

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.

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. 84345

Electronically Filed
Sep 29 2022 04:35 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

No. 84640

**AMENDED
JOINT APPENDIX
VOLUME 51, PART 3**

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

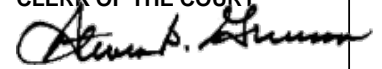
(admitted pro hac vice)

396 Hayes Street

San Francisco, California 94102

Telephone: (415) 552-7272

Attorneys for City of Las Vegas



**DECL
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 Landowner

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendant.

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

**DECLARATION OF ELIZABETH
GHANEM HAM IN SUPPORT OF
PLAINTIFF LANDOWNERS' MOTION
TO DETERMINE TAKE AND FOR
SUMMARY JUDGMENT ON THE
FIRST, THIRD AND FOURTH CLAIMS
FOR RELIEF**

1 **DECLARATION OF ELIZABETH GHANEM HAM**

2 STATE OF NEVADA)
)ss:
3 COUNTY OF CLARK)

4 I, Elizabeth Ghanem Ham, am licensed to practice law in the State of Nevada and am in-
5 house counsel for EHB Companies, which is the manager of 180 Land LLC and Fore Stars, the
6 owners of the 35 Acre Property at issue in the case of 180 Land Company, LLC, et al. v. City of
7 Las Vegas, et al., Eighth Judicial District Court case number A-17-758528-J (35 Acre Inverse
8 Condemnation Case).

9 I am familiar with the facts of the 35 Acre Inverse Condemnation Case and the documents
10 and information supporting those facts and the manner in which the documents and information
11 were obtained.

12 I submit this Declaration in support of Plaintiff Landowners Motion to Determine Take
13 and for Summary Judgment on the First, Third and Fourth Claims for Relief. Some of the Exhibits
14 include highlighting for the Court's convenience, which have been added to the original exhibits.

15 The following exhibits attached to the Landowners' Motion are Nevada Supreme Court
16 and Eighth Judicial District Court filed orders, pleadings, motions, affidavits, etc., that were
17 obtained through the court filing system or otherwise served to the Plaintiff Landowners in the
18 inverse condemnation cases filed against the City, described as the 17, 35, 65, and 133 Acre
19 Property cases in the Landowners' motion are consistent with the documents EHB Companies has
20 possession of, and are true and correct copies of what they purport to be: Exhibits 1, 4, 7-29, 32,
21 41, 42, 95, 138, 139.

22 Exhibit 117 is a true and correct copy of meeting minutes from an August 13, 2018, meeting
23 with engineers representing the Landowners and City of Las Vegas representatives regarding
24

1 attempts by the Landowners to develop the property at issue in the 65-acre Property case, which
2 have been kept in our files in the normal course of business.

3 Exhibit 2 and 3 are true and correct copies of representations of maps of The Property.

4 Exhibit 5, 6, 30, 86, 121, 122, 127-130, 143, 144, 145, 146 are true and correct copies of
5 documents that the Landowners obtained from the City of Las Vegas through a public records
6 request, the document bears the “CLV” bate stamp from when it was produced pursuant to the
7 public records request and has been kept in our files in the normal course of business.

8 Exhibit 31, 33, 53, 54, 75, 104, 106, 109-110, 114, 116, 118,119, 124, 131, 132, 135, 148
9 are true and correct copies of transcripts from City of Las Vegas Public meeting which was
10 downloaded from the City of Las Vegas public meeting website and has been kept in our files in
11 the normal course of business.

12 Exhibits 36-39 are true and correct copies of documents received as a result of purchase of
13 property located in the Master Planned Community of Queensridge and have been kept in our files
14 in the normal course of business.

15 Exhibit 34 is a true and correct copy of Declaration of Yohan Lowie made in support of
16 Landowners Opposition to the City’s Motion for Summary Judgement and Countermotions to
17 Determine the Two Inverse Condemnation Sub-Inquiries in the Proper Order and has been kept in
18 our files in the normal course of business.

19 Exhibit 35 is a true and correct copy of Declaration of Yohan Lowie made in support of
20 Plaintiff Landowners’ Motion for a New Trial and to Amend Related to: Judge Herndon’s Findings
21 of Fact and Conclusions of Law Granting City of Las Vegas Motion for Summary Judgment,
22 Entered on December 30, 2020 and has been kept in our files in the normal course of business.

23 Exhibit 40 is a true and correct copy of the deposition of Yohan Lowie, in the Matter of
24 Binion v. Fore Stars and has been kept in our files in the normal course of business.

1 Exhibit 43 is a true and correct copy of City of Las Vegas Ordinance 5353.

2 Exhibit 44, 140 are true and correct copies of Grant, Bargain and Sale Deed transferring
3 ownership of The Property.

4 Exhibit 45 and 46 are true and correct copies of correspondence received from Par 4 and
5 Elite Golf Management.

6 Exhibit 47 is a true and correct copy of the Deposition of Keith Flatt in the case Fore Stars
7 Ltd., v Allen G. Nel, Case No. A-16-748359-C.

8 Exhibit 48 is a true and correct copy of the Declaration of Christopher L. Kaempfer.

9 Exhibit 49 and 50 are true and correct copies of screenshots of the Clark County Assessors
10 Property Inquiry summary screen and Summary of Taxable Values.

11 Exhibit 51 is a true and correct copy of the Clark County Assessor's Summary of Taxable
12 Values received in our office and maintained in our office in the normal course of business.

13 Exhibit 52 is a true and correct copy of the State Board of Equalization Assessors Valuation
14 from Cases 14-175, 176,177 maintained in our office as in the normal course of business.

15 Exhibit 55 is a true and correct of City of Las Vegas required concessions signed by Yohan
16 Lowie.

17 Exhibit 56-59 are true and correct copies of the Badlands Development Agreement with
18 City of Las Vegas Comments, and Design Guidelines for The 250 that has been maintained in our
19 office in the normal course of business.

20 Exhibit 60 is a true and correct copy of The Two Fifty Development Agreement's
21 Executive Summary that has been maintained in our office in the normal course of business.

22 Exhibit 61 is a true and correct copy of Development Agreement for the Forest at
23 Queensridge and Orchestra Village at Queensridge.

24

1 Exhibits 62-74, 79-91, 97-103, 105, 111-113, 115, 133-134 are true and correct copies of
2 applications and documents submitted for the review of the City Council and Planning
3 Commission.

4 Exhibit 76 is a true and correct copy of the Agenda Summary Page for the June 21, 2017
5 City Council Meeting.

6 Exhibit 77 is a true and correct copy of the City of Las Vegas Staff report for the June 21,
7 2017 Planning Meeting.

8 Exhibit 78 is a true and correct copy of the Agenda Summary Page for the August 2, 2017
9 City Council Agenda Summary Page.

10 Exhibits 92-93 are true and correct copies of correspondence received by the City of Las
11 Vegas which were maintained in our office in the normal course of business.

12 Exhibit 94 is a true and correct copy of the Declaration of Vickie DeHart submitted in the
13 Jack B. Binion, et al.. v. Fore Stars, Ltd. Case No. A-15-729053-B.

14 Exhibit 107 is a true and correct copy of Bill No. 2018-05, Ordinance 6617.

15 Exhibit 108 is a true and correct copy of Bill No. 2018-24, Ordinance 6650.

16 Exhibit 120 is a true and correct copy of State of Nevada State Board of Equalization Notice
17 of Decision, in the Matter of Fore Star Ltd., et al..

18 Exhibit 123 is a true and correct copy of March 27, 2017 Letter from City of Las Vegas to
19 Todd S. Polikoff.

20 Exhibit 125 is a true and correct copy of campaign materials distributed by Steve Seroka.

21 Exhibit 126 are true and correct copies of Facebook posts made by Councilman Bob Coffin.

22 Exhibit 136 is a true and correct copy of a transcript from a June 21, 2018 recorded
23 Homeowners association meeting.

Exhibit 137 are true and correct copies of photos taken by cameras installed on The Property.

Exhibit 141 is a true and correct copy of the City of Las Vegas' Land Use Hierarchy chart.

Exhibit 142 is a true and correct copy of the August 3, 2017 deposition of Bob Beers Pgs. 31-36 in the Matter of Binion v. Fore Stars.

Exhibit 147 is a true and correct copy of a June 20, 2017 representation letter to Councilman Bob Coffin from Jimmerson Law Firm.

Exhibit 149 is a true and correct copy of a Las Vegas review Journal Article titled “Group that included rich and famous files suit over condo plans” downloaded from the Review Journal Website.

Exhibit 150 is a true and correct copy of the Affidavit of Don Richards with referenced pictures attached.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

/s/ Elizabeth Ghanem Ham

Elizabeth Ghanem Ham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 31st day of March, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of **DECLARATION OF ELIZABETH GHANEM HAM IN SUPPORT OF PLAINTIFF LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF** 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.

Amanda C. Yen, Esq.

Christopher Molina, Esq.

2300 W. Sahara Ave., Suite 1200

Las Vegas, Nevada 89102

gogilvie@mcdonaldcarano.com

ayen@mcdonaldcarano.com

cmolina@mcdonaldcarano.com

LAS VEGAS CITY ATTORNEY'S OFFICE

Bryan K. Scott, City Attorney

Philip R. Byrnes, Esq.

Seth T. Floyd, Esq.

495 S. Main Street, 6th Floor

Las Vegas, Nevada 89101

bscott@lasvegasnevada.gov

pbyrnes@lasvegasnevada.gov

sfloyd@lasvegasnevada.gov

SHUTE, MIHALY & WEINBERGER, LLP

Andrew W. Schwartz, Esq.

Lauren M. Tarpey, Esq.

396 Hayes Street

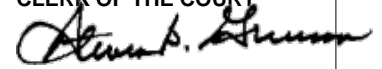
San Francisco, California 94102

schwartz@smwlaw.com

ltarpey@smwlaw.com

/s/ Evelyn Washington

Evelyn Washington, an Employee of the
Law Offices of Kermitt L. Waters



1 **NOE**
2 **LAW OFFICES OF KERMITT L. WATERS**
3 Kermitt L. Waters, Esq., Bar No. 2571
4 kermitt@kermittwaters.com
5 James J. Leavitt, Esq., Bar No. 6032
6 jim@kermittwaters.com
7 Michael A. Schneider, Esq., Bar No. 8887
8 michael@kermittwaters.com
9 Autumn L. Waters, Esq., Bar No. 8917
10 autumn@kermittwaters.com
11 704 South Ninth Street
12 Las Vegas, Nevada 89101
13 Telephone: (702) 733-8877
14 Facsimile: (702) 731-1964

15 *Attorneys for Plaintiff Landowners*

16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

18 180 LAND CO. LLC, a Nevada limited liability
19 company, et al.,

20 Plaintiffs,

21 v.

22 CITY OF LAS VEGAS, a political subdivision
23 of the State of Nevada, et al.,

24 Defendants.

CASE NO.: A-17-758528-J

DEPT. NO.: XVI

**NOTICE OF ENTRY OF ORDER
GRANTING EX PARTE APPLICATION
AND MOTION TO FILE LANDOWNERS'
MOTION TO DETERMINE TAKE AND
FOR SUMMARY JUDGMENT ON THE
FIRST, THIRD AND FOURTH CLAIMS
FOR RELIEF THAT EXCEEDS THE
EDCR 2.20(a) PAGE LIMIT**

PLEASE TAKE NOTICE that on the 1st day of April, 2021, an Order Granting Ex Parte Application and Motion to File Landowners' Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief that Exceeds the EDCR 2.2O(a) Page Limit was entered in the above-captioned case, a copy of which is attached hereto.

Dated this 2nd day of April, 2021.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ Kermitt L. Waters

KERMIT L. WATERS, ESQ., NBN 2571
JAMES J. LEAVITT, ESQ., NBN 6032
MICHAEL SCHNIEDER, ESQ., NBN 8887
AUTUMN WATERS, ESQ., NBN 8917

Attorneys for Plaintiff Landowners

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that I am an employee of the Law Offices of Kermit L. Waters,
3 and that on the 2nd day of April, 2021, pursuant to NRC 5(b) and EDCR 8.05(f), a true and
4 correct copy of the NOTICE OF ENTRY OF ORDER GRANTING EX PARTE
5 APPLICATION AND MOTION TO FILE LANDOWNERS' MOTION TO DETERMINE
6 TAKE AND FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH
7 CLAIMS FOR RELIEF THAT EXCEEDS THE EDCR 2.20(a) PAGE LIMITED was served on
8 the below via Court's electronic filing service system and/or deposited for mailing in the U.S.
9
10 Mail, postage prepaid and addressed to the following:

11 **McDONALD CARANO LLP**

12 George F. Ogilvie III, Esq.
13 Amenda C. Yen, Esq.
14 Christopher Molina, Esq.
15 2300 W. Sahara Avenue, Suite 1200
16 Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
ayen@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

17 **LAS VEGAS CITY ATTORNEY'S OFFICE**

18 Bryan K. Scott, Esq.
19 Philip R. Brynes, Esq.
20 Seth T. Floyd, Esq.
21 495 S. Main Street, 6th Floor
22 Las Vegas, Nevada 89101
bscott@lasvegasnevada.gov
pbrynes@lasvegasnevada.gov
sfloyd@lasvegasnevada.gov

23 **SHUTE, MIHALY & WEINBERGER LLP**

24 Andrew W. Schwartz (admitted *pro hac vice*)
25 Lauren M. Tarpey (admitted *pro hac vice*)
26 396 Hayes Street
27 San Francisco, California 94102

28 By: /s/ Evelyn Washington

An Employee of the Law Offices of
Kermit L. Waters

ORDR
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 Landowner

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendant.

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

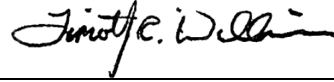
(PROPOSED)

**ORDER GRANTING EX PARTE
APPLICATION AND MOTION TO
FILE LANDOWNERS' MOTION TO
DETERMINE TAKE AND FOR
SUMMARY JUDGMENT ON THE
FIRST, THIRD AND FOURTH
CLAIMS FOR RELIEF THAT
EXCEEDS THE EDCR 2.20(a) PAGE
LIMIT**

ORDER

IT IS HEREBY ORDERED that Plaintiffs 180 LAND CO., LLC and FORE STARS, LTD. (collectively the "Landowners"), may file their Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief.

Dated this 1st day of April, 2021



B7B FE1 6948 3FDE
Timothy C. Williams
District Court Judge

ZJ

Respectfully submitted by:

LAW OFFICES OF KERMITT L. WATERS

By: /s/ Kermit L. Waters

KERMITT L. WATERS, ESQ.

Nevada Bar No. 2571

JAMES J. LEAVITT, ESQ.

Nevada Bar No. 6032

MICHAEL SCHNEIDER, ESQ.

Nevada Bar No. 8889

AUTUMN WATERS, ESQ.

Nevada Bar No. 8917

Attorneys for Plaintiff Landowners

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 180 Land Company LLC,
7 Petitioner(s)

CASE NO: A-17-758528-J

8 vs.

DEPT. NO. Department 16

9 Las Vegas City of,
10 Respondent(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 4/1/2021

16 Jeffry Dorocak

jdorocak@lasvegasnevada.gov

17 Leah Jennings

ljennings@mcdonaldcarano.com

18 Philip Byrnes

pbyrnes@lasvegasnevada.gov

19 Todd Bice

tlb@pisanellibice.com

20 Dustun Holmes

dhh@pisanellibice.com

21 Jeffrey Andrews

jandrews@lasvegasnevada.gov

22 Robert McCoy

rmccoy@kcnvlaw.com

23 Stephanie Allen

sallen@kcnvlaw.com

24 Christopher Kaempfer

ckaempfer@kcnvlaw.com

25 Adar Bagus

abagus@kcnvlaw.com

1	Robert Stewart	rstewart@hutchlegal.com
2	Suzanne Morehead	smorehead@hutchlegal.com
3	Michael Wall	mwall@hutchlegal.com
4	Maddy Carnate-Peralta	mcarnate@hutchlegal.com
5	Kimberly Peets	lit@pisanellibice.com
6	Autumn Waters	autumn@kermittwaters.com
7	Michael Schneider	michael@kermittwaters.com
8	James Leavitt	jim@kermittwaters.com
9	Kermitt Waters	kermitt@kermittwaters.com
10	Elizabeth Ham	EHam@ehbcompanies.com
11	Seth Floyd	sfloyd@lasvegasnevada.gov
12	Jelena Jovanovic	jjovanovic@mcdonaldcarano.com
13	Amanda Yen	ayen@mcdonaldcarano.com
14	George Ogilvie III	gogilvie@Mcdonaldcarano.com
15	Karen Surowiec	ksurowiec@Mcdonaldcarano.com
16	Christopher Molina	cmolina@mcdonaldcarano.com
17	Jennifer Knighton	jknighton@ehbcompanies.com
18	Matthew Schriever	mschriever@hutchlegal.com
19	CluAynne Corwin	ccorwin@lasvegasnevada.gov
20	Evelyn Washington	evelyn@kermittwaters.com
21	Stacy Sykora	stacy@kermittwaters.com
22	Desiree Staggs	dstaggs@kcnvlaw.com
23	Shannon Dinkel	sd@pisanellibice.com
24		
25		
26		
27		
28		

1	Debbie Leonard	debbie@leonardlawpc.com
2		
3	Andrew Schwartz	Schwartz@smwlaw.com
4	Lauren Tarpey	LTarpey@smwlaw.com
5	David Weibel	weibel@smwlaw.com
6		
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Heather S. Smith
CLERK OF THE COURT

MOT

Bryan K. Scott (NV Bar No. 4381)
Philip R. Byrnes (NV Bar No. 166)
Seth T. Floyd (NV Bar No. 11959)
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
sfloyd@lasvegasnevada.gov

(Additional Counsel Identified on Signature Page)

Attorneys for City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A-17-758528-J

DEPT. NO.: XVI

**CITY OF LAS VEGAS'
RULE 56(d) MOTION ON
ORDER SHORTENING TIME**

**(HEARING REQUESTED ON
ORDER SHORTENING TIME)**

OST Hearing Date: April 21, 2021
OST Hearing Time: 9:30 AM

Pursuant to NRCp 56(d) and EDCR 2.26, the City of Las Vegas moves the Court for denial without prejudice of the Motion to Determine Take and for Summary Judgement on the First, Third, and Fourth Claims for Relief (the "MSJ") filed by 180 Land Co LLC and Fore Stars Ltd. (the "Developer"). This Motion is based on the following points and authorities, the Declaration of George F. Ogilvie III, Esq. ("Ogilvie Decl.") attached as **Exhibit A**, all papers and pleadings on file with the Court, and any argument allowed by the Court at the hearing on this matter.

1 Denial of the motion is warranted because the MSJ relies on declarations, affidavits, and
2 other statements of individuals: (i) who the City has not had an opportunity to depose; (ii) who the
3 Developer failed to identify as a witness in its Rule 16.1 disclosures; and (iii) whose
4 communications the Developer has repeatedly refused to produce. Accordingly, discovery into the
5 matters asserted in the MSJ for which the Developer has either failed or refused to produce is
6 necessary.

7 The City brings this Motion with a request for an Order Shortening Time pursuant to EDCR
8 2.26 because the City should not be forced to file an opposition to the MSJ without an opportunity
9 to marshal facts essential to the opposition.

10 Respectfully submitted this 6th day of April, 2021.

11 McDONALD CARANO LLP

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

15 LAS VEGAS CITY ATTORNEY'S OFFICE
16 Bryan K. Scott (NV Bar No. 4381)
17 Philip R. Byrnes (NV Bar No. 166)
18 Seth T. Floyd (NV Bar No. 11959)
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101

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

23 *Attorneys for City of Las Vegas*

24

25

26

27

28


ORDER SHORTENING TIME

It appearing to the satisfaction of the Court and good cause appearing therefor,

IT IS HEREBY ORDERED that the hearing on the **CITY OF LAS VEGAS' RULE 56(d)**
MOTION shall be shortened and heard before the above-entitled Court in Department XVI on the
21 day of April, 2021 at 9:30 a.m. / ~~p.m.~~, or as soon thereafter as counsel may be
heard.

DATED this ____ day of April, 2021.

Dated this 8th day of April, 2021



DISTRICT COURT JUDGE

ZJ

Opposition due on or before April 16,
2021 at 5:00 PM.

238 191 56FB 00F0
Timothy C. Williams
District Court Judge

Reply due on or before April 20, 2021
at 5:00 PM.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

As the Court is well aware, this case has been embroiled in discovery disputes for more than a year and a half because of the Developer's refusal to produce documents in response to the City's requests for discovery. The City has been diligent in pursuing discovery in this case, but the Developer has refused to produce documents and responses to the City's requests for even the most basic information regarding the facts and circumstances surrounding the Developer's acquisition of the Badlands Property.

On March 26, 2021, the Developer filed a Motion to Determine Take and for Summary Judgement on the First, Third, and Fourth Claims for Relief (the "MSJ"), giving the City two weeks to file an opposition, and asking the Court to rule on the merits of this case without resolution of the pending discovery disputes and necessarily denying the City further discovery, including a deposition of the Developer's principal, that the City has, for more than a year, indicated it required to prepare a defense. *See Ex. A, Ogilvie Decl. at ¶¶5-6.* The Court should deny this sudden MSJ or deny it without prejudice until the City has the opportunity to complete discovery.

In this case, the Developer alleges that in 2017, the City effected a regulatory taking of the entire Badlands golf course property, including the 35-Acre Property at issue in this case. Regulatory takings are concerned with the economic impact of regulation on property. "[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (citing *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013)). Accordingly, to prove a regulatory taking, the Developer must establish the value of the Badlands before the City's alleged regulation, and then show that the before value was wiped out or nearly wiped out by the City's regulation. In addition, under its *Penn Central* regulatory taking claim the Developer must show not only that the City wiped out the before value, but also that the City interfered with the Developer's investment-backed expectations. *State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "completely deprive an owner of all economically beneficial use of her property") (quoting *Lingle*

1 *v. Chevron, U.S.A.*, 544 U.S. 528, 538 (2005)); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev.
2 638, 649-50, 855 P.2d 1027, 1034 (1993) (regulation must deny "all economically viable use of []
3 property" to constitute a taking under either categorical or *Penn Central* tests); *Boulder City v.*
4 *Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-35 (1994) (taking requires
5 agency action that "destroy[s] all viable economic value of the prospective development property").

6 The value of the Badlands Property before the City's alleged regulatory actions is therefore
7 an essential element of the Developer's claim to show both the value that was allegedly wiped out
8 and the effect of the City's regulation on the Developer's investment in the property. Next to the
9 City's regulatory action, which is a matter of public record, the price the Developer paid to purchase
10 the Badlands is the best evidence of the value of the property and the Developer's investment in the
11 property, and is therefore the most important evidence of the impact of the City's alleged
12 regulations in the entire case.

13 The Developer knows full well that it paid less than \$7.5 million for the Badlands¹ and that,
14 by its own allegations, the City's approval of 435 luxury housing units in a 17-acre portion of the
15 Badlands has already increased the value of the Badlands to \$26,228,569, multiplying its
16 investment in the Badlands by a factor of at least 4. *See* Membership Interest Purchase and Sale
17 Agreement attached as **Exhibit B**. The Developer, by contrast, claims that the value of the Badlands
18 before the City's alleged regulatory action, was \$386 million. *See* Plaintiff Landowners' Twentieth
19 Supplement to Initial Disclosures attached as **Exhibit C**. If the facts come out, however, the
20 Developer knows that the value of the Badlands before any City action was less than \$7.5 million
21 and the City's actions will have increased the value of the Badlands and multiplied the Developer's
22 investment, demolishing its regulatory taking claims. That explains why, for more than a year, the
23 Developer refused to produce the purchase and sale agreement through which the Developer
24 acquired the Badlands Property. **Ex. A**, Ogilvie Decl. at ¶7. After finally producing the purchase
25

26 ¹ The purchase price was less than \$7.5 million because the Developer bought personal property
27 and contracts for the golf course in addition to the land. Other documents produced by the
28 Developer indicate that the purchase price for the Badlands was only \$4.5 million. The City awaits
the Developer's production of the documents the City moved to compel that will confirm that
figure.

1 agreement – which disclosed a purchase price of only \$7.5 million for the entire 250-acre Badlands
2 Property – the Developer refused to amend its interrogatory response claiming that the Developer
3 paid \$45 million for the Badlands Property. *Id.* at ¶7. Then the Developer refused to produce
4 documents to support its claim that it paid \$45 million for the property. *Id.*

5 The Developer’s discovery abuses were briefed extensively in the City’s Motion to Compel
6 Discovery Responses, Documents and Damages Calculations and Related Documents filed on
7 October 22, 2020 (the “Motion to Compel”). *See* Motion to Compel attached as **Exhibit D**. Per
8 the order entered by the Court on February 24, 2021, the Developer was required to produce all
9 documents related to its contention that it paid \$45 million for the Badlands Property. *See* Order
10 Granting in Part and Denying In Part Defendant City of Las Vegas’ Motion to Compel Discovery
11 (“February 24 Order”) attached as **Exhibit E**. According to the Developer’s counsel, there were
12 “binders and binders” of documents related to transactions that occurred over a 20-year period
13 through which the Developer allegedly acquired the right to purchase the Badlands Property. *See*
14 Nov. 17, 2020 Hearing Transcript attached as **Exhibit F**, at 47:17-25, 49:24-50:5.

15 Instead of providing documents for this 20-year history, the Developer produced documents
16 from just one transaction that occurred in 2005. **Ex. A**, Ogilvie Decl. at ¶10. Despite failing to
17 comply with the February 24 Order, the Developer submitted two declarations in support of the
18 MSJ made by Yohan Lowie in which he makes factual assertions regarding the 20-year history
19 without any supporting documents. *See* MSJ Exhibits 34 and 35.

20 The City has reminded the Developer that the February 24 Order expressly states that the
21 City is entitled to receive all documents related to the Developer’s contention that it paid \$45
22 million for the Badlands Property before the City takes Mr. Lowie’s deposition. *See* Letter to
23 Developer’s Counsel dated April 1, 2021 attached as **Exhibit G**. Nonetheless, the City is unable
24 to prepare an opposition to the MSJ without taking Mr. Lowie’s deposition and without the
25 documents the Developer was required to produce pursuant to the February 24 Order. **Ex. A**,
26 Ogilvie Decl. at ¶ 12.

27 The City also needs discovery of matters for which the City previously filed a motion to
28 compel but on which the February 24 Order denied discovery including, but not limited to,

1 communications between the Developer and its land use consultants, including attorney Chris
2 Kaempfer. *Id.* at ¶13. The Developer relies extensively on Mr. Kaempfer's declaration to support
3 its claims about zoning and the Badlands Property's development potential. *See* MSJ at 13:12-21,
4 19:13-17, 20:2-14, 33:13-19, 37:13-17, 39:24-40:1-6. The Developer's refusal to produce
5 communications with Chris Kaempfer is one of several outstanding discovery issues addressed in
6 the City's motion for reconsideration that is currently pending. *See* Motion for Reconsideration of
7 Order Granting in Part and Denying in Part the City's Motion to Compel attached as **Exhibit H**.
8 Other issues addressed in the motion for reconsideration that are directly relevant to the City's
9 opposition to the MSJ include the Developer's refusal to produce communications with its lenders,
10 communications between the Developer's principals, and communications with the Peccole family
11 regarding the purchase price for the Badlands. **Ex. A**, Ogilvie Decl. at ¶10.

12 In support of the MSJ, the Developer also relies on an affidavit from Donald Richards, who
13 is apparently the superintendent of the Badlands property. *See* MSJ Ex. 150. The City has never
14 heard of Mr. Richards until now because the Developer failed to identify him in the Developer's
15 Rule 16.1 disclosures or any supplement thereof. *See* Plaintiff Landowner's Twentieth Supplement
16 to Initial Disclosures attached as **Exhibit C**. The City was forced to cancel a previously scheduled
17 site inspection in March 2020 due to the outbreak of the COVID-19 pandemic. A site inspection
18 will be necessary to gather evidence to oppose Mr. Richards' affidavit. **Ex. A**, Ogilvie Decl. at ¶14.

19 The Developer filed the MSJ before the discovery cut-off, while the City's requests for
20 additional discovery of vital evidence are still pending, essentially cutting off the City's discovery.
21 The timing of the MSJ motion is obviously the Developer's attempt to seek summary adjudication
22 before producing the evidence that will confirm the Developer's taking claims are completely
23 without merit. Accordingly, the City should not be required to oppose the MSJ until: (i) the
24 Developer fully complies with the February 24 Order and produces the documents related to all
25 relevant transactions between the Developer and the Peccole family; (ii) the City has had the
26 opportunity to depose Yohan Lowie; (iii) the City has had the opportunity to inspect the Badlands
27 property to gather evidence necessary to oppose the MSJ; (iv) the Court reconsiders the February
28 24 Order to the extent that it denies the City's request for discovery of matters at issue in the MSJ;

1 and (v) the City has had the opportunity to complete all other discovery necessary to prepare its
 2 case.

3 **II. LEGAL ARGUMENT**

4 **A. Standard for a NRCP 56(d)**

5 Rule 56(d) of the Nevada Rules of Civil Procedures provides that, “[i]f a nonmovant shows
 6 by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its
 7 opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain
 8 affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” This rule
 9 allows the Court to deny the MSJ without prejudice to allow the City to marshal additional facts.
 10 *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117–18, 110 P.3d 59, 62 (2005). The
 11 purpose behind the rule is to prevent the opposing party from being “railroaded” by a premature
 12 motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

13 [S]ummary judgment is improper when a party seeks additional time to conduct
 14 discovery to compile facts to oppose the motion... [W]hen no dilatory motive [is]
 15 shown, it [is] an abuse of discretion to refuse a request for further discovery at such
 an early stage in the proceedings [when the summary judgment motion was filed a
 year after the complaint].

16 *Aviation Ventures*, 121 Nev. at 118, 110 P.3d at 62, citing *Halimi v. Blacketor*, 105 Nev. 105, 106,
 17 770 P.2d 531, 531–32 (1989).

18 **B. A Denial Without Prejudice Is Warranted Because The Developer’s 19 Refusal to Comply With Discovery Has Deprived the City of Facts and Evidence Needed to Oppose the Motion for Summary Judgment**

20 **1. The Developer’s Failure to Comply with The February 24 Order**

21 The February 24 Order granted the City’s motion to compel with respect to documents that
 22 allegedly support the Developer’s claim that it paid \$45 million for the Badlands Property. During
 23 the hearing on the Motion to Compel, the Developer’s counsel stated that “the right to acquire the
 24 250-acre property, the due diligence done to acquire that property, *and the consideration paid* for
 25 the right to acquire the property *occurred over an approximately 20-year period.*” See Ex. F, Nov.
 26 17, 2020 Transcript at 19:18-21 (emphasis added). The Developer’s counsel also stated:

27 *Just one of those complicated transactions* that Mr. Lowie entered
 28 into with the Peccole family involved the Queensridge Towers; Tivoli
 Village, which is built now; Hualapai Commons, which is on the

corner of Hualapai and Sahara here in Las Vegas; two other partners;
the prior golf course operator. *Just one of them.*

Id. at 22:10-16 (emphasis added).

Contrary to the representations of the Developer's counsel, however, the documents the Developer produced pursuant to the February 24 Order relate exclusively to the one transaction involving Queensridge Towers, Tivoli Village, and Hualapai Commons, which occurred in 2005. *See Ex. A*, Ogilvie Decl. at ¶10. None of the documents produced refer to any transactions from before or after 2005. *Id.* Comparing the documents produced with the representations made by the Developer's counsel confirms that the Developer failed to comply with the February 24 Order. *Id.*

The February 24 Order expressly states that the City is entitled to receive all documents related to the consideration for the Badlands Property before taking Mr. Lowie's deposition; however, this is not the only issue raised by the MSJ that requires Mr. Lowie's deposition to prepare the City's opposition. *Id.* at ¶15. Mr. Lowie's declarations contain several claims not only about his transactions with the Peccole family but also the proposals for redeveloping the Badlands Property. *See* MSJ Exhibits 34 and 35. The MSJ should be denied without prejudice and the Developer should be compelled to produce all documents the Developer's counsel indicated would be produced, and the City should be allowed to take Mr. Lowie's deposition.

2. The City's Pending Motion for Reconsideration

The City filed a motion for reconsideration on March 11, 2021 asking the court to reconsider parts of the February 24 Order that deny the City the right to discovery related to several categories of documents implicated by the MSJ, including communications with the Developer's lenders and land use consultants, communications with the Peccole family, and communications with the Developer's principals. Despite the Developer's refusal to produce these communications, the Developer's MSJ makes claims pertaining to the same subjects as the communications requested by the City.

For example, Mr. Lowie's declaration claims that, in 2001, the Peccole family told him the Badlands property was "intended for residential development," that it "would eventually be developed," and that it was "developable at any time." *See* MSJ Ex. 34 at ¶4. However, the purchase

1 agreement contains no representations or warranties regarding zoning and actually requires that the
2 Developer indemnify the Peccole family in the event of any claims or litigation arising from
3 attempts to redevelop the property. *See* MSJ Exhibit 34, at ¶4; *see also* **Ex. B**, PSA at Section 8.13.
4 The Developer refused to produce any communications with the Peccole family before 2014 but
5 now relies on communications extending back as far as 2001 with members of the Peccole family
6 not identified by name.

7 **C. The Discovery the City Seeks Is Essential to the City’s Opposition to the**
8 **Developer’s Motion for Summary Judgment**

9 **1. The Developer’s Contention that the Badlands Property Has No Value**

10 The Developer’s categorical taking claim and non-regulatory taking claim assert that the
11 City rendered the 35-Acre Property valueless. *See* Second Amended Complaint (“SAC”) attached
12 as **Exhibit I**, at ¶¶166, 209. In the MSJ, the Developer argues that the City’s open space ordinances
13 rendered the Badlands Property useless and valueless. The communications and other documents
14 sought by the City’s motion for reconsideration are necessary to rebut the Developer’s claim that
15 the Badlands Property had a value of \$386 million before the City took the alleged action, that the
16 value of the Badlands after the City’s action is zero.

17 The City also seeks potentially significant documents concerning the Developer’s
18 communications with its lender. If the Badlands Property had no value, the only person who would
19 be more concerned than the Developer is the Developer’s lender, Vegas Ventures LLC. If the
20 property has no value, then Vegas Ventures LLC would have no security for its loan. A
21 representative of Vegas Ventures LLC actually appeared at public hearings to argue that the City’s
22 open space ordinance, Bill 2018-24, caused a taking. *See* MSJ Exhibit 118 at p. 92-94; *see also*
23 MSJ Exhibit 119 at p. 37-44. In one hearing, the lender’s representative claimed that if the
24 ordinance were “allowed to be given retroactive application...the collateral...will be decreased in
25 value and possibly rendered valueless.” *See* MSJ Exhibit 119 at p. 38.

26 The City should also be permitted to conduct discovery regarding the value of the Badlands
27 for its historic use as a golf course. While residential use of the golf course may be more profitable,
28 the Developer has not produced any evidence to support its claim that the golf course could not be

operated profitably, such as the number of tee times booked, the green fees charged, overall operating costs, etc. **Ex. A**, Ogilvie Decl. at ¶16. The Developer’s refusal to produce evidence related to the golf course operations is another issue addressed by the City’s motion for reconsideration. *Id.*

2. The Developer’s Contentions Regarding Zoning

As explained in the City’s motion to compel, an appraisal of the Badlands property in 2015 relied on Chris Kaempfer’s opinion that it was “likely” that the property could be rezoned to allow for development. *See* Valbridge Appraisal attached as **Exhibit J** at p. 30. Although Mr. Kaempfer recognized that development would not be permitted without a zone change, the Developer is now claiming that Mr. Kaempfer advised the Developer the exact opposite. *See* MSJ at 13:12-21. The City’s motion for reconsideration asks the Court to reconsider the February 24 Order to compel the Developer to produce communications with Mr. Kaempfer or at least produce a privilege log. *See Ex. A*, Ogilvie Decl. at ¶17. The Developer’s extensive reliance on Mr. Kaempfer’s declaration to support the MSJ provides yet another reason why communications with Mr. Kaempfer are not privileged.

The City attempted to meet and confer with the Developer on three separate occasions regarding the Developer’s refusal to produce communications with Mr. Kaempfer and its other land use consultants. *Id.* at ¶18. The Developer initially indicated that it would produce a privilege log for these communications but later changed its position. *Id.* In opposing the City’s motion to compel, the Developer acknowledged that there are thousands of emails with Mr. Kaempfer that have not been listed on a privilege log. *See* Opposition to Motion to Compel attached as **Exhibit K** at p 10, fn. 9. By refusing to produce these communications, the Developer prevented the City from obtaining evidence to rebut Mr. Kaempfer’s declaration.

3. The Developer’s Public Park Conspiracy Theory

The Developer claims that two members of the City Council (a minority) conspired with the surrounding neighborhood (their constituents) to prevent all development on the Badlands Property. *See* MSJ 16-19. **One of these City Council members, Steve Seroka, did not even assume office until after the Developer’s applications for the 35-Acre Property were denied.** *See* MSJ Exhibit

53 at p. 144. Nonetheless, the Developer argues that “the City through its representatives conducted their duties – under the direction of the surrounding neighbors – with the intention of denying the constitutional property rights of the Landowners in order to take their Land and give it to the surrounding neighbors.” *See* MSJ at 18:6-9.

To support this conspiracy theory the Developer submitted an affidavit from the superintendent for the Badlands property, Donald Richards, who claims that people trespassing on the Badlands property began telling him “it is our open space” beginning in or around early fall 2017 (i.e., after the applications for the 35-Acre Applications were denied). *See* MSJ Exhibit 150 at ¶ 7. The City had never even heard of Mr. Richards until Developer filed the MSJ. *See* **Ex. A**, Ogilvie Decl. at ¶ 14. Mr. Richards is not identified on the Developer’s Rule 16.1 disclosures. *See* **Ex. C**, Plaintiff Landowners’ Twentieth Supplement to Initial Disclosures.

Attached to Mr. Richards’ affidavit are roughly 160 photos of alleged trespassers taken by infrared cameras he installed on the property. *Id.* The Developer claims that this is evidence that the neighbors are using the Badlands property “in accordance with Councilman Seroka’s direction.” *See* MSJ at 18:20-23. Having reviewed the photos closely, it appears that none of them were taken on the 35-Acre Property. *See* **Ex. A**, Ogilvie Decl. at ¶11. In fact, a substantial number of photos appear to have been taken on the 17-Acre Property, where the City **approved** the Developer’s 435-luxury condominium project. *Id.*

A site inspection will allow the City to determine the general location where the photos were taken and gather evidence necessary to rebut this evidence. *Id.* A site inspection is also necessary to rebut the Developer’s claim that the City took actions to deny the Developer access to the Badlands Property and to gather evidence to demonstrate that the existing access was sufficient. Unfortunately, the City was forced to cancel a previously scheduled site visit in March 2020 due to the COVID-19 pandemic. *Id.* The City intends to reschedule the site visit as soon as it is safe to do so. *Id.*

...

...

...

1 **III. CONCLUSION**

2 Based upon the foregoing, the City respectfully requests that the Court deny the MSJ
3 without prejudice until: (i) the Developer fully complies with the February 24 Order and produces
4 the documents related to all relevant transactions between the Developer and the Peccole family;
5 (ii) the City has had the opportunity to depose Yohan Lowie; (iii) the City has had the opportunity
6 to inspect the Badlands property to gather evidence necessary to oppose the MSJ; (iv) the Court
7 reconsiders the February 24 Order to the extent that it denies the City's request for discovery of
8 matters at issue in the MSJ; and (v) the City has had the opportunity to complete all other discovery
9 necessary to prepare its case.

10 Respectfully submitted this 6th day of April, 2021.

11 McDONALD CARANO LLP

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

15 LAS VEGAS CITY ATTORNEY'S OFFICE
16 Bryan K. Scott (NV Bar No. 4381)
17 Philip R. Byrnes (NV Bar No. 166)
18 Seth T. Floyd (NV Bar No. 11959)
495 South Main Street, 6th Floor
Las Vegas, Nevada 89101

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

23 *Attorneys for City of Las Vegas*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 6th day of April, 2021, I caused a true and correct copy of the foregoing **CITY OF LAS VEGAS' RULE 56(d) MOTION ON ORDER SHORTENING TIME** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification, and as referenced below to the following:

LAW OFFICES OF KERMITT L. WATERS

Kermitt L. Waters, Esq.
James J. Leavitt, Esq.
Michael A. Schneider, Esq.
Autumn L. Waters, Esq.,
704 South Ninth Street
Las Vegas, Nevada 89101

EHB COMPANIES

Elizabeth Ghanem Ham, Esq.
1215 S. Fort Apache Road, Suite 120
Las Vegas, NV 89117

/s/ Jelena Jovanovic

An employee of McDonald Carano LLP

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 180 Land Company LLC,
7 Petitioner(s)

CASE NO: A-17-758528-J

8 vs.

DEPT. NO. Department 16

9 Las Vegas City of,
10 Respondent(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 4/8/2021

16 Jeffry Dorocak	jdorocak@lasvegasnevada.gov
17 Leah Jennings	ljennings@mcdonaldcarano.com
18 Philip Byrnes	pbyrnes@lasvegasnevada.gov
19 Todd Bice	tlb@pisanellibice.com
20 Dustun Holmes	dhh@pisanellibice.com
21 Jeffrey Andrews	jandrews@lasvegasnevada.gov
22 Robert McCoy	rmccoy@kcnvlaw.com
23 Stephanie Allen	sallen@kcnvlaw.com
24 Christopher Kaempfer	ckaempfer@kcnvlaw.com
25 Adar Bagus	abagus@kcnvlaw.com
26	
27	
28	

1	Robert Stewart	rstewart@hutchlegal.com
2	Suzanne Morehead	smorehead@hutchlegal.com
3	Michael Wall	mwall@hutchlegal.com
4	Maddy Carnate-Peralta	mcarnate@hutchlegal.com
5	Kimberly Peets	lit@pisanellibice.com
6	Autumn Waters	autumn@kermittwaters.com
7	Michael Schneider	michael@kermittwaters.com
8	James Leavitt	jim@kermittwaters.com
9	Kermitt Waters	kermitt@kermittwaters.com
10	Elizabeth Ham	EHam@ehbcompanies.com
11	Jelena Jovanovic	jjovanovic@mcdonaldcarano.com
12	Amanda Yen	ayen@mcdonaldcarano.com
13	George Ogilvie III	gogilvie@Mcdonaldcarano.com
14	Karen Surowiec	ksurowiec@Mcdonaldcarano.com
15	Christopher Molina	cmolina@mcdonaldcarano.com
16	Jennifer Knighton	jknighton@ehbcompanies.com
17	Matthew Schriever	mschriever@hutchlegal.com
18	CluAynne Corwin	ccorwin@lasvegasnevada.gov
19	Evelyn Washington	evelyn@kermittwaters.com
20	Stacy Sykora	stacy@kermittwaters.com
21	Desiree Staggs	dstaggs@kcnvlaw.com
22	Shannon Dinkel	sd@pisanellibice.com
23	Debbie Leonard	debbie@leonardlawpc.com
24		
25		
26		
27		
28		

1	Andrew Schwartz	Schwartz@smwlaw.com
2		
3	Lauren Tarpey	LTarpey@smwlaw.com
4	David Weibel	weibel@smwlaw.com
5	Sandy Guerra	sandy@kermittwaters.com
6		
7		
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