Stay is Denied

The City claims that the first two elements of NRAP Rule 8's stay requirements are met, because the object of the appeal will be defeated and it will suffer irreparable harm if a stay is not granted. *See City Motion, p. 16:5-20.* As explained above, the State of Nevada made this exact argument to the Nevada Supreme Court in State v. Second Judicial District Court, supra, and the Court rejected it. The State claimed that mandating payment of the funds pending appeal "deprives it of its right to appeal," because this would amount to "a voluntary satisfaction of judgment which renders the appeal subject to dismissal as moot." Id., at 205. The Nevada Supreme Court disagreed, holding "[s]uch is not our view of the law" and reasoned that payment of the funds pending appeal is a "condition to the condemnor's [government] right to maintain and appeal while remaining in possession. It is not an acceptance of the judgment rendered, but is the meeting of a

condition by which that judgment may be disputed." Id., at 205. Therefore, this City argument related to NRAP Rule 8 has already been rejected.

2. Rebuttal of the City's Claim that the Landowners Will Not Suffer Irreparable Harm, Because the City has to Pay Interest on the Award

The City claims that the next NRAP Rule 8 element is met, because the Landowners will not suffer irreparable injury or harm as the City will be required to pay interest on the delay in payment of the funds. *City Motion, p. 16:21-26.* Again, this argument was made by the State in State v. Second Judicial District Court, supra, and it was rejected. The Court held "the assurance of ultimate payment plus interest may not be sufficient to meet the immediate needs of a condemnee either to his property or to its cash equivalent. The power not only to take possession of another's property, but also to postpone indefinitely the payment of just compensation for it, is a power which **may well have an oppressive effect.** It might well, through duress of circumstances, compel the acceptance by a condemnee of compensation felt not to be just." Id., at 205. Therefore, this City argument related to NRAP Rule 8 has also already been rejected.

3. Rebuttal of the City's Claim that it is Likely to Prevail on Appeal

The City also claims that the next NRAP Rule 8 element is met, because the City disagrees with the verdict and thinks it will prevail on appeal. *See City Motion, pp. 17-30.* Every government entity that appeals disagrees with the verdict. This is no reason to ignore the mandatory payment requirements of NRS 37.140, NRS37.170, and State v. Second Judicial District Court.

Moreover, the City has argued and re-argued every single issue in this case at least twice. It has been given every opportunity to extensively present its case. Following extensive hearings, the Court entered FFCLs on the three primary issues in this case – the property interest issue, the take issue, and the just compensation issue. *See* FFCL Re: Property Interest, FFCL Re: Take, and FFCL Re: Just Compensation. These FFCLs are all well supported by and cite to Nevada eminent domain and inverse condemnation law directly on point. Therefore, the City's argument that it

will prevail on appeal is without merit.

On the property interest issue, the Landowners will prevail on appeal. Rather than re-argue this issue, the Landowners incorporate by reference their property interest argument set forth in the pleadings on this issue already submitted to the Court. In summary, there are six Nevada Supreme Court opinions directly on point which hold that the R-PD7 residential zoning must be used (not a master plan) to decide the property interest the Landowners had prior to the City's taking and all three relevant City Departments (City Attorney's Office, Planning Department, and Tax Department) opined that the R-PD7 residential zoning must be used to decide the Landowners' property interest and that this R-PD7 residential zoning granted the Landowners a property right to build residential units. Therefore, the Court's FFCL Re: Property Interest properly concluded the R-PD7 zoning granted the Landowners the right to build single family and multi-family residential units on their 35 Acre Property and will not be reversed on appeal. Furthermore, it is uncontested that the right to exclude is a fundamental element of property rights and the City's actions and ordinances took that right by preserving the Landowners' property for public use and authorizing the public to use the Landowners' property.

On the take issue, the Landowners will prevail on appeal. Again, rather than re-argue this issue, the Landowners incorporate by reference their take argument set forth in the pleadings on this issue already submitted to the Court. The City's taking actions are summarized above. It is rare that a government entity engages in so many aggressive and systematic actions against one landowner as the City did in this case; by denying all applications to develop the 35 Acre Property, prohibiting the Landowners from fencing their property to exclude others, prohibiting the Landowners from gaining access to their own property, and then even adopting a law that targets only the Landowners' property, makes it impossible to develop, and mandates that the Landowners allow the public to enter onto their property. The City's actions were so egregious that they met

all four of Nevada's taking standards – per se categorical, per se regulatory, non-regulatory / de facto, and Penn Central takings. Therefore, the Court's FFCL Re: Take properly concluded the City took by inverse condemnation the 35 Acre Property and will not be reversed on appeal.

On the just compensation issue, the Landowners will prevail on appeal. The Landowners presented the well-supported expert report prepared by appraiser, Tio DiFederico that values the Landowners' 35 Acre Property at $34,135,000. As the Court will recall, the City claimed it needed a continuance of the summary judgment hearings so it could retain an expert report to determine the economic impact of its actions on the 35 Acre Property, but never produced any such expert report. Therefore, the City had no expert valuation evidence to present at trial, even though the valuation in an eminent domain case is "a field dominated by expert opinion." City of Sparks v. Armstrong, 103 Nev. 619, 622 (1987). Accordingly, the City stipulated to the admission of Mr. DiFederico's $34,135,000 expert report and presented no evidence to rebut this value at the October 27, 2021, bench trial. Therefore, the Court's FFCL Re: Just Compensation properly concluded the value of the 35 Acre Property taking is $34,135,000 and will not be reversed on appeal.

IV. CONCLUSION RE: LANDOWNERS' COUNTERMOTION TO ORDER THE CITY PAY THE $34,135,000 AWARD IMMEDIATELY AND OPPOSITION TO THE CITY'S MOTION TO STAY

The Nevada Legislature adopted NRS 37.140 and NRS 37.170 to make sure every government entity pays a condemnation award within 30 days regardless of whether there is an appeal or not. NRS 37.140 states that award must be paid within 30 days of the final judgment – without exception. NRS 37.170 states that, even if the government elects to challenge that final judgment on appeal, it must pay the award as a precondition of appeal – without exception. State v. Second Judicial District Court confirms these mandatory payment provisions. Therefore, it is respectfully requested that the City be ordered to pay the $34,135,000 within 30 days of the final

judgment and as a precondition to appeal.

Finally, the City's NRCP Rule 62 and NRAP Rule 8 arguments lack merit as they are general rules and NRS 37.140 and NRS 37.170 are specific rules that apply to this inverse condemnation case. And, even considering the four NRAP Rule 8 elements, the City has failed to meet even one of the elements. Therefore, it is respectfully requested that the Court deny the City's stay request.

DATED this 5th day of January, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ James J. Leavitt
Kermitt L. Waters, Esq. (NSB 2571)
James J. Leavitt, Esq. (NSB 6032)
Michael A. Schneider, Esq. (NSB 8887)
Autumn L. Waters, Esq. (NSB 8917)
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiffs Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 5th day of January, 2022, pursuant to NRCP 5(b), a true and correct copy of the foregoing: **PLAINTIFF LANDOWNERS' OPPOSITION TO THE CITY'S MOTION FOR IMMEDIATE STAY OF JUDGMENT AND COUNTERMOTION TO ORDER THE CITY TO PAY THE JUST COMPENSATION ASSESSED** 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:

McDONALD CARANO LLP
George F. Ogilvie III, Esq.
Christopher Molina, Esq.
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan Scott, Esq., City Attorney
Philip R. Byrnes, Esq.
Rebecca Wolfson, Esq.
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz, Esq.
Lauren M. Tarpey, Esq.
396 Hayes Street
San Francisco, California 94102
schwartz@smwlaw.com
ltarpey@smwlaw.com

/s/ Sandy Guerra
an employee of the Law Offices of Kermitt L. Waters

RPLY
LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq., Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq., Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq., Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq., Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiff Landowners

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' REPLY IN SUPPORT OF MOTION FOR REIMBURSEMENT OF PROPERTY TAXES** **Hearing Date: January 18, 2022** **Hearing Time: 9:05 a.m.**

The Plaintiffs, 180 Land Co LLC and Fore Stars, Ltd. (hereinafter referred to as "Landowners") hereby file their Reply in Support of their Motion for Reimbursement of Property Taxes as follows:

The City's opposition is riddled with false statements of fact and law. The City's insistence on perpetuating a false narrative about this case has not only wasted precious judicial resources,

but has also caused the Landowners tremendously increased litigation costs, as the City's falsehoods must be continually addressed. The Landowners have filed a motion for attorney fees which is scheduled to be heard on February 3, 2022. The City's Opposition to the Landowners' request for reimbursement of property taxes is further support for why the Landowners should be awarded full attorney fees.

A. The City has *Per Se Taken* the Landowners' Property Meaning the City Is In Possession of the Property

The Landowners have established a ***"per se" taking*** of their property, not simply a regulatory taking, as the City continuously and falsely argues. *See Findings of Fact and Conclusions of Law Granting Plaintiffs Landowners' Motion to Determine Take and For Summary Judgment on The First, Third And Fourth Claims For Relief filed October 25, 2021 (hereinafter "FFCL Re: City's Taking") at ¶ 154-175.* A "per se" taking means the City is in possession of the Landowners' Property. Id. As the Court may recall, the City has taken the Landowners' property for the surrounding neighbors' use and enjoyment and has prevented the Landowners from doing anything with the Subject Property that would interfere with the surrounding neighbors' use and enjoyment of the Subject Property. For example, the City prevented the Landowners from constructing a fence around the Subject Property, as a fence would prevent the surrounding neighbors from using the Subject Property. *FFCL Re: City's Taking at ¶ 87-95*. The City passed ordinances (Bills 2018-5 and 2018-24) that preserved the Subject Property for the surrounding neighbors' use by ensuring the surrounding neighbors had ongoing access to the Subject Property. *FFCL Re: City's Taking at ¶ 103-122.* The City passed ordinances that authorized the surrounding neighbors to use the Subject Property for recreation and open space and the City went into the community and told the surrounding neighbors that the Subject Property was theirs to use as their own recreation and open space. *FFCL Re: City's Taking at ¶ 116-122.* The City even denied the Landowners access to their own property because the City did not want the Landowners' access

to impact the surrounding neighbors use of the Subject Property. *FFCL Re: City's Taking at ¶ 96-103.* Accordingly, the Landowners have been dispossessed of the Subject Property by the City and are entitled to reimbursement of the property taxes they were forced to pay since August 2, 2017.

B. The Arguments the City Presents are in Gross Disregard of Its Obligations and Are Made In Bad Faith

Despite the City's clear disappointment in not being able to take the Landowners' property for free, the City still has obligations to be truthful and equitable in this matter.

> "Occupying a position analogous to a public prosecutor, he is 'possessed of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' (Professional Responsibility: Report of the Joint Conference, (1958) 44 A.B.A.J. 1159, 1218.), The duty of a government attorney in an eminent domain action, which has been characterized as 'a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner' (Sacramento etc. Drainage Dist. v. Reed (1963) 215 Cal.App.2d 60, 69, 29 Cal.Rptr. 847, 853), is of high order. 'The condemnor acts in a **quasi**-judicial capacity and should be encouraged to exercise his tremendous power fairly, equitably and with a deep understanding of the theory and practice of just compensation.' (Hogan, Trial Techniques in Eminent Domain (1970) 133, 135.)" *City of Los Angeles v. Decker*, 18 Cal. 3d 860. 871, 558 P.2d 545, 551 (1977).

Yet the City has lost sight of these obligations, and is making arguments that are not true, are not equitable and are not just.

1) $630,000 Would Not Make the Landowners Whole

The City argues that the Landowners would be made "whole if the Court required the City to reimburse the [Landowners] for $630,000" in total, not just for property taxes. (City Opp at 1:14-15). This is an astonishingly unjust argument by the City and violates its duty in this case. Not only has it been shown that the Landowners' property, which the City took, was worth nearly

$35 million, but the Landowners have paid nearly $1 million in property taxes.[1] Moreover, the City's argument in regard to the 2005 purchase price has been repeatedly rejected by this Court, because both the PMK for the Peccole Family (seller) and PMK for the Landowners (buyer) confirmed that the City's argument is entirely baseless. *See FFCL Re: City's Taking at ¶ 207-209; Order Granting Plaintiffs' Motion in Limine No. 1, 2, and 3 filed November 16, 2021 at ¶ 1-12, and; Plaintiffs Landowners' Motion in Limine No. 1: to Exclude 2005 Purchase Price filed September 7, 2021 at p. 5-10.* Yet, the City makes the completely irrational argument that the Landowners would be made whole with only $630,000. This is a troubling position for the City to take in this proceeding and further establishes the City's bad faith and illicit tactics employed against the Landowners.

2) It Is Not the Landowners Fault that they Had to Pay Property Taxes

In yet another astonishingly untrue and unjust argument, the City claims the Landowners are to blame for paying property taxes. (City Opp at 1:20). To support this untrue and unjust argument, the City claims the Landowners voluntarily shut down the golf course in December of 2016. (City Opp at 1:21-22). The City knows this is false having concurred that it was a failed golf course. In fact, the City's own attorney admitted as much during the September hearings on this matter.

> THE COURT: I mean, I get the concern. I don't mind saying that. I do. But what happens when that golf course model is no longer viable?
> MR. MOLINA: I think that we agree that it would be very difficult to run a golf course profitably here…*See Transcr. of Sept. 24, 2021 hearing at 87:10-16.*

Indeed, as the Court will recall (and the City knows) the Landowners even offered the golf course operator free rent to continue operations and the operator could still not make a profit. *See*

[1] Since the Landowners filed their original motion, yet another real property tax bill has come due in the amount of $51,306.81. *See Exhibit 3 attached hereto.* With the most recent payment the total amount of real property taxes the Landowners were forced to pay for the 35 Acre Property after August 2, 2017 is **$ 976,889.38**.

Appendix of Exhibits in Support of Appendix of Exhibits In Support of Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the First, Third And fourth Claims For Relief - Volume 4, Exhibits 45-47. This along with the expert testimony of Mr. DiFederico that confirmed a golf course was not an economic use and the City's complete lack of any contrary evidence allowed the Court to conclude that a golf course on the Subject Property was not an economic use. See *FFCL Re: City's Taking at ¶ 158.* Yet, the City unjustly and in bad faith advances the position in its opposition that the Landowners should have maintained an uneconomic use of the Subject Property (i.e., lost significantly more sums of money) in order to pay less property taxes. This is a troubling position for the City to take in this proceeding.

3) The City's Wants the Landowners to Perpetrate a Fraud on the Assessor

Next the City advances an argument that would have the Landowners perpetrate a fraud on the Assessor by adopting the City's illegal PR-OS argument to avoid property taxes. (City Opp at 7). It is truly shocking the length the City will go in this case. As this Court will recall, the Assessor investigated the Landowners' Property and determined the "lawful" use was "residential" based on the R-PD7 residential zoning; the Assessor gave absolutely no credence to the City's PR-OS argument. On this basis, the Assessor placed a value on the Landowners' Property, imposed a tax on the Landowners based on this value, and the Landowners have dutifully followed Nevada's tax laws and paid these real property taxes. The City's suggestion that the Landowners should have taken another avenue (which was clearly illegal) to avoid taxes is misguided, misleading and disconcerting.

C. The City's Attempt to Limit the Holding of *Alper* is Contrary to *Alper*'s Long Standing Precedence in Nevada Takings Jurisprudence - Having Been Cited <u>28 Times</u> by the Nevada Supreme Court Since 1984

The City claims *Alper* only applies to a small subset of cases. City Opp at 2:17. The Nevada Supreme Court has cited *Alper* 28 times in a wide range of takings cases from inverse

condemnation to eminent domain to precondemnation damages cases. Accordingly, the City's attempt to limit *Alper*'s holding is astonishing. *Alper* does not apply "narrowly to the small subset of cases …." as the City claims. (City Opp at 2:17). Quite the opposite. *Alper* is a bedrock takings opinion in Nevada jurisprudence, dealing with specific takings doctrines, including without limitation, prejudgment interest, the project influence rule, standards of highest and best use, and the award of attorney fees.

Alper has been cited and affirmed repeatedly by the Nevada Supreme Court for nearly 40 years. *City of North Las Vegas v. Robinson*, 122 Nev. 527, 533, 134 P.3d 705, 709 (2006) (*Alper* and the impact of government dedication requirements on highest and best use); *McCarran Airport v. Sisolak*, 122 Nev. 645, 674-675, 137 P.3d 1110, 1129-1130 (2006) (expanding *Alper* to award attorney fees when the taking agency receives federal funds and relying on *Alper* to support award of prejudgment interest); *State ex rel. Dept. of Transp. v. Barsy*, 113 Nev. 712, 718, 941 P.2d 971, 975 (1997) (overruled on unrelated grounds) (relies on *Alper* to support statutory rate of interest as the floor and should only be used if other evidence of a higher rate is not offered); *City of Sparks v. Armstrong*, 103 Nev. 619, 621-622, 748 P.2d 7, 8-9 (1987) (cites *Alper* that inverse condemnation actions are the constitutional equivalent to formal condemnation proceedings and relies on *Alper* for the project influence rule even calling the project influence rule the "*Alper* doctrine"); *Vacation Village, Inc. v. Clark County*, 244 Fed.Appx. 785, 787-788, 2007 WL 2292716 (2007) (unpublished 9th Circuit opinion) (citing in approval to *Sisolak*'s expansion of *Alper*, holding that no nexus between federal funds and the taking project is needed for the award of attorney fees under the relocation act instead if the entity that took the property receives federal funds then that is sufficient for awarding attorney fees pursuant to the URA); *Belle Vista Ranch Co., LLC v. RTC of Washoe*, 2021 WL 1713288 at *1 (2021) (unpublished opinion) (citing *Alper* for the project influence rule); *City of North Las Vegas v. 5th and Centennial*, 2014 WL 1226443

at *7 (2014) (unpublished opinion) (cites *Alper* that inverse condemnation actions are the constitutional equivalent to formal condemnation proceedings); *Nevada Power co., v. 3 Kids. LLC.,* 129 Nev. 436, 441, 302 P.3d 1155, 1158 (2013) (citing *Alper* for highest and best use and government dedication requirements as it relates to highest and best use); *Dvorchak v. McCarran Airport*, 2010 WL 4117257 at *2 (2010) (unpublished opinion)(citing *Alper* for the statute of limitations starting point); *Johnson v. McCarran Airport*, 2010 WL 4117218 at *2 (2010) (unpublished opinion) (citing *Alper* for the statute of limitations starting point); *Buzz Stew LLC v. City of North Las Vegas*, 124 Nev. 224, fn 20, 181 P.3d 670 (2008) (citing *Alper* for date of taking when considering prejudgment interest and severance damages); *ASAP Storage Inc., v. City of Sparks*, 123 Nev. 639, fn 8, 173 P.3d 734 (2007)(citing *Alper* that real property interest in land supports a takings claim); *Nevadans for the Protection of Property Rights v. Heller*, 122 Nev. 894, fn 36, 141 P.3d 1235(2006) (citing *Alper* that inverse condemnation actions are the constitutional equivalent to formal condemnation proceedings); *City of Las Vegas v. Bustos*, 119 Nev. 360, fns 6, 8 and 9, 75 P.3d 351 (2003) (citing *Alper* for highest and best use and import of the property's zoning); *County of Clark v. Sun State Properties, Ltd.,* 119 Nev. 329, fn 35, 72 P.3d 954 (2003) (citing *Alper* for prejudgment interest); *County of Clark v. Buckwalter*, 115 Nev. 58, 62, 974 P.2d 1162, 1164 (1999) (overturned by constitutional amendment and statute as to most probable price) (citing *Alper* that the determination of just compensation is exclusively a judicial function and may not be impaired by statute); *Argier v. Nevada Power Co.,* 114 Nev. 137, fn 2, 952 P.2d 1390 (1998) (citing *Alper* that inverse condemnation actions are the constitutional equivalent to formal condemnation proceedings to reject Nevada Power's argument that an inverse condemnation case was not applicable to an eminent domain action); *Stagecoach Utilities, Inc., v. Stagecoach General Imp. Dist.*, 102 Nev. 363, 366, 724 P.2d 205, 207 (1986) (citing *Alper* for prejudgment interest); *Manke v. Airport Authorities of Washoe County*, 101 Nev. 755, 759, 710 P.2d 80, 82 (1985) (citing

Alper for prejudgment interest); *Iliescu v. RTC of Washoe*, 2021 WL 4933429 at *5 (2021) (unpublished opinion) (citing *Alper* for highest and best use).

Here, as discussed above, and as ruled by this Court, the City engaged in systematic and aggressive actions that resulted in the "per se" taking of the Landowners' property. This means the City is in physical possession of the Landowners' property, accordingly, any distinction the City is erroneously attempting to make between the facts of this case and *Alper* should be rejected. Furthermore, *Alper* is a bedrock takings opinion in Nevada jurisprudence and applies to a wide range of takings cases, therefore, it cannot be distinguished from this case and the Landowners are entitled to reimbursement of the property taxes they were forced to pay for the 35 Acre Property after August 2, 2017.

D. *City of North Las Vegas v. 5th & Centennial* was Not a Direct Takings Case

The City argues to the Court that *City of North Las Vegas v. 5th & Centennial* is not applicable here because it was a direct takings case - "The Court held that prejudgment interest began to accrue not on the date the city served the summons and complaint in eminent domain, but rather on the date of commencement of the City's unreasonable delay in filing the eminent domain action." City Opp at 3:21-23. Either the City did not read *5th and Centennial* or it is intentionally misleading the Court as *5th and Centennial* was not a direct taking case. "On January 1, 2010, the Landowners filed a complaint against the City for inverse condemnation and precondemnation damages…" *City of North Las Vegas v. 5th & Centennial*, 130 Nev. 619, 331 P.3d 869 (2014). This is not a situation where two parties have different opinions on the significance of a case, the City is simply misstating the law to the Court, whether intentionally or unintendedly.

The date upon which property taxes were no longer obligated is the date the owner is dispossessed of her property. In situations such as this, where the government engages in

numerous taking actions, the Nevada Supreme Court looks to the first date of compensable injury resulting from the government's conduct. *City of North Las Vegas v. 5th & Centennial, LLC*., 130 Nev. 619 (2014) (relying on eminent domain statutes and law to commence interest in a precondemnation damages case on the first date of compensable injury). Accordingly, the Landowners should be reimbursed for the property taxes they were forced to pay after August 2, 2017.

E. NRS 37.120(3)

The City misreads language from NRS 37.120(3) to claim that reimbursement of property taxes is not available as it is not specifically enumerated. The language the City cites from NRS 37.120(3) states "without limitation" meaning "including but not limited to" - therefore the City's claim that "property taxes are conspicuously absent from the list" provided in NRS 37.120(3) is meaningless as the list starts with "without limitation." It is hard to imagine that the City does not know what the phrase "without limitation" means. Long standing Nevada law, including the bedrock *Alper* decision, provides that the Landowners are entitled to the reimbursement of the property taxes they were forced to pay after the City took their property. The City has cited nothing to counter that long standing Nevada law.

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F. CONCLUSION

For the foregoing reasons, it is respectfully requested that the City be ordered to reimburse the Landowners for the $ 925,582.57 + $ 51,306.81= **$ 976,889.38** of real property taxes they were forced to pay for the 35 Acre Property after August 2, 2017.

DATED this 11th day of January, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ Autumn Waters
Kermitt L. Waters, Esq. (NSB 2571)
James J. Leavitt, Esq. (NSB 6032)
Michael A. Schneider, Esq. (NSB 8887)
Autumn L. Waters, Esq. (NSB 8917)
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 11th day of January, 2022, pursuant to NRCP 5(b), a true and correct copy of the foregoing: **PLAINTIFF LANDOWNERS' REPLY IN SUPPORT OF MOTION FOR REIMBURSEMENT OF PROPERTY TAXES** 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:

McDONALD CARANO LLP
George F. Ogilvie III, Esq.
Christopher Molina, Esq.
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan Scott, Esq., City Attorney
Philip R. Byrnes, Esq.
Rebecca Wolfson, Esq.
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz, Esq.
Lauren M. Tarpey, Esq.
396 Hayes Street
San Francisco, California 94102
schwartz@smwlaw.com
ltarpey@smwlaw.com

/s/ Sandy Guerra
an employee of the Law Offices of Kermitt L. Waters

Exhibit 3

OFFICE OF THE COUNTY TREASURER
LAURA B. FITZPATRICK, TREASURER
500 S Grand Central Pkwy 1st Floor
Box 551220
Las Vegas NV 89155-1220
(702) 455-4323 www.clarkcountynv.gov/treasurer

0190505
138-31-201-005
180 LAND CO L L C
C/O V DEHART
1215 S FORT APACHE RD #120
LAS VEGAS NV 89117-5489

Real Property and Special Taxes

FISCAL YEAR 2021-2022 (July 1, 2021 - June 30, 2022)
PARCEL NUMBER 138-31-201-005 TAX RATE 3.2782 TAX DIST. 200 TAX CAP % 7.7%

Property Location and Description
UNASSIGNED SITUS
ASSESSOR DESCRIPTION: PARCEL MAP FILE 125 PAGE 100 LOT 1

Assessed Valuation

Land	6,280,333
Improvements	
Personal Property	
Assessed Value Subject to Cap	6,280,333
Land Value**	
Improvement Value**	
Personal Property Value**	
Less Exemption Value	
NET ASSESSED VALUE	6,280,333
New Construction Supplemental**	
**Not Subject to Cap	

Summary	Amount
Taxes as Assessed	205,227.22
Less Cap Reduction	0.00
Net Taxes	205,227.22
Other Charges	
Las Vegas Artesian Basin	3.06
Total Annual Charges	205,230.28

PARCEL NUMBER 138-31-201-005 180 LAND CO L L C

DUE DATE JANUARY 3, 2022 — Installment 3

Pay within 10 days after the due date to avoid penalties.

Make checks payable to CLARK COUNTY TREASURER
500 S Grand Central Pkwy 1st Floor
Box 551220
Las Vegas NV 89155-1220

AMOUNT DUE $51,306.81

1383120100522300051306814

TEAR HERE

PARCEL NUMBER 138-31-201-005 180 LAND CO L L C

DUE DATE MARCH 7, 2022 — Installment 4

Pay within 10 days after the due date to avoid penalties.

Make checks payable to CLARK COUNTY TREASURER
500 S Grand Central Pkwy 1st Floor
Box 551220
Las Vegas NV 89155-1220

AMOUNT DUE $51,306.81

1383120100522400051306812

TEAR HERE

See Reverse Side for Distribution of Tax Dollars.

Installment	Amount
1	51,309.85
2	51,306.81
3	51,306.81
4	51,306.81

PARCEL NUMBER 138-31-201-005 180 LAND CO L L C

DUE DATE AUGUST 16, 2021 — Installment 1

Pay within 10 days after the due date to avoid penalties.

Make checks payable to CLARK COUNTY TREASURER
500 S Grand Central Pkwy 1st Floor
Box 551220
Las Vegas NV 89155-1220

AMOUNT DUE $51,309.85

1383120100522100051309853

TEAR HERE

PARCEL NUMBER 138-31-201-005 180 LAND CO L L C

DUE DATE OCTOBER 4, 2021 — Installment 2

Pay within 10 days after the due date to avoid penalties.

Make checks payable to CLARK COUNTY TREASURER
500 S Grand Central Pkwy 1st Floor
Box 551220
Las Vegas NV 89155-1220

AMOUNT DUE $51,306.81

1383120100522200051306816

TEAR HERE

IF YOUR MORTGAGE COMPANY PAYS YOUR TAXES, FORWARD THIS BILL TO THEM IMMEDIATELY

To pay online and to check the status of your taxes, visit clarkcountynv.gov/treasurer or by calling (702) 455-4323, select option 2 from the main menu.

180 LAND CO LLC 1361

Check#: 1361 Date: 01/03/2022 Vendor#: 237 Clark County Treasurer

Invoice#	Invoice Date	Job/Description	Balance	Retain	Discount	This Check
13831201005 3rd	12/31/2021	3rd Installment 1383	51,306.81			51,306.81

1361

180 LAND CO LLC
1215 S. FORT APACHE RD., #120
LAS VEGAS, NV 89117

BANK OF NEVADA
94-177/1224

FIFTY-ONE THOUSAND THREE HUNDRED SIX AND 81/100 DOLLARS 01/03/2022 $ *51,306.81
DATE AMOUNT

Security features. Details on back.

PAY TO THE ORDER OF
Clark County Treasurer
500 S Grand Cntrl Pkwy 1St Flr
PO Box 551220
Las Vegas NV 89155-1220

AUTHORIZED SIGNATURE

[redacted]

180 LAND CO LLC 1361

Check#: 1361 Date: 01/03/2022 Amount: 51,306.81 Vendor: 237 Clark County Treasurer

Invoice#	Invoice Date	Job/Description	Balance	Retain	Discount	This Check
13831201005 3rd	12/31/2021	3rd Installment 1383	51,306.81			51,306.81

PRODUCT DLM102 USE WITH 91000 ENVELOPE Reorder: CADform (928) 855-9846 PRINTED IN U.S.A. A

FEDE2B AWKDK04 10/20/2015 08:12 -141-

RIS
Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Rebecca Wolfson (NV Bar No. 14132)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101
Telephone: (702) 229-6629
Facsimile: (702) 386-1749
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

(Additional Counsel Identified on Signature Page)

Attorneys for Defendant City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No. A-17-758528-J

DEPT. NO.: XVI

CITY'S REPLY IN SUPPORT OF MOTION FOR IMMEDIATE STAY OF JUDGMENT

(HEARING REQUESTED ON ORDER SHORTENING TIME)

Hearing Date: January 13, 2022
Hearing Time: 9:30 am

Introduction

In its opposition ("Opposition") to the City's Motion for Immediate Stay of Judgment ("Motion"), the Developer avoids the heart of the City's Motion. The Motion requests a stay of the Judgment to allow the Supreme Court to decide the truly momentous question of whether Nevada's land use regulatory scheme is unconstitutional, *before* the Developer and other property owners throughout the State invoke the Judgment as license to build whatever they desire. By eliminating

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

virtually all regulatory restrictions on the use of property, the Judgment, unless stayed, could cause land use planning in Nevada to grind to a halt and throw Nevada real estate values into chaos. Home values could plunge as homeowners lose protection from undesirable development in their neighborhoods. Commercial property values could also be affected if property can be developed without any requirement to provide infrastructure or amenities to serve the new development. Without any meaningful controls on land use, unbridled real estate development could cause irrevocable harm to the environment and worsen traffic congestion. In the interest of stability of real estate values and sound land use planning, which have benefitted from many decades of extensive land use regulation, the Judgment should be stayed pending a ruling by the Nevada Supreme Court whether Nevada will have land use regulation or not.

The Developer does not dispute that the Judgment eviscerates a long-standing system of land use regulation carefully designed by the Nevada Legislature and the City of Las Vegas to protect the public interest. *See* NRS 278.010–278.630; Las Vegas Municipal Code (Unified Development Code ("UDC")) 19.10-19.18. These statutes require cities to exercise judgment and discretion in adopting General Plans that govern the use of property, require that zoning "must" be consistent with the General Plan, and authorize cities to exercise broad discretion in using these tools to plan communities for the general health, safety, and welfare. *See also Berman v. Parker*, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."). A decision with such far-reaching impacts to this well-established system of land use regulation deserves to be decided by the Nevada Supreme Court before it is implemented.

The Developer also has no answer for the City's argument that the $34 million plus Judgment should be stayed pending Nevada Supreme Court review. The cases and statutes the Developer cites for the proposition that the City must pay the Judgment within 30 days apply only in cases where (a) the agency filed an eminent domain action and requires physical possession of and title to the property to build a public project, or (b) the agency took physical possession of the property to build a public project, but failed to file an eminent domain action, requiring the property owner to file an inverse condemnation action to obtain compensation. In those cases, it is

appropriate that the Court transfers possession and title to the property to the condemning agency at the time of judgment because the agency requires the property for its public project. Under no scenario would the agency need to return possession and title to the property owner, regardless of the outcome of an appeal of the jury's determination of the amount of just compensation.

Here, in contrast, the City has not taken physical possession of the property and has no interest in or need for possession or title to fulfill a public project. The Developer remains in full possession and ownership of the property. If the Developer prevails in the appeal, it will be entitled to interest on the Judgment and will be made whole. There is no risk to the Developer if the Judgment is stayed. Requiring the City to pay compensation and take possession and title before resolution of the appeal, however, risks putting the City in an awkward position if it prevails on the appeal: the City may be unable to recover the taxpayer money paid to the Developer, and the property would have to be returned to the Developer. During the appeal, the City would be unable to physically change or sell the property, in case it needs to return the property to the Developer following a successful appeal. For these reasons, there is no Nevada authority that requires the City to pay the Judgment and take property that it does not want or need pending the City's appeal.

The City will provide compelling authorities and argument to the Nevada Supreme Court showing that the Judgment is erroneous, warranting a stay until the High Court can rule on the substantial changes in the law effected by the Judgment. At a minimum, the City has "present[ed] a substantial case on the merits when a serious legal question is involved and show[ed] that the balance of equities weighs heavily in favor of granting the stay." *Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000). Accordingly, the Court should grant a stay of the Judgment pending resolution of the City's appeal.

Argument

I. A stay of the Judgment is necessary to avoid irreparable harm

In its opposition, the Developer does not even attempt to refute the City's argument that the object of the appeal will be defeated or that irreparable harm will occur throughout the State while the City's appeal is pending, if the Nevada Supreme Court later overturns the Judgment. The Developer does not deny that (a) it has already sought judgments in its favor in the 17 and 65-Acre

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

takings cases citing the Judgment, which, according to the Developer's own evidence, would entitle it to an award of more than $125 million in those two cases, and another $200 million for the alleged taking in the 133-Acre case, (b) the media has widely reported that the Court held that property owners have a right to build anything they choose as long as the use is permitted by zoning, (c) other property owners in Nevada may invoke the Judgment to attempt to compel local governments to approve any and all development applications presented, regardless of harmful impacts on the community, and (d) city councils and boards of commissioners may feel compelled to approve any such development applications to avoid paying compensation to property owners from the public treasury. The harm to Nevada communities from poorly planned development or the drain on public fiscal resources during the appeal period could be immeasurable. Accordingly, the Court should stay the Judgment pending the City's appeal.

II. Before the power to regulate land use is shifted from the State Legislature and City Councils to the courts, the Nevada Supreme Court should determine whether such transfer of power is compelled by the Nevada and the United States Constitutions

In its Opposition, the Developer portrays the Judgment as merely following long-standing Nevada law. The Developer contends that that law has always required local government to approve any development proposed by any property owner, as long as it is a permitted use in the zoning district, or pay compensation for the market value of the property. The Developer is wrong. The Judgment effects a sea change in Nevada law and could cause irreparable harm throughout the State, the Court should stay the Judgment to allow Nevada Supreme Court review. In finding in the Developer's favor, this Court issued legal rulings that contravene statutes of the Nevada State Legislature, essentially transferring the power to regulate land use from the Legislature and local governments to the courts. Nevada's Constitution, however, expressly prohibits any one branch of government from impinging on the functions of another. *Secretary of State v. Nevada State Legislature,* 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). The Nevada State Constitution provides that the state government "shall be divided into three separate departments" and prohibits any person authorized to exercise the powers belonging to one department to "exercise any functions, appertaining to either of the others" except where expressly permitted by the Constitution. Nev. Const. art. 3 § 1.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Separation of powers "is probably the most important single principle of government." *Blackjack Bonding v. Las Vegas Mun. Ct.,* 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). Within this framework, Nevada has delegated broad authority to cities to regulate land use for the public good. *See*, *generally*,

NRS Chapter 278. The State has specifically authorized cities to "address matters of local concern for the effective operation of city government" by "[e]xpressly grant[ing] and delegat[ing] to the governing body of an incorporated city all powers necessary or proper to address matters of local concern so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government." NRS 268.001(6), (6)(a).

"Matters of local concern" include "[p]lanning, zoning, development and redevelopment in the city." NRS 268.003(2)(b). "For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land." NRS 278.020(1); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 254, 439 P.2d 219, 222 (1968) (upholding a county's authority under NRS 278.020 to require a permit applicant to present evidence that the use is necessary to the public health and welfare of the community).

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

Contrary to these authorities, this 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 City has no discretion to deny or condition approval

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

of a development application, under either zoning or the General Plan; and (3) the City's designation of the 35-Acre Property as PR-OS in the City's General Plan is irrelevant to any development application. In issuing these unprecedented rulings, the Court has disregarded virtually the entire land use regulatory scheme in Nevada, which requires cities to adopt General Plans governing the use of property and confers broad discretion on cities to apply General Plan designations and zoning ordinances in reviewing land use permit applications. *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 Developer's Opposition seeks to perpetuate those errors so that while the appeal is pending, cities and other local governments will feel constrained by the Court's decision and fail to exercise their full statutory authority over local land use decisions that protect communities and provide for orderly development.

The Court's ruling also invalidates the City's General Plan and UDC 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 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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.

The City hears and decides hundreds of local land use applications annually. During the pendency of the appeal, unless the Judgment is stayed, it will be reticent to enforce the UDC for fear of regulatory taking suit. The Developer's Opposition fails to even address this point.

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 the City of Las Vegas' site development review process [the same process at issue in this case] involved discretionary action 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.").

Accordingly, the Judgment violates separation of powers by encroaching on the Legislative Branch's prerogative to regulate land use. This challenge to the bedrock authority of a co-equal branch of government could not have more profound implications for government and the rule of law in Nevada. A stay will allow the Nevada Supreme Court to decide whether to overrule dozens of its prior decisions and statutes adopted by the State Legislature, on which government agencies and property owners have relied for decades.

III. The City is likely to prevail on the merits of its appeal, warranting a stay of the Judgment

A. The Judgment does not establish that the categorical and *Penn Central* claims are ripe

Consistent with Judge Herndon's judgment in the 65-Acre case, the Nevada Supreme Court is likely to find that the Developer's categorical and *Penn Central* taking claims are not ripe. In deciding that the categorical and *Penn Central* claims are ripe for adjudication, this Court improperly relied on a physical taking case, *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 664, 137 P.3d

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1110, 1123 (2006), where final decision ripeness does not apply and was not at issue. *See* 10-25-21 FFCL at 36-37. In fact, the court in *McCarran* actually noted that final decision ripeness *does* apply to taking claims involving regulatory denials of the owner's use of the property, like the Developer's categorical and *Penn Central* claims in this case.

At the same time the Judgment relies on authority that does not support it, the Judgment fails even to cite *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001), and *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 419-20, 351 P.3d 736, 742 (2015), which hold that final decision ripeness applies to categorical and *Penn Central* denial-of-use taking claims. Although the Developer concedes that the ripeness doctrine applies to its *Penn Central* claim, the Court did not analyze whether that claim is ripe in the Judgment.

Nor does the Judgment, or the Developer, explain how the categorical and *Penn Central* claims could be ripe where the Developer filed only one application to develop the property. The Judgment and the Developer do not refute Judge Herndon's finding that the Master Development Agreement denied by the City in August 2017 does not constitute an application to develop any of the individual properties the Developer segmented from the Badlands, including the 35-Acre Property. Ex. CCCC at 1510-11. The Developer's applications for fencing and access, even if filed (they weren't) or denied (they weren't because the Developer never filed the required applications), are not applications to develop housing on the 35-Acre Property and hence do not constitute the necessary second application to develop the 35-Acre Property. *See* Ex. DDDD. Because the Developer failed to file and have denied at least two applications to build housing on the 35-Acre Property, the City is likely to prevail in its appeal of the Judgment.

B. The Judgment fails to demonstrate that the City's denial of development of housing on the 35-Acre Property wiped out the value of the Property

Because the City did not wipe out the value of the 35-Acre Property, or even change the value of the Property, there is a strong likelihood that the Nevada Supreme Court will overturn the Judgment. The Judgment fails to cite or apply the three Nevada Supreme Court cases that establish the standard for public agency liability for categorical and *Penn Central* takings. *See State v. Eighth*

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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 do not remotely recognize a constitutional right to build conferred by zoning. Indeed, they stand for the opposite proposition.

As explained in the City's Motion, the City could not have wiped out the value of the 35-Acre Property because the Property was designated PR-OS in the City's General Plan when the Developer bought the Badlands and when it filed the 35-Acre Applications. PR-OS does not permit housing. The Judgment and the Opposition completely ignore (a) the City's Ordinances adopting the PR-OS designation for the Badlands (Exhibits I, M, N, P, Q); (b) NRS 278.150(1), which provides that "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); (c) NRS 278.250(2), which states: "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); (d) NRS 278.250(4), which states that "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 . . . ."); (e) UDC 19.16.010.A, which states that all development approvals must be "consistent with the spirit and intent of the General Plan."; and (f) Ex. AAAA at 1435 from the City's General Plan, which provides that "any zoning or rezoning or rezoning request must be in substantial agreement with the Master Plan . . . ." The Nevada Supreme Court is not likely to accept an analysis of taking claims that ignores statutes and caselaw directly on point and instead relies on misinterpretations of caselaw that does not apply.

The Developer contends that the Nevada Supreme Court has endorsed its theory that zoning confers a constitutionally protected property right to build whatever the owner wants and that a city's General Plan is meaningless. None of the cases the Developer cites remotely support this bizarre theory. For example, the Developer contends that *City of Las Vegas v. C. Bustos*, 119 Nev. 360, 75 P.3d 351 (2003) holds that zoning confers a constitutional right on a property owner to build whatever they want if the use is a permitted use in the zoning district. *Bustos* is an eminent domain

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case where, as Judge Herndon explained, the agency concedes liability for a taking by filing the action. Ex. CCCC at 1499. Thus, in eminent domain cases, the only issue is the *value* of the condemned property. Eminent domain cases cannot, as a matter of logic, have any bearing on whether the City is *liable* for taking the Developer's property by regulation. *Bustos* and other eminent domain cases the Developer cites merely recognize that zoning is a limitation on the use of property, and that in *valuing* property in eminent domain, an appraiser may not assume a use that is not permitted by the zoning unless there is a reasonable probability of a change in the zoning. *E.g.*, *Bustos*, 119 Nev. at 362, 75 P.3d at 352.

The Developer also relies on *Clark County v. Alper*, 100 Nev. 382, 685 P.2d 943(1984) for the nonsensical proposition that (a) eminent domain caselaw provides the standard for government *liability* for a regulatory taking, and (b) that standard essentially removes all discretionary land use regulatory authority from local agencies. In *Alper*, the county physically appropriated 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, which allows valuation in an eminent domain action to be moved to the date of trial where the government does not bring a formal eminent domain proceeding to trial within two years after taking property. *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.* 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 does not have the sweeping holding the Developer contends it has, and no such circumstances exist here. This is a regulatory taking action. The City has not exercised its eminent

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

domain powers under NRS Chapter 37. There is no evidence that the City took physical possession of the property. In sharp contrast to *Alper*, where the City conceded liability for a taking, the Developer here claims that the City prevented *development* of the property through regulatory restrictions on the Developer's use of the property. The City does not concede liability for a taking. 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. Because *Alper* has nothing whatever to do with an agency's liability for a regulatory taking, *Alper* cannot support the Judgment.

Similar to *Alper*, in *Argier v. Nevada Power Co.*, 114 Nev. 137, 952 P.2d 1390 (1998), Nevada Power Company (NPC) filed a complaint for an easement across Argier's land, took physical possession of the land, and installed power lines along the easement. NPC then filed an action to determine the value of the property. Prior to trial to determine the value of the easement, the Argiers sold their property. The only issue raised was whether the Argiers' conveyance of their land extinguished their right to just compensation. 114 Nev. 138, 952 P.2d 1391. The Supreme Court cited *Alper* for the unremarkable proposition that an owner is entitled to compensation if it owns the property at the time the agency takes physical possession of the land, regardless of whether the agency files an eminent domain action before taking possession or the owner files an inverse condemnation action for compensation after the agency takes physical possession. 114 Nev. 140 n.2, 952 P.2d 1392. *Argier* does not stand for the sweeping rule that zoning confers a constitutionally protected property right to build on the owner's land, or anything close to that concept.

To the same effect is the unpublished decision in *City of North Las Vegas v. 5th & Centennial, LLC.*, 2014 WL 1226443 (2014) (unpublished). In that case, the city filed an eminent domain action to acquire property for a road. The property owner claimed that the city had unreasonably delayed condemnation, entitling the owner to precondemnation damages under the inverse condemnation doctrine. The Court held that prejudgment interest accrued from the date of the injury; i.e., when the city should have filed the condemnation action. The Court thus issued the narrow holding that inverse condemnation actions and eminent domain actions should be treated the same for purposes of prejudgment interest where the agency unreasonably delayed in condemning the property. Here, the City did not condemn the property and the Developer makes no claim for

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

precondemnation damages. Regardless, like *Alper* and *Argiers*, *City of North Las Vegas* does not remotely hold that zoning confers property rights to do anything.

The Court's ruling that zoning confers a constitutionally protected property right to build whatever a property owner wants should also be stayed to avoid irrevocable and irreparable harm pending appeal, because that conclusion of law directly contradicts the Nevada Supreme Court's ruling in the related case *Seventy Acres, LLC v. Jack B. Binion, et al.*, NSC Case No. 75481 (*Binion*). In its Opposition, the Developer represents that the holding of *Binion* was the exact opposite of what the Court actually held. 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," 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 or retain it.

In its opposition, the Developer does not explain how the Judgment can withstand scrutiny where it directly contradicts the Court's own decision earlier in the case denying the PJR. In that decision, the Court held 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 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 found that as a matter of law the City Council was "well within" its discretion to determine that the Developer did not meet the criteria for a General Plan Amendment changing the PR-OS designation to one that permitted housing, regardless of the property's zoning designation, necessarily rejecting the notion that zoning confers the right 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

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

up to the Council to decide whether a change in the area or conditions justified the Developer's requested development. *Id.*

The Judgment contradicts these rulings of law, depriving local governments of their police power to regulate land use. The Judgment excuses the obvious contradiction by attempting to distinguish the authorities on which it based its decision denying the PJR on the ground that they involved PJRs and not regulatory takings. This distinction is without authority and has little prospect of passing muster with the Nevada Supreme Court. If property owners had such a constitutional right, Nevada Supreme Court decisions unanimously holding that zoning does not confer property rights to build, including *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527, 96 P.3d 756, 759-60 (2004) and *Boulder City v. Cinnamon Hills Assocs*., 110 Nev. 238, 246, 871 P.2d 320, 325 (1994), would necessarily have held the opposite. There is no authority that the underlying land use and property law applicable to a PJR, which is a procedure and remedy, not a body of substantive law, does not apply to a different cause of action with a different remedy. Moreover, *Boulder City* and *180 Land Co. LLC v. City of Las Vegas*, the Ninth Circuit Case involving the same parties and legal issue, were not PJRs, but like the instant case, were constitutional challenges to government restrictions on the use of property. In sum, whether or not a vested right exists does not depend on the type of lawsuit in which the question is being litigated.

City of Henderson v. Eighth Judicial District, 137 Nev. Ad. Op. 26, 489 P.3d 908 (2021), cited by the Developer, also does not support the Judgment's about-face from the Court's previous decision denying the PJR. In *City of Henderson*, the Court found that PJRs should not be joined with civil complaints, not because there is a danger of mixing substantive law of PJRs with substantive law of regulatory takings – *there is no substantive law of PJRs* – but rather because PJRs are limited to an administrative record, where civil complaints are not. *See id.* The Court held that by joining the two procedures before the same judge, *facts* that are not in the administrative record may affect the Court's decision on the PJR, and the record on appeal could be confused because it would be unclear which *facts* could be considered in the PJR. As the Nevada Supreme Court said: "To conclude otherwise would allow confusingly hybrid proceedings in the district courts, wherein the limited appellate review of an administrative decision would be combined with broad, original civil

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

trial matters." 137 Nev. Adv Op. 26, 489 P.3d at 910.

Thus, *City of Henderson* does not hold that the *underlying substantive law* at issue in a PJR and a civil complaint are, or could be, different. Indeed, such a proposition would be absurd. In this case, the substantive Nevada law of property and land use regulation governs. Nevada cases are unanimous that zoning does not deprive local agencies of discretion to approve or disapprove development projects, and therefore does not confer property or vested rights. *See*, *e.g.*, *Stratosphere*, 120 Nev. at 527, 96 P.3d at 759-60 (2004); *Boulder City*, 110 Nev. at 246, 871 P.2d at 325.

Indeed, if zoning confers a constitutional property right, entitling the owner to build whatever it wants, there would be no need for a regulatory takings doctrine. If a local agency denies a development project, the applicant need only file a Petition for Judicial Review, the court would be compelled to grant it, and the applicant could build its project. The Judgment fails to explain how its peculiar theory of regulatory takings can be reconciled with Nevada Supreme Court decisions such as *State*, *Kelly*, and *Boulder City*, where the Court held that there is such a thing as the regulatory takings doctrine and that the agency's discretionary decisions limiting the development of private property did not effect a regulatory taking. The taking claims in those cases would never have existed if the Judgment is correct that zoning confers a constitutional right to build. The case would have ended in the trial court with the grant of a PJR. The Judgment simply does not fit with any regulatory taking case.

Because this Court found that the PR-OS designation is valid and governs the use of the 35-Acre Property, the Judgment's conclusion that the City has "taken" the 35-Acre Property by declining to change the PR-OS designation is clearly erroneous and would require reversal of the Judgment. By declining to change the PR-OS designation, the 35-Acre Property could not be used for housing before and after the City's denial of the 35-Acre Applications. The City's action accordingly did not change the value or use of the Property. Under these facts, the Nevada Supreme Court would be hard pressed to find a taking.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

C. The Judgment ignores applicable authority that requires the Court to determine the economic impact of the City's action on the parcel as a whole

The Judgment provides that the 35-Acre Property is the parcel as a whole for purposes of regulatory taking analysis because the 35-Acre Property consists of only one assessor's parcel. In support of the Judgment, the Developer cites an unpublished eminent domain case, *City of North Las Vegas v. Eighth Judicial Dist. Court*, 133 Nev. 995, *2, 401 P.3d 211 (table) (May 17, 2017) 2017 WL 2210130 (unpublished disposition) and the eminent domain statute NRS 37.039. Because liability for the taking is not at issue in eminent domain actions, and instead only the market value of the property is in question, these authorities have no bearing on the parcel as a whole for determination of liability in an inverse condemnation case, where liability is contested.

The standards for determining the parcel as a whole for regulatory takings are set forth in cases that the Judgment ignores. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943-44 (2017) (establishing three-part test to determine the parcel as a whole for purposes of liability for a regulatory 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 "[the development] 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 Judgment cannot stand where it fails even to cite the controlling authority of the Nevada and United States Supreme Courts on the question of the parcel as a whole, and instead relies on authorities that have no relevance to the issue.

The Judgment's conclusion that the 35-Acre Property is parcel as a whole is inconsistent with well-established law. *Murr* requires that the Court consider the history of use of the 35-Acre Property. The Property is part of a 25-acre golf course set aside as the park, recreation, and open space for a 1,539-acre master planned development, the Peccole Ranch Master Plan ("PRMP"). The Judgment erroneously fails to recognize that the PRMP is the parcel as a whole and that because the City allowed 84% of the PRMP to be developed, the City cannot have taken the 35-Acre Property. *See Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034 (regulation must deny "all economically viable use of [] property" to constitute a taking under either categorical or *Penn Central* tests).

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

The facts of the instant case present an even stronger case than *Kelly* for treating the PRMP as the parcel as a whole. In *Kelly*, the developer argued that the agency had deprived the developer's property of all value by pointing to the impact of a regulation on seven lots out of the developer's 39-lot planned unit development. 109 Nev. at 641 & n.1, 651, 855 P.2d at 1029 & n.1, 1035. The Court found that the developer had segmented the property to manufacture a takings claim, and that the development "must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of all economic use." *Id.* at 651. Because only seven lots were affected by the regulations in that case, the court concluded that Kelly "has not been deprived of all economic use." *Id*. at 651 (citing Penn Central, 438 U.S. at 130) (internal citation omitted). The Nevada Supreme Court rejected the regulatory takings claim because the developer had sold the 32 lots that were not subject to development restrictions, thus "yielding him a substantial profit." *Id*.

If the Supreme Court found no taking where Kelly was denied the right to develop single family home lots, where the seven Hilltop lots had *not* been designated as an open space amenity for the first 32 lots, the Supreme Court is even less likely to find a taking in the instant case, where the property the Developer seeks to develop had been set aside as open space. Here, unlike *Kelly*, the City's approval of the Peccole Ranch Master Plan ("PRMP") was conditioned on the set-aside of the 250-acre Badlands as a park, recreational, and open space amenity for the 1,289 acres of the PRMP that was developed. Exs. E, G, and H. In contrast to *Kelly*, the original developer of the PRMP had no expectation to segment and then develop the Badlands. The Judgment thus ignores the history of development of the PRMP and the Badlands, the relationship of the subject property to the acreage from which it came, and the legitimate expectations of the Developer. Under *Murr* and *Kelly*, these factors make all the difference in determining the parcel as a whole. The Supreme Court will likely follow unanimous Nevada and United States Supreme Court precedent to determine the parcel as a whole and therefore can be expected to overturn the Judgment.

Even if assessor's parcel boundaries were controlling, in this case the parcel as a whole would still be, at a minimum, the entire Badlands, which consists of several assessor's parcels, because *the Developer* created the assessor's parcels that now constitute the 35-Acre Property and the other three properties the Developer segmented from the Badlands. *Compare* Ex. VV *with* Ex.

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XX. As Judge Herndon held, the Developer purchased the Badlands when the golf course was still in operation, and then closed the golf course and "recorded parcel maps subdividing the Badlands into nine parcels." The Developer later 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; emphasis added). The Badlands had historically been a single economic unit. The Developer cannot create an artificial parcel as a whole by simply segmenting the Badlands into new assessor's parcels, particularly where, as Judge Herndon held, the Developer intended to develop the entire Badlands.

Finally, assuming that the parcel as a whole is the 250-acre Badlands, the Judgment erroneously denies that the City has allowed significant development of the Badlands. The Judgment asserts that the City's approval of 435 luxury housing units for construction on the 17-Acre Property does not exist because the City "clawed back" the 17-Acre approvals. 10-25-21 FFCL at 39. This argument is, as Judge Herndon concluded, "frivolous." Ex. CCCC at 1507-08. "After the Supreme Court reinstated the approvals, the City had no power to nullify the approvals even if it had intended to do so. To the contrary, upon reinstatement, the City twice wrote to the Developer extending the approvals for two years after the date of the remittitur. Ex. FFF at 1019; Ex. GGG at 1021." Indeed, the City recently notified the Developer, again, that the 17-Acre approvals were valid and the Developer could start construction as soon as it obtained ministerial building permits. *See* Ex. A to Declaration of George F. Ogilvie III in Support of City's Opposition to Motion to Determine Prejudgment Interest filed 12/23/21. It is not plausible that the Nevada Supreme Court will find that the 17-Acre approvals are invalid after the Supreme Court itself reinstated those approvals (Ex. DDD), and the City has on three separate occasions notified the Developer that the approvals are valid and that the time for the Developer to start construction under those approvals has been extended for two years. As a result, because the City approved 435 luxury housing units for construction in the Badlands, increasing the value of just the 17-Acre Property to six times the amount the Developer paid for the entire 250-acre Badlands, the Supreme Court is

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

likely to find that the Judgment erroneously found that the City wiped out the value of the parcel as a whole.

D. The Developer failed to present any evidence or authority to defend the Judgment's conclusion that the City is liable for a physical, non-regulatory, or temporary taking

In its Opposition, the Developer fails to demonstrate that Bill 2018-24 exacted an easement from the Developer. Bill 2018-24 did not apply to the Badlands on its face, and the City never applied the ordinance to the Developer. The physical taking claim is undermined by the fact that members of the public were trespassing on the Badlands *before* Bill 2018-24 was enacted, during the 15 months the legislation was in effect, and *after* it was repealed. Ex. 150. There is no evidence that any member of the public trespassed on the 35-Acre Property *as a result of Bill 2018-24*. The City did not authorize any trespasses. Finally, the Developer submitted no evidence of damage to the 35-Acre Property from trespassers on the Badlands, and the Court did not award any damages. It is therefore a strong probability that the Nevada Supreme Court will reverse the Judgment for a physical taking.

Nor did the Developer present any evidence or argument in its Opposition to show that the City interfered with the Developer's property, rendering it "unusable or valueless" as required for a non-regulatory taking. *State*, 131 Nev. at 421, 351 P.3d at 743. Finally, the Developer failed to point to any evidence that the City engaged in a temporary taking. Thus, the Nevada Supreme Court can be expected to reverse the Judgment as to these claims as well as the categorical and *Penn Central* claims.

IV. The Developer fails to rebut the City's authorities holding that Nevada law requires a stay of the money judgment until a final decision of the Nevada Supreme Court affirming the Judgment

A. Eminent Domain statutes regarding payment of judgments and transfer of possession and title do not apply to regulatory taking judgments

The Developer's contention that the Court should disregard statutes governing stays of judgments in civil actions and instead apply the rules for judgments applicable to eminent domain actions in NRS 37.140 because the latter are "more specific" is misplaced. NRS 37.140 applies only where a public agency has exercised its power of eminent domain. NRS 37.0095; *see also Valley*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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."). The statute does not apply to regulatory taking judgments. As Judge Herndon concluded, 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." 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 94. As demonstrated in Section I above, *Alper* applies to the small set 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, here the City does not need or want the 35-Acre Property for a public facility. It would be a manifest error of law to require the City to pay the assessed compensation within 30 days after the Judgment under NRS 37.140, which has no application to this case. Accordingly, the eminent domain statutes regarding judgments are not "more specific" than statutes and caselaw pertaining to regulatory takings. Instead, the two bodies

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

of law are separate in concept and practice. Under the law applicable to regulatory takings judgments, NRCP 62(d) and *Clark Cty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 134 Nev. 174, 177, 415 P.3d 16, 19 (2018), the City is entitled to an automatic stay of the money judgment without posting a bond.

B. Even if the statutes governing judgments in eminent domain actions did apply, the judgment would not be payable until it is final in the Nevada Supreme Court

Even if the Court finds that NRS Chapter 37 applies, the Court should stay the payment of the Judgment pending the City's appeal. 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." NRS 37.009(2). The Developer's Opposition does not even address this statutory language. The Judgment here can be directly attacked by appeal 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. Therefore, in the event the Court does not stay the money judgment as described above, it should nevertheless issue a stay of the City's obligation to pay the Judgment unless and until the Nevada Supreme Court affirms the Judgment and issues a remittitur.

C. The Developer fails to show that it will suffer any harm if the Judgment is stayed

Regardless of the statutory authority for a stay, the Court should issue the stay because the City has demonstrated that the Developer will not suffer irreparable, or any, harm if the City's payment of the Judgment is stayed. Although the Developer insists that it paid $100 million for the Badlands, the Developer provides no evidence to support that claim, and overwhelming documentary evidence shows that the Developer paid less than $4.5 million for the Badlands. Ex. AAA at 966; Ex. FFFF at 1591-95; Ex. SSSS at 3787-88; Ex. UUU at 1300; Ex. FFFF at 1595-97; Ex. FFFF-34 at 1998. Moreover, the Developer has not attempted to refute the City's evidence, again overwhelming, that the Developer has no interest in developing any part of the Badlands; its sole objective in this litigation is to obtain money from the public treasury without having to take the risk of actually developing its property. Accordingly, immediate payment of the windfall

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

judgment of $34,135,000 plus additional amounts (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), is not necessary to avoid irreparable harm. *See Hansen*, 116 Nev. at 658, 6 P.3d at 987 (noting that increased litigation expenses alone do not constitute irreparable harm). Because the Developer is entitled to interest on the Judgment at the prime rate plus two percent, it will not suffer any harm from a delay in the judgment. NRS 17.130.

The Developer also fails to address the potential harm to the City if the City hands the Developer a sizeable portion of the public treasury. If the Nevada Supreme Court reverses the Judgment, as it is likely to do, and the Developer has spent the money, the taxpayers will be left without recourse to recover the money. Accordingly, the balance of the harms weighs heavily in favor of the City. The stay should be granted.

Conclusion

The City's Motion for Immediate Stay of the Judgment should be granted.

DATED this 11th day of January 2022.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III (NV Bar No. 3552)
Christopher Molina (NV Bar No. 14092)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Rebecca Wolfson (NV Bar No. 14132)
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101

SHUTE, MIHALY & WEINBERGER LLP
Andrew W. Schwartz (CA Bar No. 87699)
(Admitted *pro hac vice*)
Lauren M. Tarpey (CA Bar No. 321775)
(Admitted *pro hac vice*)
396 Hayes Street
San Francisco, California 94102

Attorneys for Defendant City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 11th day of January, 2022, I caused a true and correct copy of the foregoing **CITY'S REPLY IN SUPPORT OF 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RIS
Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Rebecca Wolfson (NV Bar No. 14132)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101
Telephone: (702) 229-6629
Facsimile: (702) 386-1749
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

(Additional Counsel Identified on Signature Page)

Attorneys for Defendant City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **CITY'S REPLY IN SUPPORT OF MOTION TO RETAX MEMORANDUM OF COSTS** Hearing Date: January 18, 2022 Hearing Time: 9:00 a.m.

The City of Las Vegas ("City"), by and through the undersigned counsel, submits the following reply in support of the City's motion to retax the verified memorandum of costs filed by Plaintiffs 180 Land Co LLC and Fore Stars Ltd. (collectively, the "Developer"). In opposing the City's motion, the Developer admitted that certain costs it claimed were incurred in a different case. The Developer's opposition also revealed that it is seeking costs actually paid by the City. Finally, additional documentation the Developer submitted with its opposition fails to satisfy *Cadle Co. v. Woods & Erickson*, LLP, 131 Nev. 114 (2015). For these reasons, the motion should be granted.

I. Costs Withdrawn

The Developer conceded that it is not entitled to recover $61.33 for charges paid to FedEx to ship a package to one of the Developer's attorneys, stating that "on closer review, the brief sent to Mr. Schneider was for the 65 Acre Case." Opp. at 4:5-7. The City accepts the Developer's concession that this cost is not recoverable but has serious concerns about the accuracy of the remaining costs claimed. As a matter of common sense, the Developer cannot substantiate the reasonableness or necessity of any costs for purposes of NRS 18.005 if the Developer cannot substantiate that the cost was actually incurred in this case and not some other case. The Developer has now admitted to claiming costs for something that related exclusively to another case. The Court should not rely on the Developer's unsupported declarations as evidence that costs were actually incurred in this case.

II. Costs Amended – E-filing Fees

The Developer conceded that it estimated its filing fees by multiplying the number of filings by the standard filing fee. That much was clear based upon the documentation submitted with the Developer's memorandum of costs. The Developer had now "amended" its estimate to arrive a lower figure, which is still an estimate. The Nevada Supreme Court has made it quite clear that estimated costs are not actual costs, and only the latter are recoverable. *See Bobby Berosini, Ltd. v. PETA,* 114 Nev. 1348, 1352, 971 P.2d 383, 385–86 (1998) ("*PETA*") (stating that costs awarded under NRS 18.005 must be reasonable, and that "reasonable costs must be actual and reasonable," rather than an estimate, even if the estimate itself is reasonable (internal quotation marks omitted)). While the City does not dispute the e-filing fees are recoverable costs, an estimation of such costs is not sufficient to support an award of costs pursuant to NRS 18.005.

III. Costs Disputed

1. Photocopy Fees Paid to Holo Discovery ($14,422.81)

The Developer initially claimed $14,422.81 in photocopying costs paid to Holo Discovery and submitted no documentation to substantiate that these costs were reasonable or necessary. The Developer only submitted invoices and checks to show the amounts paid.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

The largest invoice, for $13,646.69, indicated that the documents were delivered on October 27, 2021, the date that trial was supposed to begin in this case. Per the Court's 3rd Amended Order Setting Civil Jury Trial, Pre-trial/Calendar Call ("Scheduling Order"), the parties were required to deliver their exhibits two days prior to the trial date. Thus, based on the delivery date shown on the invoice and assuming the Developer complied with the Scheduling Order, these copies could not have been the Developer's trial exhibits.

In opposing the motion, the Developer claims that the invoice was issued in error and submitted a revised invoice stating that the documents were delivered two days before trial on October 25, 2021. Nonetheless, the Developer failed to explain why it was necessary or reasonable to print 44,145 pages in black and white, and 7,580 pages in color (a total of 51,725 pages) for a trial that was limited to one issue—damages. Moreover, there is no explanation as to why the Developer's trial exhibits required index tabs for lettered exhibits (as shown on the invoice), where neither the Developer nor the City used letters to identify trial exhibits.

The Developer's claim that its expert witness files were voluminous does not explain the excessive copying charges, as the expert witness reports and work files totaled only 8,003 pages. Setting aside the fact that it was completely unnecessary to include the entire work file for each of its experts with its trial exhibits, the Developer's explanation still does not add up. The only way to get to 51,725 pages is if the Developer printed at least five copies of its trial exhibits when the Scheduling Order required only two copies. Any additional copies printed were for the convenience of the Developer's counsel and were not necessary. Nonetheless,

Finally, the Developer provided no explanation regarding the other invoices from Holo Discovery totaling $776.21 or how those invoices relate to this case. Because the Developer made no attempt to explain why each copy was necessary, none of these copying costs are recoverable under *PETA.*

2. Copies of Briefs from Supreme Court Law Library ($33.20)

In opposition to the City's motion, the Developer claims that it was necessary to order the briefs in the *Kelly v. Tahoe* case to review the same for any applicability to the subject case. Opp. at 5:14-15. The Developer further claims that the City relied heavily on *Kelly v. Tahoe*, which

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

simply is not true. The first time the City filed any briefing citing *Kelly v. Tahoe* was in the City's opposition to the Developer's motion to dismiss Seventy Acres LLC, which the City filed on May 12, 2020. The City also cited *Kelly*, once in a footnote and again in string cite, in the City's opposition to Developer's motion to determine property interest, which the City filed on August 18, 2020. That is not heavy reliance that justifies ordering copies of briefs that have no evidentiary or precedential value in this case or any other case involving the Badlands Property. In fact, according to the Developer, *Kelly* had no applicability to the instant case (*see* Opp. at 5:15), which implies that these costs were not necessary.

3. Copies of Certified Documents from Clark County Recorder ($171.00)

In opposition to the City's motion, the Developer claims that the City made the CC&Rs relevant to this case but does not explain how. The Developer claims that the City spent 4-hours at the summary judgment hearing "trying to rewrite Mr. Peccole's history." However, the Developer ordered copies of the CC&Rs two years before the summary judgment hearings, and the Developer did not rely on the CC&Rs at the summary judgment hearing or in its briefing. In any event, it was not necessary for the Developer to order copies of these documents because there were numerous copies submitted into the record on the Developer's applications, which were included in the record for the Developer's petition for judicial review, and which were also produced in discovery by the City. The City never questioned the authenticity of these documents and it was not necessary for the Developer to pay for certified copies of the same.[1]

4. District Court Clerk ($119.00)

In opposition to the City's motion, the Developer claims it was necessary to do research on a case between the City and Mr. Peccole from 1992 because "the interaction between the City and Mr. Peccole was put at issue *by the City* in this case." Not true. The Developer consistently argued

[1] The Developer presumably had copies of these documents in its possession as a result of the litigation involving the homeowners in Queensridge, a case which actually did concern the CC&Rs. *See* Findings of Fact and Conclusions of Law, Final Order and Judgment entered January 31, 2017 in Case No. A-16-739654-C. It was not necessary for the Developer's counsel to purchase additional copies for this case.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

that Mr. Peccole always intended to develop the golf course as residential, a claim that was flatly rejected by the 30(b)(6) designee for Peccole Nevada Corporation, William Bayne. In any event, Mr. Peccole's intent is not relevant to any claim or issue in the case and there was nothing that the Developer could have expected to find in that case that would have made it relevant. The Developer's acknowledgment that it found nothing relevant further reinforces the fact that this research was not necessary.

5. GGA Partners ($11,162.41) and Global Golf Advisors ($67,094.00)

With respect to GGA Partners and Global Golf Advisors, which are apparently the same entity, the Developer claims that it was necessary to retain them to rebut the City's arguments that a golf course was an economically viable use of the Badlands Property. The Developer failed to cite to one instance where the City made that argument. Instead, the Developer cited a transcript from a hearing where the City argued that even if the court were to assume that a golf course was not an economically viable use, the subject property still has value to the surrounding development as open space. *See* Opp. Ex 20, 9.27/21 Transcript.

The Developer claims that the City should have retained an expert to rebut the GGA report even though the Developer did not disclose GGA as an expert. The Developer only included the report in the work file produced by Tio DiFederico, the Developer's appraiser. Fees paid to nondisclosed experts are not recoverable under NRS 18.005. There is simply no basis to court to determine the reasonableness of the costs charged by an expert who is never disclosed and never testifies.

6. The DiFederico Group ($114,250.00)

The Developer claims that the City cannot criticize Mr. DiFederico's work because it never deposed him, however, the fact that the City never deposed him is another reason the costs claimed are unreasonable. Mr. DiFederico incurred these excessive costs despite the fact that he was never deposed and never testified at trial. Moreover, a portion of Mr. DiFederico's final invoice includes 5.5 hours preparing for trial, for which he billed at a higher rate, on October 27, 2021, after the parties agreed to stipulate to the admissibility of Mr. DiFederico's report. *See* Exhibit 3 to Memo of Costs at pg. 26.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

The Developer claims that the City cannot dispute the reasonableness of Mr. DiFederico's fees because the City stipulated to the admissibility of Mr. DiFederico's report. The City stipulated that Mr. DiFederico's report was admissible, it did not stipulate that the costs incurred to prepare the report were reasonable or necessary. The admissibility of an expert report has little to no bearing on whether the amount paid to the expert are reasonable.

As to whether Mr. DiFederico performed an independent analysis of the highest and best use of the property or an independent analysis of the economic impact on the property, the report speaks for itself. Mr. DiFederico's report does not contain an analysis of the 7,048 pages the Developer claims that Mr. DiFederico reviewed to determine the impact on the property. Mr. DiFederico relied entirely on the Court's order regarding the Developer's motion to determine property interest in concluding that the highest and best use of the property was for single family residential, and then concluded without any analysis that the value of the property was zero after the "City's actions" because there is no market for property that cannot be used for its legally permitted use.

The Developer attempts to defend the SDM based on *Tacchino v. State Department of Highways,* 89 Nev. 150, 508 P.2d 1212 (1973). The *Tacchino* case is distinguishable because the landowner in that case had already received approval of a subdivision map and had already started cutting and grading streets, and some sewers and storm drains had been installed. Thus, valuing the property based on individual lot sales was not mere speculation as it was something that a purchaser might consider in purchasing the property.

The *Tacchino* court acknowledged that "valuation must be based upon what a willing purchaser will pay for the whole at the time of the taking and not on what a number of purchasers might be induced to pay in the future for the land in small parcels." 89 Nev. at 153, 508 P.2d at 1214. The Court went on to state, "[t]here is solid support for this rule when the land is undeveloped and the subdivision is imaginary or hypothetical." *Id.* (citing *Department of Highways v. Schulhoff*, 167 Colo. 72, 445 P.2d 402 (1968). Although the *Tacchino* court ultimately rejected a per se rule that appraisals based on the SDM are inadmissible, it recognized that such appraisals are unreliable where the subdivision is imaginary or hypothetical.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Whether the use of the SDM in this case was reasonable is beside the point. Mr. DiFederico analyzed three different hypothetical subdivisions, none of which had been approved and two of which had not even been proposed to the City. Mr. DiFederico certainly incurred unnecessary costs in attempting to analyze lot values for three hypothetical subdivisions rather than one. For purposes of this motion, the issue is not the reasonableness of the SDM, but rather the reasonableness and necessity of Mr. DiFederico's fees. It was not reasonable or necessary for Mr. DiFederico to analyze the value of individual lots in three hypothetical subdivisions.

Finally, the Developer submitted a declaration in support of its opposition to the motion stating that, in the last eminent domain case tried by the Law Offices of Kermitt L. Waters, an appraiser who did not provide trial testimony had fees that exceeded $250,000. *See* Opp. Ex 23. The declaration does not state whether the Court awarded costs to the Developer's counsel for such fees or who that expert was. The expert fees charged by an unknown expert in a one case does not somehow establish that a lesser amount of fees charged by a different appraiser in another case are reasonable.

7. Jones Roach & Caringella ($29,625.00)

The Developer claims that Jones Roach & Caringella (JRC) were "prepared to be rebuttal or surrebuttal experts." Opp. at 10:20-21. The Developer further claims that the City deprived the Developer of a "vehicle" to use these rebuttal experts. *Id.* at 10:22-23. The Developer apparently paid JRC $29,625.00 to prepare them with background information. *Id.* at 11:1-6. Finally, the Developer claims that even though JRC never produced a report, the costs were still reasonable and actually incurred.

The Developer's arguments regarding JRC ignore a key element of the analysis under NRS 18.005. In addition to being reasonable and actually incurred, costs must be necessary. The Developer made a strategic decision to retain these experts prior to the expert disclosure deadline and assumed the risk that their anticipated testimony may not be necessary. The City should not be forced to bear the cost of experts who were never disclosed, never prepared a report, and never testified at a deposition or at trial simply because the Developer made a decision to retain them prematurely in the event that their testimony *might* be necessary.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

8. Legal Wings ($290.00)

The Developer claims that this cost was incurred for the deposition of Clyde Spitze. The City noticed Mr. Spitze's deposition, filed the application for commission to take Mr. Spitze's deposition out of state, filed the application for subpoena under the Utah Uniform Interstate Depositions and Discovery Act, and served the subpoena on Mr. Spitze. *See* **Exhibit A** attached hereto. In opposition to the motion, the Developer submitted the first page of the deposition transcript, which does not establish that the commission the Developer paid for was for Mr. Spitze's deposition.

9. Fee to Transcribe HOA Meeting Paid to Oasis Reporting ($1,049.00)

The Developer paid $1,049.00 to have Oasis Reporting transcribe an audio recording of an HOA meeting. The transcript is hearsay and was never properly authenticated. The statements quoted from the transcript are inadmissible hearsay, were not made under oath, and were not part of the record related to the Developer's petition for judicial review. The Developer never deposed Mr. Seroka and the City never had an opportunity to cross examine about the statements he allegedly made at the HOA meeting. In any event, NRS 18.005(2) only allows costs for reporter's fees for depositions and one copy of each deposition, it does not allow for costs incurred to *create* transcripts from HOA meetings.

10. Westlaw ($50,669.02)

The Developer submitted no additional evidence to substantiate the Westlaw charges it claims were actually or necessarily incurred in this case. Instead, the Developer simply asks the Court to rely upon the Developer's unsupported assertion 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." Opp. at 12:5-6. This is not persuasive given that the Developer attempted to claim costs that related exclusively to another case. Moreover, the Developer appears to be suggesting that all of its Westlaw charges should be recoverable regardless of whether they were incurred in this case or the other three cases because this is the "lead case." This simply begs the question, did the Developer incur Westlaw charges in the other cases that the Developer did not include in its memorandum of

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

costs in this case? There simply is no way to tell because the Developer failed to use any discernable method for separately tracking its Westlaw charges in each case.

The Developer made no attempt to demonstrate that the Westlaw charges were reasonable, necessary, and actually incurred in this case through evidence that corroborates the Developer's unilateral assertions. The Developer's opposition, like its memorandum of costs, simply tells the court that the costs were incurred in this case. This is not sufficient under *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120 (2015), *PETA*, 114 Nev. at 1353, 971 P.2d at 386 (1998); and *Matter of DISH Network Derivative Litig.*, 133 Nev. 438, 452, 401 P.3d 1081, 1094 (2017).

11. In-House Copy Costs ($6,345)

In opposition the motion, the Developer makes no attempt to explain how the in-house copying costs claimed were actually incurred in this case. The Developer simply points to the number of pages that the Developer filed with the court and the number of pages produced by both parties to argue that the sheer volume of documents filed and produced somehow makes the number of copies printed reasonable. *See* Opp. at 12:13-24. This argument has no merit because all documents filed in the case have been filed electronically and all discovery produced in this case has been produced electronically.

In addition to failing to submit evidence demonstrating that these copying costs were incurred in this, the Developer failed to provide any evidence substantiating the reason for these copies. As the Supreme Court stated in *Caddle Co.*, "[d]ocumentation substantiating the reason for each copy 'is precisely what is required under Nevada law.'" 131 Nev. 114, 121 (2015). The documentation submitted by the Developer is clearly insufficient to support an award of costs for these copying charges.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

IV. Conclusion

The City respectfully requests that the Court grant its motion to retax costs.

DATED this 11th day of January, 2022.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III (NV Bar No. 3552)
Christopher Molina (NV Bar No. 14092)
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Rebecca Wolfson (NV Bar No. 14132)
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz (CA Bar No. 87699)
(Admitted *pro hac vice*)
Lauren M. Tarpey (CA Bar No. 321775)
(Admitted *pro hac vice*)
396 Hayes Street
San Francisco, California 94102
Attorneys for City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, and that on the 11th day of January, 2022, a true and correct copy of the foregoing **CITY'S REPLY IN SUPPORT OF MOTION TO RETAX MEMORANDUM OF COSTS** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

EXHIBIT A

NTTD

George F. Ogilvie III (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Debbie Leonard (NV Bar #8260)
LEONARD LAW, PC
955 S. Virginia St., Suite 220
Reno, NV 89502
Telephone: 775.964.4656
debbie@dleonardlegal.com

Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 S. Main Street, 6th Floor
Las Vegas, NV 89101
Telephone: 702.229.6629
Facsimile: 702.386.1749
bjerbic@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

Attorneys for Defendants City of Las Vegas

DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **NOTICE OF TAKING DEPOSITION OF CLYDE SPITZE**

PLEASE TAKE NOTICE that City of Las Vegas will take the deposition of Clyde Spitze on the **24th** day of **July, 2019** at **10:00 a.m. (Mountain Time)** at National Court Reporter's Inc., 1575 West 200 North, Cedar City, Utah 84720, before a Notary Public or some other officer authorized by law to administer oaths, and shall be recorded by stenographic means. You are invited to attend and cross-examine. Oral examination will continue from day-to-day until completed, or at a later date mutually agreed upon by the parties until completed. Defendant reserves the right to videotape the deposition.

DATED this 2nd day of July, 2019.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III, Esq. (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102

LEONARD LAW, PC
Debbie Leonard (NV Bar #8260)
955 S. Virginia St., Suite 220
Reno, NV 89502

LAS VEGAS CITY ATTORNEY'S OFFICE
Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
495 S. Main Street, 6th Floor
Las Vegas, NV 89101

Attorneys for City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 2nd day of July, 2019, a true and correct copy of the foregoing **NOTICE OF TAKING THE DEPOSITION OF CLYDE SPITZE** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

George F. Ogilvie III
Name
2300 West Sahara Avenue, Suite 1200
Address
Las Vegas, Nevada 89102
City, State, Zip
(702) 873-4100
Phone
gogilvie@mcdonaldcarano.com
Email

Check your email. You will receive information and documents at this email address.

I am the [ ] Plaintiff/Petitioner
[ ] Defendant/Respondent
[X] Attorney for the [ ] Plaintiff/Petitioner [X] Defendant/Respondent and my Nevada (state) Bar number is 3552

In the District Court of Utah

Fifth Judicial District Iron County

Court Address 40 North 100 East, Cedar City, Utah 84720

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Plaintiff/Petitioner v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X Defendant/Respondent	**Application for Subpoena under the Utah Uniform Interstate Depositions and Discovery Act** 190500094 Case Number Bell Judge Commissioner

Instructions: You must attach the following records and forms if they are not already on file with the court.

- Proposed Utah Subpoena and all required supporting records and forms

- The foreign Subpoena
- The names, addresses and telephone numbers of all attorneys of record and of any self-represented party

(1) [X] I request that the court issue a Subpoena incorporating the terms of the foreign Subpoena issued by or on behalf of the court in which the action is pending.

(2) [X] The district court of this judicial district is permitted to issue a Utah Subpoena because this is the district in which discovery is sought to be conducted.

(3) [X] The court in which this action is pending is a court of record in Nevada, a state that has enacted the Uniform Interstate Depositions and Discovery Act or provisions substantially similar to the uniform act.

(4) The foreign Subpoena requires the person named to: (check at least one)

[X] Attend and give testimony at a deposition
[ ] Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person
[ ] Permit inspection of premises under the control of the person.

(5) [X] The foreign Subpoena is attached to this Application.

(6) [X] The names, addresses and telephone numbers of all attorneys of record and of any self-represented party are attached to this Application.

I declare under criminal penalty under the law of Utah that everything stated in this document is true.

Signed at _____ (city, and state or country).

7-3-19
Date

Signature ► _____

Printed Name George Ogilvie

Certificate of Service

I certify that I filed with the court and am serving a copy of this Application for Subpoena under the Utah Uniform Interstate Depositions and Discovery Act on the following people.

Person's Name	Service Method	Service Address	Service Date
LAW OFFICES OF KERMITT L. WATERS Kermitt L. Waters, Esq., James J. Leavitt, Esq., Michael A. Schneider, Esq., Autumn L. Waters, Esq., Michael K. Wall, Esq.,	[X] Mail [ ] Hand Delivery [ ] E-filed [ ] Email [ ] Left at business (With person in charge or in receptacle for deliveries.) [ ] Left at home (With person of suitable age and discretion residing there.)	704 South Ninth Street Las Vegas, Nevada 89101	
HUTCHISON & STEFFEN, PLLC Mark A. Hutchison (4639) Joseph S. Kistler (3458)	[X] Mail [ ] Hand Delivery [ ] E-filed [ ] Email [ ] Left at business (With person in charge or in receptacle for deliveries.) [ ] Left at home (With person of suitable age and discretion residing there.)	Peccole Professional Park 10080 West Alta Drive, Suite 200 Las Vegas, NV 89145	
	[ ] Mail [ ] Hand Delivery [ ] E-filed [ ] Email [ ] Left at business (With person in charge or in receptacle for deliveries.) [ ] Left at home (With person of suitable age and discretion residing there.)		

Date

Signature ▶ _____

Printed Name _____

4824-7490-2683, v. 1

ANOT

George F. Ogilvie III (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Debbie Leonard (NV Bar #8260)
LEONARD LAW, PC
955 S. Virginia St., Suite 220
Reno, NV 89502
Telephone: 775.964.4656
debbie@leonardlawpc.com

Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
LAS VEGAS CITY ATTORNEY'S OFFICE
495 S. Main Street, 6th Floor
Las Vegas, NV 89101
Telephone: 702.229.6629
Facsimile: 702.386.1749
bjerbic@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

Attorneys for Defendants City of Las Vegas

DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND CO LLC, ET AL., Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **AMENDED NOTICE OF TAKING THE DEPOSITION OF CLYDE SPITZE** **Date of Deposition: August 16, 2019** **Time: 10:00 a.m. (Mountain Time)**

PLEASE TAKE NOTICE that the City of Las Vegas will take the deposition of Clyde Spitze on the **16th** day of **August, 2019** at **10:00 a.m. (Mountain Time)** at National Court Reporter's Inc., 1575 West 200 North, Cedar City, Utah 84720, before a Notary Public or some other officer authorized by law to administer oaths, and shall be recorded by stenographic means. You are invited to attend and cross-examine. Oral examination will continue from day-to-day until completed, or at a later date mutually agreed upon by the parties until completed. Defendant reserves the right to videotape the deposition.

DATED this 18th day of July, 2019.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III, Esq. (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102

LEONARD LAW, PC
Debbie Leonard (NV Bar #8260)
955 S. Virginia St., Suite 220
Reno, NV 89502

LAS VEGAS CITY ATTORNEY'S OFFICE
Bradford R. Jerbic (NV Bar #1056)
Philip R. Byrnes (NV Bar #166)
Seth T. Floyd (NV Bar #11959)
495 S. Main Street, 6th Floor
Las Vegas, NV 89101

Attorneys for City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 18th day of July, 2019, a true and correct copy of the foregoing **AMENDED NOTICE OF TAKING THE DEPOSITION OF CLYDE SPITZE** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

ELECTRONICALLY SERVED
7/22/2019 9:05 AM

ANOT

George F. Ogilvie III (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Debbie Leonard (NV Bar #8260)
LEONARD LAW, PC
955 S. Virginia St., Suite 220
Reno, NV 89502
Telephone: 775.964.4656
debbie@leonardlawpc.com

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LAS VEGAS CITY ATTORNEY'S OFFICE
495 S. Main Street, 6th Floor
Las Vegas, NV 89101
Telephone: 702.229.6629
Facsimile: 702.386.1749
bjerbic@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

Attorneys for Defendants City of Las Vegas

DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND CO LLC, ET AL., Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **SECOND AMENDED NOTICE OF TAKING DEPOSITION OF CLYDE SPITZE** **LOCATION CHANGE ONLY** **Date of Deposition: August 16, 2019** **Time: 10:00 a.m. (Mountain Time)**

PLEASE TAKE NOTICE that the City of Las Vegas will take the deposition of Clyde Spitze on the **16th** day of **August, 2019** at **10:00 a.m. (Mountain Time)** at National Court Reporter's Inc./Hampton Inn, 1145 South Bentley Boulevard, Cedar City, Utah 84720, before a Notary Public or some other officer authorized by law to administer oaths, and shall be recorded by stenographic means. You are invited to attend and cross-examine. Oral examination will continue from day-to-day until completed, or at a later date mutually agreed upon by the parties until completed. Defendant reserves the right to videotape the deposition.

DATED this 22nd day of July, 2019.

McDONALD CARANO LLP

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

LEONARD LAW, PC
Debbie Leonard (NV Bar #8260)
955 S. Virginia St., Suite 220
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Bradford R. Jerbic (NV Bar #1056)
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495 S. Main Street, 6th Floor
Las Vegas, NV 89101

Attorneys for City of Las Vegas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
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/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Electronically Filed
8/15/2019 2:11 PM
Steven D. Grierson
CLERK OF THE COURT

APCOM

George F. Ogilvie III (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com

Debbie Leonard (NV Bar #8260)
LEONARD LAW, PC
955 S. Virginia St., Suite 220
Reno, NV 89502
Telephone: 775.964.4656
debbie@leonardlawpc.com

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LAS VEGAS CITY ATTORNEY'S OFFICE
495 S. Main Street, 6th Floor
Las Vegas, NV 89101
Telephone: 702.229.6629
Facsimile: 702.386.1749
bjerbic@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

Attorneys for Defendant City of Las Vegas

DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND CO LLC, ET AL., Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **APPLICATION FOR ISSUANCE OF COMMISSION TO TAKE OUT-OF-STATE DEPOSITION OF CLYDE SPITZE** **Date of Deposition: August 16, 2019** **Time: 10:00 a.m. (Mountain Time)**

Case Number: A-17-758528-J

Pursuant to Rule 28(a) of the Nevada Rules of Civil Procedure, counsel for Defendant City of Las Vegas ("Defendant"), hereby apply to this Court for issuance of a Commission to take the deposition of Clyde Spitze ("Deponent") outside the State of Nevada, commencing at **10:00 a.m. (Mountain Time)** on **August 16, 2019**, (and continuing from day to day thereafter until completed) at the offices of National Court Reporter's Inc./Hampton Inn, 1145 South Bentley Boulevard, Cedar City, Utah 84720. Defendant respectfully submit the following:

1. Applicant is the attorney of record for Defendants in the above-entitled action.

2. Deponent resides in the State of Utah.

3. Defendant will provide for the attendance of a court reporter at the time and place of the deposition who is authorized to administer oaths under the laws of the State of Utah.

4. A copy of the Second Amended Notice of Taking Deposition of Clyde Spitze is attached hereto as Exhibit 1 and incorporated herein by this reference as if set forth in full and at length.

5. Under Rule 28(a) of the Nevada Rules of Civil Procedure, upon application and proof that the notice to take deposition out of the State of Nevada has been given as provided in NRCP 30(b)(1), the Clerk of Court is authorized to issue a Commission for the taking of deposition of the witness(es) outside the State of Nevada.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

6. Wherefore, applicant prays that the Clerk of this Court issue a Commission to take the deposition as listed above outside the State of Nevada.

DATED this 15th day of August, 2019.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III, Esq. (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
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Las Vegas, NV 89102

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Debbie Leonard (NV Bar #8260)
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Reno, NV 89502

LAS VEGAS CITY ATTORNEY'S OFFICE
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Las Vegas, NV 89101

Attorneys for City of Las Vegas

McDONALD CARANO
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PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on 15th day of August, 2019, a true and correct copy of the foregoing **APPLICATION FOR ISSUANCE OF COMMISSION TO TAKE OUT-OF-STATE DEPOSITION OF CLYDE SPITZE** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

McDONALD CARANO
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PHONE 702.873.4100 • FAX 702.873.9966

EXHIBIT “1”

ELECTRONICALLY SERVED
7/22/2019 9:05 AM

ANOT

George F. Ogilvie III (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
McDONALD CARANO LLP
2300 W. Sahara Ave, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com

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Telephone: 775.964.4656
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Telephone: 702.229.6629
Facsimile: 702.386.1749
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sfloyd@lasvegasnevada.gov

Attorneys for Defendants City of Las Vegas

DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND CO LLC, ET AL., Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **SECOND AMENDED NOTICE OF TAKING DEPOSITION OF CLYDE SPITZE** **LOCATION CHANGE ONLY** **Date of Deposition: August 16, 2019** **Time: 10:00 a.m. (Mountain Time)**

PLEASE TAKE NOTICE that the City of Las Vegas will take the deposition of Clyde Spitze on the **16th** day of **August, 2019** at **10:00 a.m. (Mountain Time)** at National Court Reporter's Inc./Hampton Inn, 1145 South Bentley Boulevard, Cedar City, Utah 84720, before a Notary Public or some other officer authorized by law to administer oaths, and shall be recorded by stenographic means. You are invited to attend and cross-examine. Oral examination will continue from day-to-day until completed, or at a later date mutually agreed upon by the parties until completed. Defendant reserves the right to videotape the deposition.

DATED this 22nd day of July, 2019.

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McDONALD CARANO
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/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

McDONALD CARANO
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COMM

George F. Ogilvie III (NV Bar #3552)
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McDONALD CARANO LLP
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Las Vegas, NV 89102
Telephone: 702.873.4100
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DISTRICT COURT

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TO: ANY OFFICER AUTHORIZED BY LAW TO ADMINISTER OATHS, OR ANY NOTARY PUBLIC OF THE STATE OF NEW YORK

YOU ARE HEREBY COMMISSIONED AND FULLY AUTHORIZED to take the deposition of Clyde Spitze ("Deponent") in accordance with the Nevada Rules of Civil Procedure at the offices of National Court Reporter's Inc./Hampton Inn, 1145 South Bentley Boulevard, Cedar City, Utah 84720 on August 16, 2019 at 10:00 a.m. (Mountain Time) and on succeeding days until concluded, or at such other time and places as may be mutually agreed upon by counsel for the respective parties hereto.

You shall put the witness under oath, and the testimony shall be recorded by someone acting under your direction, stenographically and, if requested, by videotape, and thereafter transcribed. Objections to evidence presented noted, and the evidence shall be taken subject to the objections. When the testimony is fully transcribed, it shall be signed by the witness after a full opportunity to make corrections or changes. You shall certify on the deposition that the witness was duly sworn by you, and that the deposition is a deposition, and place it in an envelope endorsed with the title of the action and the deponent's name and send it by registered mail to the deponent for review and signature and to Defendant's counsel.

DATED: 8/16/2019

STEVEN D. GRIERSON
CLERK OF THE COURT

By: _____
DEPUTY
Alexander Banderas

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Submitted by:

McDONALD CARANO LLP

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George F. Ogilvie III, Esq. (NV Bar #3552)
Amanda C. Yen (NV Bar #9726)
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McDONALD CARANO

Fifth District Court for the State of Ut

28369

DATE	INVOICE NUMBER	MEMO			BALANCE
07/03/2019	GFO/070419				
		18169-	2	35.00	
		18169.2 Filing Fee Out-of-State Subpoena, Clyde Spitze			

CHECK DATE	CHECK NUMBER		
07/03/2019	000028369	TOTAL	35.00

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER

NEVADA STATE BANK
1 West Liberty Street
Reno, Nevada 89501

94-77/1224

28369

McDONALD CARANO

2300 W. SAHARA AVENUE, #1000
LAS VEGAS, NEVADA 89102
(702)873 4100

PAY: *Thirty Five and 00/100 Dollars*

NUMBER	DATE	AMOUNT
000028369	07/03/2019	*********35.00

TO THE ORDER OF: **Fifth District Court for the State of Ut**

2 SIGNATURES REQUIRED IF OVER $2500.00

MP

MP

THE BACK OF THIS DOCUMENT CONTAINS CHECK SECURITY WATERMARK AND COIN REACTIVE INK

⑈028369⑈ [redacted]

McDONALD CARANO

Fifth District Court for the State of Ut

28369

DATE	INVOICE NUMBER	MEMO			BALANCE
07/03/2019	GFO/070419				
		18169-	2	35.00	
		18169.2 Filing Fee Out-of-State Subpoena, Clyde Spitze			

CHECK DATE	CHECK NUMBER		
07/03/2019	000028369	TOTAL	35.00

FILE COPY

WLD51124x1 JAY JOHNSON & ASSOCIATES PH. 775-323-6200 / FAX 775-323-4587 PRINTED IN U.S.A.

CHECK REQUEST

RUSH Yes No	Date/Time needed: 7/3/19 a.m. run
Client # 18169	Client name: City of Las Vegas
Matter # 2	Matter Name: adv. 180 Land Co.
Expense code: 024	Type Description: Court Filing Fee
Amount of check : $35.00	Requested by: jj/GFO/KS
Reason for check: Filing Fee Out-of-State Subpoena, Clyde Spitze	
Payable to: Fifth District Court 40 North 100 East Cedar City, UT 84720 Main Telephone: (435) 867-3250	
FOR ACCOUNTING ONLY	
Vendor #	Batch #
Voucher #	G/L #
Miscellaneous notation:	

21958

McDONALD CARANO

Clyde Spitze

28370

DATE	INVOICE NUMBER	MEMO			BALANCE
07/03/2019	GFO/070319	18169-	2	18.50	
	18169.2 Witness Fee				
				TOTAL	18.50

CHECK DATE	CHECK NUMBER
07/03/2019	00028370

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER

28370

NEVADA STATE BANK
1 West Liberty Street
Reno, Nevada 89501

94-77/1224

McDONALD CARANO

2300 W. SAHARA AVENUE, #1000
LAS VEGAS, NEVADA 89102
(702)873-4100

PAY: *Eighteen and 50/100 Dollars*

NUMBER	DATE	AMOUNT
000028370	07/03/2019	*********18.50

TO THE ORDER OF

Clyde Spitze
1148 East Ashdown Forest Road
Cedar City, UT 84721

2 SIGNATURES REQUIRED IF OVER $2500.00

THE BACK OF THIS DOCUMENT CONTAINS ARTIFICIAL WATERMARKS AND ARTIFICIAL INK

⑈028370⑈ [redacted]

McDONALD CARANO

Clyde Spitze

28370

DATE	INVOICE NUMBER	MEMO			BALANCE
07/03/2019	GFO/070319	18169-	2	18.50	
	18169.2 Witness Fee				
				TOTAL	18.50

CHECK DATE	CHECK NUMBER
07/03/2019	00028370

FILE COPY

WL0511241 JAY JOHNSON & ASSOCIATES PH. 775 323 0200 / FAX 775-323-4307

PRINTED IN U.S.A.

CHECK REQUEST

RUSH Yes No	Date/Time needed: 7/3/19 a.m. run
Client # 18169	Client name: City of Las Vegas
Matter # 2	Matter Name: adv. 180 Land Co.
Expense code: 014	Type Description: Subpoena Witness Fee
Amount of check : $18.50	Requested by: jj/GFO/KS
Reason for check: Witness Fee	
Payable to: Clyde Spitze 1148 East Ashdown Forest Road Cedar City, Utah 84721	
FOR ACCOUNTING ONLY	
Vendor #	Batch #
Voucher #	G/L #
Miscellaneous notation:	

21960

McDONALD CARANO

ICU Investigations

28371

DATE	INVOICE NUMBER	MEMO			BALANCE
07/03/2019	GF0/070319				
		18169	2	272.00	
		18169.2 Process Server Fee, Clyde Spitze			

CHECK DATE	CHECK NUMBER	TOTAL
07/03/2019	000028371	272.00

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER

28371

McDONALD CARANO

2300 W. SAHARA AVENUE, #1000
LAS VEGAS, NEVADA 89102
(702)873-4100

NEVADA STATE BANK
1 West Liberty Street
Reno, Nevada 89501

94-77/1224

PAY: *Two Hundred Seventy Two and 00/100 Dollars*

NUMBER	DATE	AMOUNT
000028371	07/03/2019	********272.00

TO THE ORDER OF

ICU Investigations
2157 S. Talon Cr.
Cedar City, UT 84720

2 SIGNATURES REQUIRED IF OVER $2500.00

THE BACK OF THIS DOCUMENT CONTAINS CHECK SECURITY WATERMARK AND COIN REACTIVE INK

⑈028371⑈

McDONALD CARANO

ICU Investigations

28371

DATE	INVOICE NUMBER	MEMO			BALANCE
07/03/2019	GF0/070319				
		18169	2	272.00	
		18169.2 Process Server Fee, Clyde Spitze			

CHECK DATE	CHECK NUMBER	TOTAL
07/03/2019	000028371	272.00

FILE COPY

WF85113M1 JAY JOHNSON & ASSOCIATES PH 775-823-0500 / FAX 775-823-4507 PRINTED IN U.S.A.

CHECK REQUEST

RUSH Yes No	Date/Time needed: 7/3/19 a.m. run
Client # 18169	Client name: City of Las Vegas
Matter # 2	Matter Name: adv. 180 Land Co.
Expense code: 044	Type Description: Process Server Fee
Amount of check : $272.00	Requested by: jj/GFO/KS
Reason for check: Process Server Fee, Clyde Spitze	
Payable to: ICU Investigations, LLC 2157 S. Talon Cr. Cedar City, Utah 84720	
FOR ACCOUNTING ONLY	
Vendor #	Batch #
Voucher #	G/L #
Miscellaneous notation:	

21962

Electronically Filed
6/22/2022 2:19 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS,
DISTRICT COURT JUDGE

THURSDAY, JANUARY 13, 2022

RECORDER'S TRANSCRIPT OF HEARING

CITY'S MOTION FOR IMMEDIATE STAY OF JUDGMENT ON OST

PLAINTIFF LANDOWNERS' OPPOSITION TO THE CITY'S MOTION FOR IMMEDIATE STAY OF JUDGMENT AND COUNTERMOTION TO ORDER THE CITY TO PAY THE JUST COMPENSATION ASSESSED

APPEARANCES:

For the Petitioner: JAMES J. LEAVITT, ESQ.
ELIZABETH M. GHANEM HAM, ESQ.

For the Respondent: GEORGE F. OGILVIE, III, ESQ.
REBECCA L. WOLFSON, ESQ.
PHILIP R. BYRNES, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER

GAL FRIDAY REPORTING & TRANSCRIPTION
10180 W. Altadena Drive, Casa Grande, AZ 85194 (623) 293-0249
Case Number: A-17-758528-J

Las Vegas, Nevada, Thursday, January 13, 2022

[Case called at 12:25 p.m.]

THE COURT: All right, let's go back on the record and next up happens to be page 19 of the calendar, and that's 180 Land Company, LLC versus the City of Las Vegas. Let's go ahead and set forth our appearances.

MR. LEAVITT: Good afternoon, Your Honor. James J. Leavitt on behalf of 180 Land, the plaintiff landowners.

MS. GHANEM: Good morning, Your Honor. Elizabeth Ghanem Ham also plaintiff landowners.

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

THE COURT: All right.

MS. WOLFSON: Good afternoon, Your Honor. Rebecca Wolfson also on behalf the City of Las Vegas.

MR. BYRNES: Good afternoon, Your Honor. Phil Byrnes on behalf of the City of Las Vegas.

THE COURT: And does that cover all appearances for the record?

MR. LEAVITT: On behalf of the Plaintiff, Your Honor, yes.

MR. OGILVIE: On behalf the City, yes, Your Honor.

THE COURT: All right. Okay. And I have a question for everyone as far as today's matters are concerned. I think everyone understand it's 12:30? Is that correct, staff?

THE CLERK: 12:26, yes.

THE COURT: 12:26.

THE CLERK: Yeah.

THE COURT: And we have another matter set this afternoon, right?

THE CLERK: 1:15.

THE COURT: And we -- we currently have a 1:15 set. And as far as the morning calendar's concerned, there's another three matters on calendar. I can't -- I don't know how our calendar ended up being so jammed up like it is right now because I'm looking here -- how many contested matters did we have on the calendar?

THE CLERK: Wow.

THE COURT: Excessive.

THE CLERK: Almost.

THE COURT: Too many.

THE LAW CLERK: Fourteen.

THE COURT: Fourteen contested matters.

THE CLERK: Yes.

THE COURT: And the reason why I bring this up and I just want to make sure I'm clear on this. I understand -- I read the -- the motion for immediate stay of judgment. I understand this is a hotly contested matter. I respect both the positions that have been asserted by all parties to this litigation and I'm concerned about one issue for now and it's really this simple. I don't want to short circuit the argument in this case. I want to make sure both sides have a

full and fair opportunity to explain their respective positions, not just for the purposes of my decision making, but also purposes for the record on appeal in this matter because there's going to be an appeal, right? And so --

MR. OGILVIE: Yes, Your Honor.

THE COURT: Right. And I respect that, I really and truly do. And so, here's my question, especially in light of this very very important motion regarding stay of the judgment and whether or not the City has to tender within the appropriate time period 34 plus million dollars, I -- that's not a summary hearing. It's not. And I don't have the time right now to give this the time this -- this issue deserves.

And so my question is this, and I'm talking about coming back within a relatively short period of time. My trial calendar has -- has cleared out and I would like to give this motion an entire afternoon. And it might take us an hour, it might take less or could take the whole afternoon, but my point is this, I think we have to make a vibrant record in this matter and then I can make a decision.

Any objection to that? We'll first go to the Plaintiff, 180.

MR. LEAVITT: Your Honor, no -- no objection. We agree that we need to have a -- a full record. Obviously the -- the concern is the timeliness to have this heard on a -- in a timely manner.

THE COURT: We're going to get it done as soon as possible, I mean, and we're talking probably -- we have -- we have a -- we have a lot of dates here we're going to give you. But we're

going to do -- we're not kicking a can down the road very far, Mr. Leavitt, I'll just tell you that.

And Mr. Ogilvie, sir?

MR. OGILVIE: Your Honor, I'll -- I'll be candid with the Court. My argument was about 20 minutes. I don't anticipate it requiring more than an hour.

THE COURT: Okay. And I get that, but -- and here's my point, Mr. Ogilvie, I'm starting another hearing at 1:15.

MR. OGILVIE: Oh, I -- let me -- let me -- I don't have a problem kicking a can -- or not kicking a can but continuing this hearing. I don't -- I don't have a problem -- let me just make that clear. I don't have a problem, Your Honor. I -- you -- you were suggesting setting aside a whole afternoon. I -- I don't think that's necessary and I'll advise the Court that we're in front of the Court on Tuesday morning at 9:00. I presume that the Court's calendar is probably as crowded that day as it was today, but if it isn't, I would say that we could -- we could probably hear both matters Tuesday morning.

THE COURT: Okay. Mr. Ogilvie, that's a good suggestion. We're going to look at that right now because I don't know the answer. I don't. We'll find out.

What do we have Tuesday? How backed up are we Tuesday? Check it out, CJ.

THE CLERK: Checking it now, Judge, the law clerk and I are and, wow, that 9:05 session, just that session alone has 10

matters.

THE COURT: Okay. That's better than today.

THE CLERK: A lot of motions --

THE COURT: What do we have in the afternoon?

THE CLERK: The afternoon, 18th, we have already given a special session to Ann McGee, the Miracle Flights case. We have summary judgment at 9:30 that's a separate session that's full that has --

THE COURT: What do we have --

THE CLERK: -- three cases.

THE COURT: What -- what do we have Monday?

THE CLERK: Martin Luther King Day.

THE COURT: Okay. I got you. We're off.

THE CLERK: Yes.

THE COURT: What do we have -- I'd like to get this done next week if possible. What do we have afternoons?

THE CLERK: Afternoons. As you mentioned, trial lifted so we've already discussed Front Sight [ph] on the Monday. I don't know if you --

THE COURT: No, but I'm talking about next week.

THE CLERK: Oh, the --

THE COURT: Afternoons next week.

THE CLERK: Afternoons, so Tuesday off. We have bench trial in the afternoon on Wednesday --

THE LAW CLERK: We could do -- we could do the

morning, the 19th. It's not --

MR. OGILVIE: Your Honor, I'll advise the Court that Judge Sturman just kicked a hearing in one of the other (indiscernible) lands matters to Thursday afternoon at 1:30.

THE COURT: Okay. So she's backed up also from what -- with a lot --

MR. OGILVIE: I -- I think it's a common malady.

THE COURT: Well you know what it is? This is what's happened. There's -- right now they actually have a civil judges meeting I can't attend because of my calendar. But, there's been this big push to try to try cases which I think is somewhat unrealistic in light of COVID and so there's so much going on and pressures and -- and we're going to do the best we can. But I think that's caused some of this too.

THE LAW CLERK: CJ?

THE CLERK: Yes?

THE LAW CLERK: 19th? In the morning at the 9:30 we don't have anything.

THE COURT: How about the 19th at 9:30 there's nothing, right?

THE LAW CLERK: Uh-huh. Short -- very short.

THE CLERK: There are some matters but short enough.

THE LAW CLERK: Yeah.

THE COURT: You'll have the whole -- for all practical purposes, you'll at least have a couple hours that morning, if

necessary.

MR. OGILVIE: That works for the City, Your Honor.

MR. LEAVITT: Your Honor, that works for the -- the landowners.

THE COURT: All right. And that's what we'll do. So we'll just vacate today's hearing -- you know what? Shouldn't we just move both matters that are pending to that day? Does that make sense, gentlemen? You know better than I do. Because they're telling me I have very light calendar on the 19th in the morning.

MR. OGILVIE: It -- Your Honor, this is George Ogilvie. It does make sense. I -- I need to consult with the rest of my legal team relative to the other matter though.

THE COURT: All right, I understand. We'll keep that --

MR. LEAVITT: Yeah, the other matter --

THE COURT: We'll keep that currently pending.

But hypothetically, Mr. Ogilvie, after you discuss this with your other legal team and if you parties want to stipulate just a simple -- you can actually prepare a letter by -- a joint letter with -- to make it even quicker with you and Mr. Leavitt if you want me to move that to the 19th, I'll move the other matter to the same time period. All right?

MR. OGILVIE: Sounds good.

THE COURT: Okay.

MR. OGILVIE: Yes.

THE COURT: So, what we're going to do, we're going to

go ahead and vacate the motion for immediate stay from today and we're going to move that for six days to the 19th. Is that correct, sir?

THE CLERK: Correct, Judge, and 10:00?

THE COURT: Ten o'clock. And by then I should --

MR. OGILVIE: Your --

THE COURT: -- be finished with my prior calendar and you have two hours, or more.

MR. OGILVIE: Great. Just one -- one item, Your Honor. I don't know what 180 Land's intentions are pending that hearing, but I would ask that a stay be imposed at least on the execution of the judgment until the Court can hear this -- this motion next Wednesday.

MR. LEAVITT: Well, Your Honor, on behalf of 180 Land, James J. Leavitt. I mean obviously we won't agree to any type of stay but there's -- we will wait for the motion to be heard, Your Honor, before we take further action against the City of Las Vegas --

THE COURT: Okay.

MR. LEAVITT: -- or towards the City of Las Vegas.

THE COURT: All right. What about that? Is that enough? Mr. Ogilvie?

MR. OGILVIE: I -- yeah, no, I accept Mr. Leavitt's --

THE COURT: Okay.

MR. OGILVIE: -- representations, absolutely.

THE COURT: All right. Okay. Just wanted to make sure

we're all on the same page.

And so anyway, I just want to thank you for your accommodation and we're going to just move this matter from today to Wednesday and that's January 19th at 10:00. Is that correct, CJ?

THE CLERK: Correct, Judge.

THE COURT: All right. Okay. And enjoy your day.

MR. OGILVIE: Thank you, Your Honor.

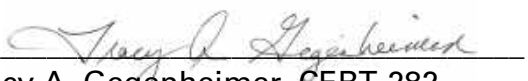
MR. LEAVITT: Thank you. Be safe.

THE COURT: Okay.

[Proceedings concluded at 12:35 p.m.]

* * * * * *

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



Tracy A. Gegenheimer, CERT-282
Court Recorder/Transcriber