**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**Case No. 84345**
**and**
**Case No. 84640**



CITY OF LAS VEGAS, a political subdivision of the State of Nevada,

Appellant

v.

180 LAND CO, LLC, a Nevada limited-liability company, FORE STARS LTD., a Nevada limited liability company,

Respondents

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District Court Case No.: A-17-758528-J
Eighth Judicial District Court of Nevada

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# APPELLANT CITY OF LAS VEGAS' MOTION TO EXCEED WORD LIMIT FOR OPENING BRIEF


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| LAS VEGAS<br>CITY ATTORNEY'S OFFICE<br>Bryan K. Scott (#4381)<br>Philip R. Byrnes (#166)<br>Rebecca Wolfson (#14132)<br>495 S. Main Street, 6th Floor<br>Las Vegas, NV 89101<br>Phone: 702.229.6629<br>Fax: 702.386.1749<br>bscott@lasvegasnevada.gov<br>pbyrnes@lasvegasnevada.gov<br>rwolfson@lasvegasnevada.gov | McDONALD CARANO LLP<br>George F. Ogilvie III (#3552)<br>Amanda C. Yen (#9726)<br>Christopher Molina (#14092)<br>2300 W. Sahara Ave, Suite 1200<br>Las Vegas, NV 89102<br>Phone: 702.873.4100<br>Fax: 702.873.9966<br>gogilvie@mcdonaldcarano.com<br>ayen@mcdonaldcarano.com<br>cmolina@mcdonaldcarano.com |

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| LEONARD LAW, PC<br>Debbie Leonard (#8260)<br>955 S. Virginia St., Suite #220<br>Reno, NV 89502<br>775-964-4656<br>debbie@leonardlawpc.com | SHUTE, MIHALY & WEINBERGER, LLP<br>Andrew W. Schwartz<br>(CA Bar No. 87699)<br>(Admitted pro hac vice)<br>Lauren M. Tarpey<br>(CA Bar No. 321775)<br>(Admitted pro hac vice)<br>396 Hayes Street<br>San Francisco, California 94102 |

Appellant City of Las Vegas moves to exceed the 14,000-word limit imposed by NRAP 28.1(e)(2) for its Opening Brief attached hereto as Exhibit 2. This motion is supported by the following points and authorities and declaration of Debbie Leonard attached hereto as Exhibit 1.

On August 12, 2022, the parties filed a Stipulation to Modify Briefing Schedule to streamline the briefing schedule from seven to four briefs in the consolidated cross-appeals. In that stipulation, the parties advised the Court that it may be necessary for the parties to request an enlargement of the type-volume limitation upon filing of their individual briefs since: (1) the total briefs in the cross-appeals are being reduced from seven to four; (2) the joint appendix is 130 appendix volumes;[1] and (3) numerous important issues are presented in the appeals. On September 7, 2022, the Court granted the parties' stipulation and consolidated the cases for briefing.

**MEMORANDUM OF POINTS AND AUTHORITIES**

NRAP 28.1(e)(1-2) states "[t]he appellant's opening brief...is acceptable if it contains no more than 14,000 words…unless…permission of the court is obtained

[1] The joint appendix is now 131 volumes.

under Rule 32(a)(7)(D)…" NRAP 32(a)(7)(D) authorizes the filing of a motion to file a brief that exceeds the applicable length limit "on a showing of diligence and good cause."

This case involves the district court's award of a $34 million judgment ("the Judgment") and approximately $14 million in post-judgment awards (the "Additional Sums") against the City for declining to amend its General Plan to allow housing in an area that has been designated for parks, recreation and open space since 1992. In awarding these substantial sums from the public treasury, the district court contradicted its own factual findings and legal conclusions, contravened this Court's long-standing precedents, and turned the entire land use regulatory framework in NRS Chapter 278 on its head.

The stakes in this matter are extraordinary. In addition to the excessive amount of the Judgment and Additional Sums, the district court ruled that a local authority such as the City has no discretion to deny a land use application so long as property is zoned for the proposed use. According to the district court's flawed analysis, the City's General Plan limitations and the Council's obligations under NRS Chapter 278 – to ensure compatibility among land uses, preserve air and water quality, promote the conservation of open space, provide for recreation, and generally

promote health and welfare – do not matter because zoning supersedes everything else.

The district court held that, if the City does not approve a project simply because it is an allowed use within the applicable zoning district, the City must pay just compensation for a taking. That conclusion is contrary to Nevada's well-established jurisprudence, which holds that zoning does not create a vested property right or strip a decision maker of its discretion to deny an application.

Counsel for the City worked diligently to present the Opening Brief in a concise manner. Counsel spent considerable time attempting to shorten the Opening Brief, remove words, and distill the procedural history and argument to meet the word limit. The City respects the Court's time and is cognizant that the Court does not want to read long briefs.

However, due to the gravity of this matter and the enormous sums of money at stake, the City likewise needed to ensure that the most important facts, conclusions and arguments are presented to the Court for consideration. The net result of counsel's effort to strike this balance is that the Opening Brief is 21,675 words, so the City seeks leave to file its Opening Brief with 7,675 more words than allowed under NRAP 28.1(e)(2). Due to the extensive procedural history of the case, the

numerous legal errors committed by the district court, and the need to address the issues in the combined cross-appeal – as well as both pre- and post-Judgment matters – in one opening brief, the City respectfully submits that it has exercised diligence and demonstrated good cause to exceed the 14,000 word limit in NRAP 28.1(e)(2) and requests leave to do so.

**AFFIRMATION**

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person

DATED this 17th day of October, 2022.

BY: /s/ Debbie Leonard


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|---|---|
| LAS VEGAS<br>CITY ATTORNEY'S OFFICE<br>Bryan K. Scott (#4381)<br>Philip R. Byrnes (#166)<br>Rebecca Wolfson (#14132)<br>495 S. Main Street, 6th Floor<br>Las Vegas, NV 89101<br>Phone: 702.229.6629<br>Fax: 702.386.1749<br>bscott@lasvegasnevada.gov<br>pbyrnes@lasvegasnevada.gov<br>rwolfson@lasvegasnevada.gov | McDONALD CARANO LLP<br>George F. Ogilvie III (#3552)<br>Amanda C. Yen (#9726)<br>Christopher Molina (#14092)<br>2300 W. Sahara Ave, Suite 1200<br>Las Vegas, NV 89102<br>Phone: 702.873.4100<br>Fax: 702.873.9966<br>gogilvie@mcdonaldcarano.com<br>ayen@mcdonaldcarano.com<br>cmolina@mcdonaldcarano.com |

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|---|---|
| LEONARD LAW, PC<br>Debbie Leonard (#8260)<br>955 S. Virginia St., Suite #220<br>Reno, NV 89502<br>775-964-4656<br>debbie@leonardlawpc.com | SHUTE, MIHALY & WEINBERGER, LLP<br>Andrew W. Schwartz<br>(CA Bar No. 87699)<br>(Admitted pro hac vice)<br>Lauren M. Tarpey<br>(CA Bar No. 321775)<br>(Admitted pro hac vice)<br>396 Hayes Street<br>San Francisco, California 94102 |

*Attorneys for City of Las Vegas*

## NRAP 32(a)(9)(C) ATTORNEY'S CERTIFICATE

I hereby certify that the opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that the opening brief exceeds the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 21,675 words.

DATED this 17th day of October, 2022

LEONARD LAW, PC

BY: /s/ Debbie Leonard
Debbie Leonard (#8260)
955 S. Virginia St., Suite #220
Reno, NV 89502
775-964-4656
debbie@leonardlawpc.com

(additional counsel listed above)

*Attorneys for City of Las Vegas*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on October 17, 2022, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants below who are registered as E-Flex users will be served by the EFlex system upon filing. All others will be served by first-class mail.

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

Claggett & Sykes Law Firm
Micah S. Echols, Esq.
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
*Attorneys for 180 Land Co., LLC and Fore Stars, Ltd.*

EHB Companies
Elizabeth Ham, Esq.
1215 S. Fort Apache Road, Suite 120
Las Vegas, NV 89117
*Attorneys for 180 Land Co., LLC and Fore Stars, Ltd.*

*/s/ Tricia Trevino*
An employee of Leonard Law, PC

# EXHIBIT 1

# EXHIBIT 1

**DECLARATION OF DEBBIE LEONARD IN SUPPORT OF MOTION TO EXCEED WORD LIMIT FOR OPENING BRIEF**

I, Debbie Leonard, do hereby swear under penalty of perjury that the assertions in this declaration are true and correct.

1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated within this declaration. If called as a witness, I would be competent to testify to these facts.

2. I am the owner of Leonard Law, PC and counsel of record for Appellant City of Las Vegas.

3. This declaration is offered in support of Appellant's Motion to Exceed Word Limit For Opening Brief.

4. On August 12, 2022, the parties filed a Stipulation to Modify Briefing Schedule to streamline the briefing schedule from seven to four briefs in the consolidated cross-appeals. In that stipulation the parties advised the Court that it may be necessary for the parties to request an enlargement of the type-volume limitation upon filing of their individual briefs since: (1) the total briefs in the cross-appeals are being reduced from seven to four; (2) the joint appendix is 130 appendix volumes; and (3) numerous important issues are presented in the appeals. On September 7, 2022, the Court granted the parties' Stipulation and consolidated the cases for briefing. The Joint Appendix is now 131 volumes.

5. This case involves the district court's award of a $34 million judgment ("the Judgment") and approximately $14 million in post-judgment awards (the "Additional Sums") against the City for declining to amend its General Plan to allow housing in an area that has been designated for parks, recreation and open space since 1992. In awarding these substantial sums from the public treasury, the district court contradicted its own factual findings and legal conclusions, contravened this Court's long-standing precedents, and turned the entire land use regulatory framework in NRS Chapter 278 on its head.

6. The stakes in this matter are extraordinary. In addition to the excessive amount of the Judgment and Additional Sums, the district court ruled that a local authority such as the City has no discretion to deny a land use application so long as property is zoned for the proposed use. According to the district court's flawed analysis, the City's General Plan limitations and the Council's obligations under NRS Chapter 278 – to ensure compatibility among land uses, preserve air and water quality, promote the conservation of open space, provide for recreation, and generally promote health and welfare – do not matter because zoning supersedes everything else.

7. The district court held that, if the City does not approve a project simply because it is an allowed use within the applicable zoning district, the City must pay just compensation for a taking. That conclusion is contrary to Nevada's well-

established jurisprudence, which holds that zoning does not create a vested property right or strip a decision maker of its discretion to deny an application.

8. I worked diligently to present the Opening Brief in a concise manner. I spent considerable time attempting to shorten the Opening Brief, remove words, and distill the procedural history and argument to meet the word limit. I respect the Court's time and am cognizant that the Court does not want to read long briefs.

9. However, due to the gravity of this matter and the enormous sums of money at stake, the City likewise needed to ensure that the most important facts, conclusions and arguments are presented to the Court for consideration. The net result of my effort to strike this balance is that the Opening Brief is 21,675 words, so the City seeks leave to file its Opening Brief with 7,675 more words than allowed under NRAP 28.1(e)(2). Due to the extensive procedural history of the case, the numerous legal errors committed by the district court, and the need to address the issues in the combined cross-appeal – as well as both pre- and post-Judgment matters – in one opening brief, I respectfully submit that the City has exercised diligence and demonstrated good cause to exceed the 14,000 word limit in NRAP 28.1(e)(2) and requests leave to do so.

10. I believe diligence and good cause exist to grant the Motion to Exceed the Word Limit.

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

DATED October 17, 2022

/s/ Debbie Leonard
Debbie Leonard

# EXHIBIT 2

# EXHIBIT 2

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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# APPELLANT CITY OF LAS VEGAS' OPENING BRIEF


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## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. The City of Las Vegas is a political subdivision of the State of Nevada and has no corporate affiliation.
2. The City of Las Vegas is represented by the following:
    a. Las Vegas City Attorney's Office
    b. McDonald Carano LLP
    c. Shute, Mihaly & Weinberger, LLP
    d. Leonard Law, PC

DATED this 17th day of October, 2022

LEONARD LAW, PC

BY: /s/ Debbie Leonard
Debbie Leonard (#8260)
955 S. Virginia St., Suite #220
Reno, NV 89502
775-964-4656
debbie@leonardlawpc.com

(additional counsel listed below)

*Attorneys for City of Las Vegas*

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## TABLE OF AUTHORITIES

### Cases

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## JURISDICTIONAL STATEMENT

The City appeals the following orders:

1. November 18, 2021 Findings of Fact and Conclusions of Law on Just Compensation, notice of entry of which was served electronically on November 24, 2021, and all decisions, rulings and interlocutory orders made appealable by the foregoing (collectively, "the Judgment"). 110(19852-19874);
2. February 9, 2022 Findings of Fact and Conclusions of Law and Order Denying the City's Motion for Immediate Stay of Judgment; [*sic*] and Granting Plaintiff Landowners' Countermotion to Order the City to Pay the Just Compensation, notice of entry of which was served electronically on February 10, 2022. 126(22984-22995);
3. February 16, 2022 Order Granting in Part and Denying in Part the City of Las Vegas' Motion to Retax Memorandum of Costs, notice of entry of which was served electronically on February 17, 2022. 126(23037-23048);
4. February 16, 2022 Order Granting Plaintiffs Landowners' Motion for Reimbursement of Property Taxes, notice of entry of which was served electronically on February 17, 2022. 126(23026-23036);

5. February 18, 2022 Order Granting Plaintiff Landowners' Motion for Attorney Fees In Part and Denying In Part, notice of entry of which was served electronically on February 22, 2022. 126(23049-23062);

6. February 25, 2022 Order Denying City of Las Vegas' Motion to Amend Judgment (Rules 59(e) and 60(b)) and Stay of Execution ("Motion to Amend"), notice of entry of which was served electronically on February 28, 2022. 126(23063-23073); and

7. April 1, 2022 Findings of Fact and Conclusions of Law and Order Granting Plaintiffs' Motion for Pre-Judgment Interest, notice of entry of which was served electronically on April 1, 2022. 127(23167-23182).

The Judgment is a "final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." NRAP 3A(b)(1). Orders 2-7 above are "special order[s] entered after final judgment…." NRAP 3A(b)(8).

The City filed its Motion to Amend on December 21, 2021, which tolled the time to appeal. NRAP 4(a)(4); 117(21349-21355). The City timely filed its Notice of Appeal of Orders 1-6 on March 2, 2022, which was within 30 days after service of the notice of entry of the earliest appealable Order (February 10, 2022). 127(23075).

The City timely filed its Notice of Appeal of the Prejudgment Interest Order on April 29, 2022, which was within 30 days after the date of service of the April 1, 2022 written notice of entry of order and within 14 days of the Developer's April 25, 2022 notice of appeal. NRAP 4(a)(1)-(2). 131(26953).

In light of the appealability of the foregoing orders, the "Final Judgment in Inverse Condemnation" entered on April 18, 2022 was superfluous. 127(23183-23192).

## ROUTING STATEMENT

The principal issues raised in these consolidated appeals affect government entities throughout Nevada and are of great statewide public importance. The district court's decision effectively deemed unconstitutional local land use authorities' broad discretionary powers to preserve open space, require recreational amenities, and deny proposed redevelopment applications that are prohibited by a General Plan. The takings found by the district court contravene long-standing Nevada precedent and the comprehensive statutory framework in NRS Chapter 278 and expose local governments to sizeable inverse condemnation judgments, such as occurred here, simply for declining to convert designated open space into housing. Because these are important issues of law that affect land use decisionmakers throughout the State, the matter should be retained by the Supreme Court. NRAP 17(a)(12).

## STATEMENT OF THE ISSUES

1. Did the district court err in holding the City liable for categorical and *Penn Central* takings of the 35-Acre Segment of the Badlands golf course and ordering the City to pay $34,135,000 as just compensation where:
    a. The district court lacked jurisdiction because the Developer filed only one set of applications to redevelop the 35-Acre Segment, thereby failing to ripen its claims;
    b. The district court improperly validated the Developer's segmentation tactic when the 1,549-acre Peccole Ranch Master Plan ("PRMP") area, or at a minimum, the 250-acre Badlands, should have been deemed the whole parcel, and the City had approved substantial development in both, thereby increasing the property's value to the Developer and its predecessor;
    c. Even if the 35-Acre Segment were deemed the whole parcel, the City had discretion to disapprove the Developer's application for a housing development because the General Plan had, since 1992, designated the Badlands as Parks, Recreation and Open Space ("PR-OS"), which prohibits housing;

d. R-PD7 zoning does not confer a constitutionally protected property right to build any housing development within the zoning density and is subject to the General Plan's restrictions and the Council's discretion to approve, disapprove, or conditionally approve a project;

e. NRS 278.150, NRS 278.250, and this Court's precedents confirm that: (i) cities have broad discretion to regulate land use to promote and protect the public interest; (ii) cities must adopt General Plans that govern the future uses of property; and (iii) General Plan designations are superior to other land use regulations, including zoning;

f. The R-PD7 zoning was consistent with the PR-OS General Plan designation because it not only permitted, but encouraged, the developer of the PRMP to set aside open space to complement the residential development;

g. The City's discretion to deny or condition the approval of a land use application exists whether the applicant files a petition for judicial review under NRS Chapter 278 or sues for a regulatory taking;

h. Statements and actions of individual City Council members and staff do not constitute regulations that bind the City;

i. The district court committed reversible error by barring the City from presenting evidence and/or making reference at the valuation trial to: (i) the $4,500,000 purchase price the Developer paid for the entire 250-Acre Badlands and the $630,000 purchase price of the 35-Acre Segment; (ii) the PR-OS designation; and (iii) the PRMP; and

j. The appraisal report on which the district court relied to value the 35-Acre Segment in its "before" condition at $34,135,000 was premised on an erroneous understanding of law that the Developer could build houses in open space, notwithstanding the PR-OS designation, and an incorrect date for the alleged taking.

2. Did the district court err in finding that the City effected a physical taking of the 35-Acre Segment when:

   a. There was no evidence that the City invaded the property, physically dispossessed the Developer, authorized public use, or restricted the Developer's right to exclude strangers;

   b. The City's denial of the Developer's applications for additional access and fencing simply instructed the Developer to file a different type of application and did not exact an easement from the Developer in favor of the public; and

c. Bill Nos. 2018-5 and 2018-24 did not apply to the Developer or the 35-Acre Segment, and even if applicable, did not compel the Developer to allow the public to invade and occupy the 35-Acre Segment, and there was no evidence that the public trespassed on the Badlands as a result of those ordinances.

3. Did the district court err in finding the City liable for a non-regulatory taking where all of the City actions alleged by the Developer were regulatory and none interfered with the property's existing uses?

4. Did the district court err in denying the City's Motion to Amend to correct the Judgment's requirement that the City pay damages to the Developer without an associated requirement that the Developer convey its fee simple interest to the City?

5. Did the district court err in awarding the Developer's post-judgment motions where:

   a. Attorneys' fees and costs and reimbursement of property taxes in the amount of $4,707,002.04 and prejudgment interest in the amount of $10,258,953.30 derived from the legally unsupportable Judgment and were unreasonable;

b. The Judgment conferred windfall profits on the Developer and thus additional amounts were not required to make the Developer "whole"; and

c. The Developer voluntarily agreed to have the 35-Acre Segment's assessment changed from open space to residential, thereby inviting an increase in property taxes.

## INTRODUCTION

This is a regulatory takings case arising from efforts by Plaintiffs-Respondents-Cross Appellants 180 Land Company, LLC and Fore Stars Ltd. (collectively, "the Developer") to convert the 250-acre Badlands golf course from open space to houses.[1] The Badlands is part of the 1,539-acre PRMP, which was developed by the Developer's predecessor ("Peccole"). Peccole set aside the Badlands as open space to compliment residential, office, retail, hotel, and casino development in the PRMP. In approving the casino as a destination resort, the Las Vegas City Council ("Council") required Peccole to set aside the Badlands as a recreation amenity.

[1] To avoid repetition, all references to the Joint Appendix for the facts stated in the Introduction are included in the Statement of Facts. References are to the volume number followed by the page number(s) in parentheses of documents in the Amended Joint Appendix, unless the referenced volume was not amended, in which case the reference is to the originally filed Joint Appendix.

In furtherance of Peccole's approved PRMP, starting in 1992, the Council designated the Badlands as PR-OS in the General Plan. The Council repeatedly reaffirmed the PR-OS designation by legislative act, most recently in 2018. Although housing is prohibited in areas designated PR-OS, and the Developer purchased the Badlands with full knowledge of the PR-OS designation, it nevertheless gambled that the Council would amend the General Plan to allow the Developer to convert the Badlands from open space into housing.

When the Developer acquired the Badlands in 2015, its PR-OS designation had existed in the General Plan for 23 years, the golf course had been operating for over two decades, and the remaining 84% of the PRMP had been built out with a retail shopping center, a hotel, a casino, and thousands of homes (many by the Developer), with the Badlands serving as an open space "focal point," drainage, and recreational amenity for the PRMP. In 2016, the Developer voluntarily closed the golf course, segmented the Badlands into four redevelopment areas, and proceeded to file applications to convert open space into houses, which required a General Plan amendment.

The four areas included: (1) a 34.07-acre segment ("the 35-Acre Segment"), which is at issue in this case; (2) a 17.49-acre segment ("the 17-Acre Segment"), for which the City approved 435 luxury condominiums ("the 435-Unit Project"); (3) a

133-acre segment ("the 133-Acre Segment"), for which the City invited the Developer to resubmit applications that were initially stricken on technical grounds, and which the Developer has declined to do; and (4) the remaining 65-acre segment ("the 65-Acre Segment"), for which the Developer has filed no applications, notwithstanding the City's invitation.

For its proposed project on the 35-Acre Segment (the subject of this appeal), the Developer presented one proposed project that sought: a General Plan Amendment to change the PR-OS designation to allow housing; a Site Development Review for 61 lots; a Waiver of street width; and a Tentative Map Application (collectively, the "35-Acre Application"). On June 21, 2017, the Council rejected the project as proposed, and the Developer sued, filing a petition for judicial review ("PJR") and claims for a categorical, *Penn Central*, "regulatory per se" (*i.e.*, physical), non-regulatory, and temporary takings. The Developer also brought separate takings actions for each of the other three Badlands segments, notwithstanding the City's approval of the 435-Unit Project on the 17-Acre Segment and the Developer's failure to allow the City to consider the 133-Acre Application on its merits and failure to submit any application for the 65-Acre Segment.[2] The

[2] Eighth Jud. Dist. Ct. Cases A-18-773268-C, A-18-775804-J, and A-18-780184-C.

Developer never filed a second application for a modified project on the 35-Acre Segment, thereby failing to ripen its categorical and *Penn Central* claims.

The district court denied the Developer's PJR (the "PJR Order"), correctly holding that (1) the PR-OS designation was valid and in effect when the Developer bought the Badlands and prohibited housing; (2) the Developer was aware of the designation when it acquired the property; and (3) the City had broad discretion to retain the PR-OS designation when the Developer applied to redevelop the 35-Acre Segment. In the PJR Order, the district court also rejected the Developer's contention that the 35-Acre Segment's zoning (R-PD7) granted the Developer a constitutionally protected property right to build the project proposed in the 35-Acre Application. These holdings were based squarely on unambiguous Nevada statutes and this Court's long-standing jurisprudence.

Inexplicably, however, when considering the Developer's taking claims, the district court completely changed course, holding that the PR-OS designation has no legal effect on the 35-Acre Segment, and the Developer has a constitutionally protected property right to build any development project it desires, free of any City discretionary approval, so long as the proposed use and density are permitted by the zoning ordinance. No authority supports these conclusions. To the contrary, the unwavering decisions of this Court provide that the General Plan controls the future

use of property, and zoning, which implements the General Plan, *does not* confer a right to build, or any rights at all. Rather, zoning *limits* the owner's use of property for the benefit of the community. In holding otherwise, the Judgment turns all land use authority on its head, essentially declaring Nevada's carefully constructed system of land use regulation unconstitutional.

The district court's sole explanation for this 180-degree pivot is that its findings of fact and conclusions of law in the PJR Order do not apply to a taking claim. There is no law or logic to support this distinction because there is no substantive law particular to NRS Chapter 278 petitions for judicial review. The facts determined in the PJR and the land use law applicable to those facts do not change simply because the Developer also sued for a taking. The City has the same discretion to disapprove a redevelopment application, no matter whether the Developer then challenges the City's action through a PJR or through inverse condemnation claims. The PR-OS designation alone required judgment in the City's favor on the regulatory takings claims.

The district court also ignored the parcel-as-a-whole doctrine, improperly disregarding the substantial development the Council approved in the PRMP or, at a minimum, the Badlands. Instead, contrary to all the evidence and law, the district court treated this case as one where the Developer bought an isolated 35-acre

property that had no physical or historical connection to either a 1,539-acre master planned development or a 250-acre open space area set aside as an amenity for the master planned development.

Even if the 35-Acre Segment could be deemed the parcel as a whole and the Council had made a final decision denying permission to redevelop it with housing, the Council was merely doing its job as directed by state law to preserve long-established open space for the community's benefit. The City has an obligation under NRS Chapter 278 to prepare a General Plan and to only approve projects that are consistent with that plan. It also had broad discretion to deny a General Plan amendment and maintain the land use status quo, which had been in place for decades at the request of the Developer's predecessor.

The Developer paid an $18,000/acre bargain-basement purchase price for the Badlands, reflecting the buyer and seller's knowledge that the PR-OS designation prohibited residential and commercial development. According to the Developer's own evidence, the City's approval of the 435-Unit Project alone increased the value of the Badlands by nine times the purchase price. Through the City's development approvals, therefore, the Developer reaped an enormous profit.

Nevertheless, the district court awarded the Developer an additional $34.1 million in inverse condemnation damages, which equates to 54 times the

Developer's purchase price of the 35-Acre Segment, an unjustifiable windfall. If that Judgment is sustained, the Developer's profit would be more than 1,100%, and the Developer still has 233 acres of the Badlands remaining with potential for redevelopment, recreation, and open space because the district court did not require the Developer to convey its fee simple interest to the City as a condition for receiving just compensation. Although the Judgment alone made the Developer "whole" 54 times over, the district court also awarded the Developer $15 million in attorneys' fees, costs, property tax reimbursement and pre-judgment interest.

State law requires that the City adopt a General Plan that designates future uses of land and zoning ordinances to implement those designations, giving the City broad discretion to regulate land uses in the public interest. By finding that the City cannot apply its General Plan or zoning to limit the use of property without paying just compensation, the Judgment runs afoul of well-established law, interferes with the City's discretionary authority, and plunders the public treasury. The City therefore requests that the Court reverse the Judgment and all post-Judgment orders and instead enter judgment in the City's favor on all claims.

## STATEMENT OF THE CASE

This case arises from the Council's June 21, 2017 decision to deny the Developer's application to redevelop the 35-Acre Segment of the Badlands with 61

houses. 1(44). The Developer filed the PJR and inverse condemnation claims, which the district court bifurcated. 1(71-87). After briefing and oral argument, the district court entered the PJR Order, which denied the PJR and dismissed the inverse condemnation claims. 1(205-229).

The Developer filed two separate motions for reconsideration: one that challenged the PJR denial (called "motion for new trial") and one that challenged dismissal of the inverse condemnation claims. 2(295-441). The district court granted the latter and entered an Order Nunc Pro Tunc that removed only those lines of the PJR Order that dismissed the inverse condemnation claims (23:4-20 and 24:4-5) but left intact all other findings and conclusions. 4(807-808). In a separate order, the district court denied the "motion for new trial," finding no clear error in its PJR Order, as amended. 8(1551-1566). On December 20, 2018, the Developer appealed the PJR Order, which the Court dismissed for lack of jurisdiction (Case No. 77771).

As to the Developer's inverse condemnation claims, the district court entered an order that determined "the permitted uses by right of the 35 Acre Property are single-family and multi-family residential," notwithstanding the PR-OS designation, that the applicable zoning ordinance also permits open space, and that the property had been used as open space for nearly a quarter century. 18(3436); 58(10380). The district court then granted summary judgment in the Developer's favor for

categorial, *Penn Central*, non-regulatory and physical takings. 109(19642-19691). Prior to trial on just compensation, the district court granted the Developer's motions in limine, excluding the City's evidence of the PR-OS designation, the PRMP, and the amount of money the Developer paid for the Badlands. 110(19826-19838).

The Developer's appraiser valued the 35-Acre Segment at $34.1 million on the erroneous premises that before the City's denial of the 35-Acre Application, it could be developed for residential uses (which contravened the PR-OS designation) and that the 35-Acre Segment's zoning granted the Developer a constitutional right to build housing up to the numerical maximum of the zoning ordinance. 87(15355-15384). The district court nevertheless accepted $34.1 million as the "before" value, concluded the "after" value was zero, and awarded the Developer $34.1 million as just compensation. 110(19865-19868). However, the district court failed to require that if the City was compelled by a final judgment to pay just compensation for "taking" the 35-Acre Segment, the Developer must convey its fee simple title to the City. 110(19869). The City moved to amend the Judgment on that basis, which the district court denied. 117(21349-21354); 127(23159-23166).

The district court also granted the Developer's post-Judgment motions for prejudgment interest, fees, costs, and a property tax reimbursement, resulting in a total judgment against the City of $48 million. 126(23066-23069); 27(23116-

23150). The City appealed the Judgment and all post-Judgment orders (Case Nos. 84345, 84640). 127(23075-23166); 131(26593). The Developer appealed only the award of pre-judgment interest (Case No. 84640). 127(23193-23217). The Developer **did not** appeal the Judgment to contest the PJR Order. *See id.*

## STATEMENT OF FACTS

### A. The Developer's Predecessor Developed The Peccole Ranch Master Planned Area With The Badlands Golf Course As A Recreation And Open Space Amenity

In 1980, the City approved William Peccole's petition to annex 2,243 acres of undeveloped land. 57(9987-9997). Mr. Peccole's intent was to develop the entire parcel as a master planned development. 57(9987). After the annexation, the City approved an integrated plan to develop the land with a variety of uses, called the "Peccole Property Land Use Plan." 57(9999-10005). In 1986, Mr. Peccole requested approval of an amended master plan featuring two 18-hole golf courses, one of which was in the general area where the Badlands golf course was later developed. 57(10019-10025); 61(11039).

In 1988, the Peccole Ranch Partnership (collectively, with William Peccole, "Peccole") submitted the PRMP as a revised proposed master plan and an application to rezone 448.8 acres for the first phase of development ("Phase I"). 57(10052-10083). In 1989, the City approved the PRMP and Phase I rezoning

application after Peccole agreed to limit the overall density in Phase I and reserve 207.1 acres for a golf course and drainage in the second phase of the PRMP's development ("Phase II"). 57(10086-10087).

In 1989, the City included Peccole Ranch in a Gaming Enterprise District, which allowed Peccole to develop a resort hotel in the PRMP so long as Peccole provided a recreational amenity such as an 18-hole golf course. 57(10106-10116, 10122, 10127-10129). The 207 acres Peccole had reserved for a golf course in Phase II of the PRMP satisfied this requirement. 57(10086, 10088, 10115-10116).

In 1990, Peccole applied to amend the PRMP in conjunction with a rezoning application for Phase II. 57(10131-10154). The revised PRMP highlighted an "extensive 253-acre golf course and linear open space system winding throughout the community [that] provides a positive focal point while creating a mechanism to handle drainage flows." 57(10138). The City approved the Phase II rezoning application under a resolution of intent subject to all conditions of approval for the revised PRMP. 57(10176-10187).

#### 1. Starting In 1992, The City's General Plan Designated The Badlands Golf Course As Open Space, Thereby Effectuating The Peccole Ranch Master Plan Proposed And Built By The Developer's Predecessor

On April 1, 1992, the Council adopted a new Las Vegas General Plan, which included maps showing existing and proposed future land uses. 58(10219-10223,

100229-10253). The future land use map for the Southwest Sector designated the area Peccole set aside for an 18-hole golf course as "Parks/Schools/Recreation/Open Space." 58(10253). That designation allowed "large public parks and recreation areas such as public and private golf courses, trails and easements, drainage ways and detention basins, and any other large areas of permanent open land," not housing. 58(10238-10240, 10318).

From 1992 to 1996, Peccole developed the 18-hole golf course in the location depicted in the 1992 General Plan, and a 9-hole course to the north of the 18-hole course. *Compare* 58(10253) *with* 61(11033); *see also* 58(10255-10260); 61(11035). The 9-hole course was also designated "P" for "Parks" in the General Plan as early as 1998. 58(10262-10264). When the Council adopted a new General Plan in 2000 to project growth over the following 20 years ("2020 Master Plan"), it retained the PR-OS designation. 58(10273); *compare* 58(10277) *with* 58(10239-10240, 10253). Beginning in 2002, the General Plan maps show the entire Badlands designated as PR-OS. 58(10283-10286).

In 2005, the Council incorporated an updated Land Use Element in the 2020 Master Plan. 58(10288-10292). This 2005 Land Use Element designated all 27 holes of the Badlands golf course as PR-OS for "Park/Recreation/Open Space." 58(10301). Each ordinance updating the Land Use Element since 2005 has

reaffirmed the Badlands' PR-OS designation, and the description of that designation has remained unchanged. 58(10303, 10311-10312) (Ordinance #6056 9/2/2009); 58(10314-10316, 10328-10329) (Ordinance #6152 5/18/2011); 58(10331, 10344-10345) (Ordinance #6622 6/26/2018). The Badlands 18-hole and 9-hole golf courses, totaling 250 acres, remained in the same configuration when the Developer purchased the property. *Compare* 61(11035) *with* 61(11039).

### 2. At Peccole's Request, The City Rezoned Phase II Of The Peccole Ranch Master Plan, Including The Golf Course, As R-PD7, Which Was Consistent With Its Open Space Designation

The City established R-PD zoning "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns." 58(10347). R-PD7 zoning allows for Residential-Planned Unit Development at 7 units/acre. 58(10347-10348). Planned Development zoning, generally applicable to larger development sites, "permits planned-unit development by allowing a modification in lot size and frontage requirements under the condition that other land in the development be set aside for parks, schools, or other public needs." *Zoning*, *Black's Law Dictionary* (11th ed. 2019). "The purpose of a Planned Unit Development [was] to allow maximum flexibility for imaginative and innovative

residential design and land utilization in accordance with the General Plan." 58(10347).

> As a Residential Planned Development, density may be concentrated in some areas while other areas remain less dense, as long as the overall density for this site does not exceed 7.49 dwelling units per acre. Therefore, portions of the subject area can be restricted in density by various General Plan designations.

65(11554).

During the 1990's, the City approved rezoning requests by a resolution of intent, meaning that a rezoning was provisional until the rezoned property was developed. 57(10187); 53(10356). Once rezoned property was developed, the City would adopt an ordinance amending the Official Zoning Map Atlas to make the rezoning permanent. *See*, *e.g*. 58(10358). When Peccole sought tentative R-PD7 zoning for 614.24 acres in the PRMP in 1990, the Las Vegas Municipal Code required that the land be developed "in accordance with the General Plan," as required by NRS 278.250(2). 61(11021). To implement the PRMP and provide the recreational amenity required by ordinance for the resort hotel and casino, Peccole set aside 211.6 acres of the 614.24 acres zoned R-PD7 for a golf course and drainage. 57(10152, 10156-10158, 10185).

Also in 1990, at Peccole's request, the City adopted a resolution of intent to rezone the 996.4 acres in Phase II in accordance with the amended PRMP. 57(10180-

10187). Under NRS 278.150 and consistent with the R-PD7 zoning ordinance, the Council then designated the golf course and drainage portion of the R-PD7 zone as PR-OS and the housing portion as ML (Medium-Low Density Residential) in the General Plan. 58(10253, 10262-10264, 10283). In later General Plan ordinances, the City Council included the additional 39 acres Peccole added to the golf course in that part of the PRMP designated PR-OS. 58(10301).

In 2001, after Peccole and successor developers built out Phase II with homes and the golf course, the City amended the Zoning Map to rezone to R-PD7 the Phase II property previously approved under the resolution of intent. 58(10358-10377). In 2011, the City discontinued the R-PD ("Residential – Planned Development") zoning category for new developments, replacing it with "PD" ("Planned Development"); however, it did not alter the R-PD7 zoning of the Badlands and surrounding residential areas of Phase II. 58(10380).

### B. The Developer Acquired The Badlands At Market Value For A Golf Course And Segmented It Into Multiple Redevelopment Areas

In early 2015, Peccole owned the Badlands through a company known as Fore Stars Ltd. ("Fore Stars"). 58(10383-10386). In March 2015, the Developer acquired Fore Stars, thereby acquiring the 250-Acre Badlands. 58(10398); 62(11058-11074). At the time, the golf course business was in full operation.

62(11058-11059). The Developer continued operations for a year, but after recording a series of parcel maps to subdivide the Badlands into nine parcels, the Developer chose to close the golf course in 2016. 59(10413-10441); 61(11041); 70(12363).

The Developer transferred 178.27 acres to its affiliate 180 Land Co LLC and 70.52 acres to its affiliate Seventy Acres LLC, leaving Fore Stars with 2.13 acres. 58(10388-10395, 10398). Each of these entities is controlled by the Developer's EHB Companies LLC. 58(10389, 10393, 10398). The Developer then segmented the Badlands into 17, 35, 65, and 133-acre redevelopment areas and began pursuing individual redevelopment applications for three of the segments, despite the Developer's intent to redevelop the entire Badlands. 59(10479-10499); 60(10696-10723); 61(10861-10946); 62(11076-11092).

### C. The City Approved 435 Luxury Housing Units For The Developer's 17-Acre Redevelopment Area

In November 2015, the Developer applied for a General Plan Amendment, Re-Zoning, and Site Development Plan Review to redevelop the 17-Acre Segment from open space to 720 luxury condominiums (collectively, the "17-Acre Application"). 59(10479-10499). The 17-Acre Application sought to change the General Plan designation from PR-OS to H (High Density Residential) and the zoning from R-PD7 to R-4 (High Density Residential). 59(10482-10483). The

Planning Staff Report noted that the proposed development required a Major Modification Application ("MMA") to amend the PRMP. 59(10504). In 2016, the Developer submitted an MMA and related applications but later withdrew them. 59(10518-10529); 60(10630).

On February 15, 2017, the Council approved the 17-Acre Application without an accompanying MMA after the Developer voluntarily limited the project to 435 luxury housing units ("the 435-Unit Project"). 60(10634-10640); 64(11414-11419). This approval involved a General Plan Amendment to change the land use designation from PR-OS to M (Medium Density Residential), along with a rezoning to R-3 (Medium Density Residential). *See id.* The City did not require or condition its approval on the Developer filing an MMA. *See id.*

#### 1. District Judge Crockett Granted The Neighbors' Petition For Judicial Review And Voided The City's Approval Of The 435-Unit Project On The Basis That It Required A Major Modification Application

Nearby homeowners filed a petition for judicial review to challenge the City's approval of the 435-Unit Project ("Neighbors' PJR"), which was assigned to District Judge Jim Crockett. 60(10648, 10660). On March 5, 2018, Judge Crockett granted the Neighbors' PJR over the objection of both the Developer and the City, vacating the City's approval on the grounds that the Council was required to approve an MMA before approving applications to redevelop the Badlands ("Judge Crockett's

Order"). 60(10647, 10659-10660). The Developer appealed. 62(11106-11112). Although the City did not appeal, it did file an amicus brief in support of the Developer's position that an MMA was not required, and the City's approvals were valid. 62(11093-11104).

### 2. This Court Reversed Judge Crockett's Order, Reinstating The City's Approval Of The 435-Unit Project

On appeal, this Court agreed with the City and reversed Judge Crockett's Order, concluding that an MMA was not required to redevelop the 17-Acre Segment because the Las Vegas Municipal Code required MMAs for property zoned PD, but not R-PD ("Order of Reversal"). 62(11098-11101, 11109). The Court further concluded that because the Badlands was designated PR-OS in the General Plan, the 17-Acre Property could not be developed with housing unless the City changed that designation: "The governing ordinances require the City to make specific findings to approve a general plan amendment…." 62(11110), citing LVMC 19.16.030(I).

On March 26, 2020, the City provided the Developer with written notice that this Court had reinstated the City's approval of the 435-Unit Project and that the approval would be valid for two years after the date of remittitur. 62(11117). On September 1, 2020, the City notified the Developer that the Court had issued its remittitur, reiterating that the City's approval of the 435-Unit Project had been reinstated, the Developer was free to proceed, and the approvals would be extended

for two years after the date of remittitur. 62(11114-11115, 11120). On December 23, 2021, the City notified the Developer a third time that the approval remained valid, and the Developer could apply for ministerial building permits and start construction. 119(21756).

### 3. The City's Approval Of The 435-Unit Project Increased The Badlands' Value By $27 Million

Under its Membership Purchase and Sale Agreement with Peccole, the Developer purchased the 250-acre Badlands for $7,500,000, or $30,000 per acre. 62(11059). The City established from Peccole's deposition and records provided by the Developer that $3,000,000 of the purchase price was consideration for property interests other than the Badlands, putting the price paid for the Badlands at less than $4,500,000, or $18,000 per acre. 66(11774-11849); 67(11862-11987); 68(11988-12081); 93(16660-16665). Therefore, the Developer paid approximately $630,000 for the 35-Acre Segment ($18,000/acre x 35 acres = $603,000). *See id.* Although the Developer asserted that the purchase price for the Badlands was $45 million (68(12118-12119)), it conceded it had no documents to support that assertion. 64(11434); 69(12150).

The Developer contended that if the Badlands could be developed with housing, it was worth $1,542,857 per acre. 64(11454). According to the Developer's own evidence, therefore, the City's approval of the 435-Unit Project increased the

value of the 17-Acre Segment alone by as much as $27 million ([$1,542,857 - $18,000] x 17). *Id.* In other words, the City increased, rather than diminished, the economic value of the Badlands. *See id.*

### D. After Approving The 435-Unit Project, The City Denied The Developer's Application To Redevelop The 35-Acre Segment Of The Badlands Into Houses

In early 2016, the Developer filed a Master Development Agreement ("MDA") application in conjunction with the MMA for the entire Badlands. 59(10518, 10527-10577). After the Developer withdrew the MMA and MDA applications, the Developer filed the 35-Acre Application on December 29, 2016. 60(10630, 10696-10723). The Developer subsequently filed a different MDA application without an MMA on May 22, 2017. 61(10861-10946). The proposed MDA incorporated the City's approval of the 435-Unit Project, but the development proposed for the 35-Acre Segment was inconsistent with the then-pending 35-Acre Application. 60(10696-10723); 61(10861-10946).

Both the 35-Acre Application and the MDA application were heard at the Council's June 21, 2017 meeting. 60(10726-10731); 128(23513-23609, 25605-25861). The inconsistencies between the proposed MDA and the 35-Acre Application were discussed during the hearing. 128(25612-25619, 25703-25704). After hearing from the Developer and the public, the Council voted to deny the 35-

Acre Application. 128(25605-25714). Because there were two new councilmembers who had not yet been sworn in, and who were not up to speed on the proposed MDA, the Council voted to hold the MDA in abeyance until August 2, 2017. 128(25697, 25717-25719, 25854-25859). On August 2, 2017, the Council denied the MDA by a vote of 4-3, which the Developer did not challenge with a petition for judicial review under NRS 278.0233. 61(10948).

### E. The District Court Denied The Developer's Petition For Judicial Review Of Denial Of The 35-Acre Application, Concluding That The City Properly Exercised Its Discretion

Although it did not challenge the denial of the MDA, the Developer filed the PJR and inverse condemnation claims at issue in this case challenging the Council's denial of the 35-Acre Application. 1(39-65, 71-119). On November 21, 2018, the district court denied the PJR. 1(202-229).

#### 1. In The PJR Order, The District Court Correctly Concluded That The Developer Had No Right To An Amendment Of The Long-Standing PR-OS Designation

In denying the PJR, the district court acknowledged the validity and applicability of the PR-OS designation:

> ***The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS)*** and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor.

* * *

> The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course.

* * *

> It is up to the Council – through its discretionary decision making – to decide whether a change in the area or conditions justify the development sought by the Developer and how any such development might look. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723.

* * *

> The City's General Plan provides the benchmarks to ensure orderly development. A city's master plan is the "standard that commands deference and presumption of applicability." *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723; *see also City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010).

* * *

> [T]he City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development.

1(222-223, 225) (emphasis added).

### 2. In The PJR Order, The District Court Correctly Concluded That Zoning Did Not Confer A Constitutionally Protected Right

The district court also rejected the Developer's contention that it had a vested property right to build whatever it desired – free of any City discretion to approve, disapprove, or conditionally approve the project – simply because the proposal did not exceed the zoning limits:

> The decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review

is a discretionary act. *See Enterprise Citizens Action Committee v. Clark County Bd. of Comm'rs*, 112 Nev. 649, 653, 918 P.2d 305, 308 (1996); *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004).

* * *

A zoning designation does not give the developer a vested right to have its development applications approved ... *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60 (holding that because City's site development review process under Title 19.18.050 involved discretionary action by Council, the project proponent had no vested right to construct).

***"[C]ompatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest***." *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *see also Nevada Contractors*, 106 Nev. at 311, 792 P.2d at 31-32 (affirming county commission's denial of a special use permit even though property was zoned for the use).

* * *

In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, ***no matter the zoning designation***. UDC 19.00.030, 19.16.030, 19.16.050, 19.16.100, 19.16.130.

* * *

The Court rejects the Developer's attempt to distinguish the *Stratosphere* case, which concluded that the very same decision-making process at issue here was squarely within the Council's discretion, no matter that the property was zoned for the proposed use. *Id*. at 527; 96 P.3d at 759.

* * *

> The Court rejects the Developer's argument that the RPD-7 zoning designation on the Badlands Property somehow required the Council to approve its Applications.

* * *

> Statements from planning staff or the City Attorney that the Badlands Property has an RPD-7 zoning designation do not alter this conclusion.

1(215, 221-223) (emphases added).

### F. Directly Contradicting Its PJR Order, The District Court Held The City Liable For Categorical And *Penn Central* Takings On The Erroneous Basis That: (1) Zoning Confers A Constitutional Right To Build Any Use Permitted By Zoning And (2) The General Plan's PR-OS Designation Is Irrelevant To The Takings Analysis

Notwithstanding the PJR Order's correct conclusions of law, and this Court's holding that a General Plan amendment was "required" for the City to permit residential development of the Badlands (62(11110)), when considering the Developer's takings claims, the district court decided the exact opposite, concluding that:

(a) RPD-7 zoning gave the Developer a constitutional right to build any development within the zoning density that can be "taken" if denied;

(b) The General Plan's PR-OS designation did not limit that right;

(c) Housing is the only permitted use in the R-PD7 zoning district (even though R-PD ordinance not only expressly allows, but encourages, the set-side of portions of the planned development for open space, and the golf course had been the approved, built, and operated use of the Badlands for decades);

(d) The Council had no discretion to deny the Developer's proposed project; and

(e) The whole parcel for purposes of the regulatory takings analysis is the 35-Acre Segment, alone, rather than the PRMP or the Badlands.

18(3434-3436); 109(19644, 19652, 19680-19684); 110(19866). These conclusions were contrary to Nevada law, the City's Unified Development Code ("UDC"), and this Court's Order of Reversal that affirmed the 435-Unit Project, and are irreconcilable with the PJR Order. 1(215, 221-225); 62(11110) and citations therein. In essence, the district court found the entire system of land use regulation in Nevada unconstitutional because, notwithstanding the General Plan designation that precludes housing and the discretion afforded government decision makers in NRS Chapter 278 to amend the General Plan designation and apply zoning ordinances, a regulatory taking occurs if a project application that does not exceed the maximum zoning density is denied. 18(3434-3436); 109(19644, 19652, 19680-19685); 110(19866).

The district court also found, for ripeness purposes, that the City had made a final decision that it will never allow any housing on the 35-Acre Segment, despite the Developer having filed only one application for one project. 109(19686-19687). The district court then held that the City "took" the fee simple interest in the 35-Acre Segment by: (1) preventing any economically viable use of the property; and (2)

depriving the Developer of its "vested right" to develop the housing project proposed in the 35-Acre Application. 18(3434-3436); 109(19673-19674, 19686).

### G. The District Court Held The City Liable For A Physical Taking, Notwithstanding The Absence Of Any Evidence That The City Occupied, Or Authorized The Public To Occupy, The Property

The district court identified three actions by the City that it deemed physical takings: (1) The City's passage of Bills 2018-5 and 2018-24, adopted in March and November 2018, respectively, and repealed in January 2020, which required owners proposing to redevelop golf courses to provide certain impact studies, engage the community in discussion of their proposals, and report to the City (40(7402-7407); 66(11717-11728); 109(19675)); (2) the City's denial of the Developer's application for new access points into the Badlands (66(11670-11696); 109(19676)); and (3) the City's denial of the Developer's application to build new fencing elsewhere on the Badlands (66(11698-11704); 109(19676)), the latter two of which simply required the Developer to file a different type of application. 66(11696, 11704).

The district court ignored the facts: (i) the Bills did not apply to the 35-Acre Segment and, even if they did, did not exact an easement from the Developer for public access, as required for a physical taking (40(7402-7407); 66(11717-11728)); (ii) the Badlands already had access, and the City merely required the Developer to file a different application, but even had the City denied a proper application, it did

not authorize the public to occupy the 35-Acre Segment, as required for a physical taking (66(11678, 11696, 11794)); and (iii) the City merely required the Developer to file a different application for fencing around certain ponds not located on the 35-Acre Segment, but even had the City denied a proper fence application, that denial did not allow the public to occupy the 35-Acre Segment. 66(11704).

### H. The District Court Held The City Liable For A Non-Regulatory Taking Based Only On Regulatory Actions That Did Not Interfere With The Long-Established Uses

Finally, the district court concluded that the "aggregate" of the City's regulatory actions constituted a non-regulatory taking, notwithstanding the absence of any evidence that the City engaged in any activity of a *non-regulatory* nature that either prevented the Developer from using the 35-Acre Segment as it had been for the previous 23 years (*i.e.*, for a golf course and drainage) or diminished the property's value. 109(19679). Instead, the district court relied on the City's alleged *regulatory* restrictions on the Developer's use of the 35-Acre Segment, which were the bases for the district court's findings of a categorical and *Penn Central* takings. *Id.* The district court entered summary judgment for the Developer on the categorical, *Penn Central*, physical, and non-regulatory taking claims. 109(19687).[3]

[3] Because the district court found a permanent taking, the Developer's temporary taking claim was moot.

### I. The District Court Awarded The Developer $34.1 Million In Just Compensation Based On A Faulty Appraisal And After Barring The City's Evidence

Prior to trial on just compensation, the district court granted the Developer's motions in limine to bar all evidence or mention of: (1) the PR-OS designation; (2) the PRMP; and (3) the purchase price paid by the Developer. 110(19829-19838). The Developer's appraiser valued the "before" condition of the 35-Acre Segment at $34,135,000 based on the erroneous premise that it could be developed with houses, contrary to the PR-OS designation. 87(15383-15384). The district court accepted that value, determined the value in the "after" condition was zero, and ordered the City to pay the Developer $34,135,000 as just compensation. 110(19865-19868). However, the district court failed to also order the Developer to convey title to the 35-Acre Segment to the City if the City paid the just compensation. 110(19868). The City moved to amend the Judgment on that ground, which the district court denied. 117(21349-21355); 126(23063-23073).

### J. The District Court Awarded The Developer An Additional $4.7 Million In Fees, Costs And Property Tax Reimbursements And $10.3 Million In Pre-Judgment Interest

In addition to the $34 million Judgment, the district court granted the Developer's post-trial motions for attorneys' fees and costs and reimbursement of property taxes in the sum of $4,707,002.04 and $10,258,953.30 in prejudgment

interest (collectively, the "Additional Sums"), all of which derived from the legally unsupportable Judgment. 126(23026-23062); 127(23167-23182).

### K. The Developer Refused To Build The 435-Unit Project, Refused To Allow The Council To Consider The 133-Acre Application For The First Time On The Merits, Refused To File A Second Application To Redevelop The 35-Acre Segment, And Never Filed Any Application To Redevelop The 65-Acre Segment

After initiating this litigation, the Developer applied in October 2017 to redevelop the 133-Acre Segment with housing (the "133-Acre Application"). 62(11076-11079). On May 16, 2018, in light of Judge Crockett's Order (the appeal of which was still pending), the Council voted to strike the 133-Acre Application as incomplete because it did not include an MMA, as Judge Crockett's Order required. 62(11083-11092). The Developer filed a petition for judicial review and a complaint for a taking and other related claims ("133-Acre Case"). 61(10952). District Judge Gloria Sturman dismissed the petition for judicial review on the grounds that the parties were bound by Judge Crockett's Order and, therefore, the Developer's failure to file an MMA was valid grounds for the City to strike the application. *Id.* Judge Sturman allowed the Developer's inverse condemnation claims to proceed. *Id.*

Because the Council struck the 133-Acre Application on procedural grounds, after this Court's reversal of Judge Crockett's Order, the City moved to remand the 133-Acre Case to allow the Council to consider the 133-Acre Application on the

merits, which the Developer opposed and Judge Sturman denied. 106(18941-18971). Accordingly, the Council has not addressed the merits of any application for the 133-Acre Segment. 63(11270-11271).

Additionally, although this Court reinstated the approval of the 435-Unit Project in September 2020, and the City extended the approval for two years, the Developer has done nothing to develop it. 62(11117-11125). Instead, the Developer brought and prosecuted a taking case for the 17-Acre Segment, seeking millions of dollars in "just compensation," even though the City *approved* its application and dramatically increased the property's value. 60(10675-10694). Finally, the Developer never filed any application to redevelop the 65-Acre Segment yet sued the City for a taking. 65(11636-11637). In sum, instead of proceeding with the approved 435-Unit Project, the Developer filed four lawsuits to extort millions of dollars from the public treasury and avoid the typical risks of real estate development, all premised on a false narrative that it has been victimized by the City.

## SUMMARY OF THE ARGUMENT

The PR-OS designation should be the beginning and end of this case. As the district court concluded when denying the PJR, the City's General Plan prohibited residential uses in the Badlands when the Developer bought the property, the Developer knew that fact, and the Council had discretion whether to grant, deny, or

condition an application to convert open space to houses. The $18,000 per acre purchase price also reflected the Developer and Peccole's knowledge that the Badlands could not be redeveloped with housing without a change in the law, which was subject to the City's discretion. In its Order of Reversal that upheld the City's approval of the 435-Unit Project, this Court confirmed that discretion. Because categorical and *Penn Central* regulatory takings require extreme limits on the use of property that wipe out or nearly wipe out all economic value, by merely declining to change the PR-OS designation (*i.e.*, preserving the status quo), the City did not change the value of the 35-Acre Segment or "take" anything. On that basis alone, judgment in the City's favor was required.

The Court should reverse for numerous other reasons as well. Because the Developer filed only one application to redevelop the individual 35-Acre Segment, the Developer failed to show that the City had made a final decision as to the level of development it would allow. As a result, the categorical and *Penn Central* claims are unripe.

Setting aside their jurisdictional defect, those claims should have failed because the City approved substantial development in the PRMP and the Badlands, conferring a significant economic return to the Developer and its predecessor well before the 35-Acre Application was even presented to the Council for consideration.

The Developer's improper segmentation of the 35-Acre Segment from the rest of the Badlands and PRMP did not transform it into the whole parcel for the purpose of analyzing a regulatory taking claim.

Even if the 35-Acre Segment is deemed the parcel as a whole, the City did not interfere with the property's long-approved and existing use as a golf course and drainage. There could be no objectively reasonable expectation that the Council would amend the General Plan to allow housing. Accordingly, the uses and value remained the same before and after the City's denial of the 35-Acre Application. In awarding $34.1 million to the Developer, the district court failed to consider the property's legal restrictions and the actual value the Developer paid, which reflected that housing was prohibited.

The district court also erred in finding a physical taking because the City did not physically occupy the 35-Acre Segment, pass any law exacting an easement in the public's favor, or authorize any trespass. Moreover, the City's actions that the district court deemed in the "aggregate" to constitute a non-regulatory taking were regulatory in nature and did not damage or devalue the 35-Acre Segment. As a result, reversal of the Judgment and all post-Judgment orders is warranted.

Should any part of the Judgment stand, the post-Judgment orders must still be reversed. If the City must pay the Developer money for a "take," it is entitled to

receive fee simple title to the property. And because the $34.1 million Judgment bestowed a financial windfall after the City's approval of the 435-Unit Project had already conferred enormous profits to the Developer, the Additional Sums of $14 million were not necessary to make the Developer "whole." Rather, they further raided the City's treasury and were unreasonable. As a result, all post-Judgment orders should be vacated and judgment should be entered in the City's favor.

## ARGUMENT

### A. Standard Of Review

The following questions of law are reviewed de novo:

1. Whether the government has inversely condemned private property. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006).

2. An order that grants summary judgment. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

3. Ripeness – subject matter jurisdiction. *See Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

4. A decision to grant a motion to alter or amend the judgment where, as here, all issues presented are questions of law. *See AA Primo Builders, LLC v. Washington,* 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) ("While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error.").

5. An order granting a motion in limine based on legal error. *See id.*; *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759–60 (9th Cir. 2017) (reviewing de novo a ruling on a motion in limine that "preclude[d] presentation of a defense").

6. Eligibility for attorney fees. *In re Estate of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009). Otherwise, awards of costs and attorney fees are reviewed for an abuse of discretion. *Pub. Emp. Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 133, 135, 393 P.3d 673, 680, 682 (2017).

7. Whether prejudgment interest is available. *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 716 (9th Cir. 2004); *see State Dep't of Tax. v. Masco Builder*, 129 Nev. 775, 777, 312 P.3d 475, 477 (2013).

### B. The District Court Ignored The Controlling Law For Categorical And *Penn Central* Takings, Which Required The Developer To Show That Regulatory Restrictions On Use Of The Property Wiped Out Or Nearly Wiped Out Its Economic Value

The regulatory takings doctrine is based on the Fifth Amendment of the United States Constitution, which provides: "nor shall private property be taken for public use, without just compensation," and its counterpart in Nevada Constitution Article 1 §8. The Just Compensation Clause was originally intended to require compensation only for eminent domain—*i.e.*, direct government takings. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In 1922, the Supreme Court

held that a regulation that "goes too far," such that it destroys all or nearly all the value or use of property, equivalent to an eminent domain taking, can require the regulatory agency to compensate the property owner for the property's value before the regulation was imposed. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see Lingle v. Chevron U.S.A.*, 544 U.S. 528, 539 (2005). This type of inverse condemnation that does not involve a physical occupation of private property, but rather alleges excessive regulation of the owner's use of the property, is known as a "regulatory taking."[4]

Under the separation of powers doctrine, courts may only intervene in land use regulation in two extreme circumstances:

[4] Citing *County of Clark v. Alper*, 100 Nev. 382, 685 P.3d 943 (1984), the district court consistently conflated eminent domain and regulatory takings. 18(3435); 109(19644). However, the two doctrines have little in common. In eminent domain, the government's liability for the taking is established by the filing of the action, with valuation of the property taken being the only issue remaining. NRS 37.110, NRS 37.120. In inverse condemnation, by contrast, the government's liability is in dispute and is decided by the court. *Cf. Fritz v. Washoe Cnty.*, 132 Nev. 580, 586, 376 P.3d 794, 798 (2016). The Court noted this distinction when granting the City's Motion to Stay: "[W]hile we generally apply eminent domain rules and principles to inverse condemnation cases," certain provisions of NRS Chapter 37 are "inapposite to the circumstances here." Order Granting Stay at 3. The district court's blind application of eminent domain statutes and decisions to this case was legal error.

i. Categorical takings, where the regulation completely wipes out the economic use of the property, similar to a physical ouster by eminent domain. *See Lucas*, 505 U.S. at 1014-15; or

ii. *Penn Central* takings that nearly wipe out the property's value, as determined by three factors: (a) the economic impact of the regulation; (b) the extent to which the regulation interferes with reasonable investment-backed expectations; and (c) the character of the regulation. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Categorical and *Penn Central* regulatory takings tests both "aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

This Court has established an identical test, requiring an extreme economic burden to find liability for a regulatory taking. *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "'completely deprive an owner of all economically beneficial use of her property'") (quoting *Lingle*, 544 U.S. at 538); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993) (regulation must deny "all economically viable use of [] property" to constitute a taking under either categorical

or *Penn Central* tests); *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35 (taking requires agency action that "destroy[s] all viable economic value of the prospective development property"). The district court ignored this controlling law.

### C. The District Court Acted Outside The Bounds Of Its Jurisdiction By Allowing the Developer's Unripe Categorical And *Penn Central* Claims To Proceed

If a party's claims are not ripe for review, they are not justiciable, and the Court lacks subject matter jurisdiction to review them. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010); *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988). A taking claim is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), *overruled on other grounds by Knick v. T'ship of Scott, Pa.*, 139 S.Ct. 2162 (2019). "A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of all economically beneficial use of the property … or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (internal citations and quotations omitted).

U.S. Supreme Court decisions "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986)). That is because "[a] court cannot determine whether a regulation has gone 'too far' [such that it destroys all or nearly all of the value or use of property] unless it knows how far the regulation goes." *Id.* at 348, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). A regulatory taking claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). The property owner bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id*.

### 1. The Developer's Failure To Present More Than One Project For The 35-Acre Segment Renders Its Regulatory Takings Claims Unripe

The Developer's categorical and *Penn Central* claims were not ripe because the Developer proposed only one project for the individual 35-Acre Segment. *Williamson County* requires that a developer file and have denied more than one development application before a taking claim is ripe. *See* 473 U.S. at 191. Nevada follows *Williamson County* for its ripeness analysis. *See State v. Eighth Jud. Dist.*

*Ct.*, 131 Nev. 411, 419-20, 351 P.3d 736, 742 (2015). Without being given a chance to consider a modified project, the Council cannot be said to have reached a "clear, complete, and unambiguous" decision or to have "drawn the line, clearly and emphatically, as to the sole use to which [the 35-Acre Segment] may ever be put." *Hoehne*, 870 F.2d at 533. In deciding that the Developer's claims were ripe, the district court failed to cite *Williamson County*, much less analyze it. 109(19679-19680, 19686-19687).

Rather than require the Developer to present a revised project for the Council's consideration, the district court speculated that a second application would be futile. 109(19686-19687). The ripeness doctrine prohibits such speculation. *See Pakdel v. City & Cnty. of San Francisco, Calif.*, 141 S. Ct. 2226, 2230 (2021). Even if speculation were allowed, the City's approval of the 435-Unit Project shows it was just as likely to approve a modified project, which would have negated the Developer's regulatory takings claims. 64(11414-11419).

#### 2. The City's Denial Of The Master Development Agreement Application Did Not Ripen The Developer's Claims On The 35-Acre Segment

To conclude that the Developer's *Penn Central* claim was ripe, the district court erroneously pointed to the Council's denial of the MDA. 109(19686-19687). The MDA covered the entire 250-acre Badlands, incorporated the existing approval

of the 435-Unit Project without modification, and offered only generalities for a phased redevelopment of the Badlands, rather than a specific, revised project for the 35-Acre Segment. 61(10868-10869, 10877-10887). It did not constitute, and could not substitute for, a valid set of land use applications for the 35-Acre Segment. *See* UDC 19.16.150(D). As the Developer acknowledged, even if the Council approved the MDA, a Site Development Review application and General Plan Amendment would still be required for any specific project within the MDA area, including the 35-Acre Segment (except the 17-Acre Segment because of the 435-Unit Project approval). 61(10886-10887); 109(19686-19687).

In finding that the MDA constituted a second application to develop the 35-Acre Segment, the district court ignored the holding in *State*, which placed the burden on a takings claimant to show that the agency has made a final decision with regard to the "property at issue," rather than other property that may include the subject property. 131 Nev. at 419, 351 P.3d at 742, *quoting Williamson County*, 473 U.S. at 186. The district court also failed to acknowledge that there could have been myriad reasons for the Council to deny the MDA that had nothing to do with the 35-Acre Segment, such as, for example, an objection to the development the MDA proposed for the 65-Acre Segment. 61(10861-10946).

Moreover, the Developer presented the MDA simultaneously with the 35-Acre Application as a competing proposal to leverage the MDA negotiations and pressure the Council into a commitment for the entire 250-acre Badlands, without providing the specifics that are required in a development application. 60(10725-10732); 128(25612-25619, 25703-25704). Hedging its bet by presenting the 35-Acre Application and MDA simultaneously is not the appropriate procedure to obtain finality for ripeness purposes. *See Williamson County*, 473 U.S. at 191.

According to the district court, "the City" informed the Developer that it would not approve applications to redevelop the Badlands' segments individually, but would only approve an MDA to develop the entire Badlands. 109(19653-19655). In support, the district court only cited alleged statements by two individual Council members and City staff in a private meeting with the Developer. 109(19653-19655), referencing 26(4807-4808). A private meeting is not Council action as required by law and therefore does not constitute an official statement of what type of project the Council would approve. *See* NRS 241.0355(1). Moreover, an alleged statement of an individual City Council member is insufficient to show futility. *See State*, 131 Nev. at 420, 351 P.3d at 742.

Nevertheless, from this "evidence," the district court concluded that the Council would never approve any redevelopment application following denial of the

MDA, notwithstanding that the Council approved the 435-Unit Project without a development agreement in place. 109(19687). Regardless, commentary about the MDA from Councilmembers at the public hearings indicates that they might approve a lower density development. 64(11463, 11497-11502); 128(25832-25838). Having segmented the Badlands into four redevelopment sites and sued the City in four separate takings actions, the Developer had to ripen its regulatory takings claims as to each segment standing alone. *See Williamson County*, 473 U.S. at 191.

### 3. The City's Adoption Of Legislation That Temporarily Affected The Application Requirements For Golf Course Redevelopment Did Not Render A Second Redevelopment Application Futile

The district court also erroneously pointed to two ordinances passed in 2018 and repealed in 2020 as a supposed basis for futility. 109(19687). The district court's conclusions that Bills 2018-5 and 2018-24 "1) targeted only the Landowners 250 Acres; 2) made it impractical and impossible to develop the 250 Acres, including the 35-Acre Property, and preserved the 35 Acre Property for use by the public ..." are unsupported by any evidence or authority, and the district court cited none. *Id.* The district court's focus on the intent of the Bills was misplaced because only the effect – not the intent – of regulation is pertinent to a regulatory takings analysis. *Lingle*, 544 U.S. at 543 (citing *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987)).

Even if intent were relevant, the Bills did not "target" the Developer. On their face, the Bills applied to all golf courses, and their purpose was to increase public participation in golf course redevelopment proposals. 40(7402-7407); 66(11717-11729). There are numerous planned developments in Las Vegas where housing was built around a golf course or other open space amenity (*e.g.* man-made lake). 93(16684-16697).[5] Closure of golf courses around which residential communities have been built is a legitimate concern for the Council to address. *See generally* NRS 278.150; NRS 278.250.

The source of the district court's conclusion that the City purportedly "targeted" the Developer were statements of a Councilmember who supported the Developer and the Developer's own attorneys, neither of which is evidence of legislative intent. 109(19663-19664). Moreover, the district court's conclusion that the Bills made it "impossible" to develop the entire Badlands was not supported by any evidence, contravened the letters sent by the City extending the 435-Unit Project's entitlement for an extra two years,[6] and failed to acknowledge that the Bills

[5] In each of these cases, the entire development was zoned for planned development. 93(16687-16691). The City then designated the housing portion of the development for residential and the open space portion PR-OS in the General Plan, just like the Badlands. 93(16684-16685, 16693-16697).

[6] The City approved the 435-Unit Project before it enacted Bills 2018-5 and 2018-24. 64(11414-11419). Because the bills applied only to proposals, and not approved projects, the 435-Unit Project was not affected. 40(7402-7407); 66(11718-11724).

did not impose substantive requirements. 40(7402-7407); 62(11114-11120); 66(11718-11729); 109(19664); 119(21756). In any event, although the Bills had certain procedural requirements, they did not prevent the Developer from submitting a second application for the 35-Acre Segment or indicate how the Council would act on that application had it been submitted. 40(7402-7407); 66(11718-11729).

The Developer never challenged either bill through a petition for judicial review or filed a second application for the 35-Acre Segment after the City repealed the bills in January 2020, confirming that the Developer's arguments regarding the Bills were simply a red herring to extort millions of dollars from the City, rather than take the risks associated with land development. 63(11252-11265).

#### 4. The Final Decision Ripeness Doctrine Applies To Both Categorical And *Penn Central* Taking Claims

The district court's holding that the *Williamson County* final decision requirement applies only to the Developer's *Penn Central* claim and not to its categorical taking claim is illogical and legally unsound. 109(19679-19680). If a final decision is necessary prior to suing for a near-total economic wipe out (*i.e.*, *Penn Central*), it must also be required prior to suing for a total economic wipeout (*i.e.*, categorical). The question presented in both cases is whether the government might allow some lesser—but still economically beneficial—use of the property. *See Palazzolo*, 533 U.S. at 618-19; *MacDonald*, 477 U.S. at 348 ("It follows from *the*

*nature of a regulatory takings claim* that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property.") (emphasis added). In *Palazzolo*, the Court applied the *Williamson County* ripeness analysis to a categorical claim. *Id.* at 618; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 731, 734 (1997) (applying *Williamson County* to action alleging that government "deprived [landowner] of 'all reasonable and economically viable use' of her property").

The lower federal courts have consistently held that the *Williamson County* ripeness doctrine applies to both categorical and *Penn Central* takings claims. *See*, *e.g.*, *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 124-25, 131 (2d Cir. 2003) (*Lucas* categorical claim) (*abrogated on other grounds by San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005)); *Barlow & Haun, Inc. v. United States*, 805 F.3d 1049, 1057-59 (Fed. Cir. 2015) (claim alleging categorical taking of oil and gas leasing rights); *Seiber v. U.S.*, 364 F.3d 1356, 1365-66, 1368 (Fed. Cir. 2004) (claim alleging that denial of logging permit effected temporary categorical taking of landowner's property). This Court reached the same result in *State*, applying the ripeness requirement to regulatory takings claims without distinguishing between the amount of economic impact alleged. *See* 131 Nev. at 419-20, 351 P.3d at 742.

The district court avoided the above authorities and instead relied on *Sisolak*, 122 Nev. at 661, 137 P.3d at 1121, and *Hsu v. County of Clark*, 123 Nev. 625, 173 P.3d 724 (2007). 109(19679-19680). Those are physical taking cases, however, in which regulations exacted permanent easements by allowing airplanes to physically invade the landowners' airspace not, like here, allegations that regulations denied the owner's use of property. *Compare Sisolak*, 122 Nev. at 663, 667, 137 P.3d at 1122, 1124; *Hsu*, 123 Nev. at 635, 173 P.3d at 731-32. Because the City never argued that the final decision requirement applies to physical takings, these cases are inapplicable.[7] Nonetheless, *Sisolak* expressly acknowledged that final decision ripeness is required for categorical taking claims alleging denial of the owner's use of property. 122 Nev. at 664, 137 P.3d at 1123.

### D. The District Court Failed To Recognize The Substantial Development Approved By The City In the Parcel As A Whole, Which Negated Any Regulatory Takings Claim

Ignoring all binding authorities, the district court improperly rewarded the Developer for engaging in "segmentation," a real estate developer tactic to divide the whole parcel into segments and then assert a taking if development applications are denied for any particular segment, even though – as here – the agency increased

[7] The City also never argued that final decision ripeness applied to the Developer's non-regulatory taking claims, so it is unclear why the district court analyzed that question. 109(19679).

the value of the whole parcel by approving development in another segment. 109(19680-19682). Takings claims based on this trick are routinely rejected, including in the seminal *Penn Central* case:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather ... on the nature and extent of the interference with rights in the parcel as a whole ....

*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978).

In *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327, 331 (2002), the Supreme Court held that defining the relevant parcel required consideration of the "aggregate . . . in its entirety," rejecting the notion that takings analysis could be applied only to the portion of a larger property directly burdened by a regulation. "Of course, defining the property interest taken in terms of the very regulation being challenged is circular." *Id*. at 331. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Prod. of Calif., Inc. v. Constr. Laborers Pension Tr. for S. Calif.*, 508 U.S. 602, 644 (1993). Nevada law is the same. *See Kelly*, 109 Nev. at 641 & n.1, 651, 855 P.2d at 1029 & n.1, 1035 (rejecting

developer's segmentation of seven lots affected by regulation from the remainder of a 39-lot planned unit development).

The Supreme Court recently identified a three-factor test to define the relevant property for takings analysis: (1) "the treatment of the land, in particular how it is bounded or divided, under state and local law"; (2) "the physical characteristics of the landowner's property"; and (3) "the value of the property under the challenged regulation." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945-46 (2017). The Court emphasized that the goal is to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Id*. at 1945; *see also id*. at 1950 ("Courts must ... define the parcel in a manner that reflects reasonable expectations about the property."). "Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant 'private property' narrowly." *Id*. at 1952 (Roberts, C.J., dissenting). Here, the Developer engaged in a classic segmentation strategy of the 1,596-acre PRMP, or at a minimum, the 250-acre Badlands, to manufacture a takings claim.

#### 1. Peccole And The City Historically Treated The PRMP As A Single Master Planned Area

The 35-Acre Segment is just a small piece of the large, master planned area created by the Developer's predecessor, which involved the development of

thousands of housing units, a hotel/casino, retail shopping mall, and golf course within the PRMP. 57(10181); 61(11037, 11043); 65(11576-11577). The golf course provided sufficient open space and recreational amenities to satisfy the City that R-PD7 zoning was appropriate for the PRMP, and Peccole marketed it as an open space amenity to increase the value of adjacent parcels. 57(10144, 10146, 10152-10153); 58(10347); 61(11025). The golf course also served as the recreational amenity that allowed Peccole to establish a Gaming Enterprise District within the PRMP and obtain the City's approval of a destination resort casino. 57(10115-10116, 10176). In the 25-years before the Developer purchased the Badlands, the master planned area was developed as envisioned by Peccole. 61(11031-11039); 65(11577). Given that the PRMP was historically treated as a single integrated project, the district court erred in concluding that only a fraction of the Badlands – itself just a fraction of the master planned area – was the relevant parcel for takings purposes. *Compare* 109(19680-19682) *to* 61(11031-11039).

### 2. Peccole And The City Historically Treated The Badlands As A Single Open Space Area

Even if the PRMP is not deemed the whole parcel, the 250-acre Badlands should be, such that the City's approval of the 435-Unit Project prevented the district court from finding a taking of the 35-Acre Segment. For over 25 years, the Badlands has existed as a single land area for open space and recreation purposes. 57(10146,

10152-10153); 61(11031-11039). The Developer then bought the Badlands in a single transaction from a single seller. 58(10398); 62(11058-11074). The Developer's promotional materials for redevelopment of the Badlands encompassed the entire 250 acres, showing it as designated PR-OS. 59(10443-10477). Importantly, when applying for a General Plan Amendment in 2016, the Developer treated the entire Badlands as "the subject property." 128(26144). Likewise, when proposing the MDA, the Developer presented its proposed redevelopment of the Badlands as a unified "Property." 59(10584); 61(10868).

The fact that the Badlands consists of more than one parcel does not alter the parcel-as-a-whole analysis because lot lines created under state law do not define the relevant parcel for regulatory takings. *Murr*, 137 S. Ct. at 1947. As in *Murr*, courts routinely consider multiple contiguous lots as a single property for takings purposes. *See id*.; *see Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1344, 1346 (Fed. Cir. 2004); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1362-63, 1365-66 (Fed. Cir. 1999). *Kelly*, 109 Nev. at 641 & n.1, 651, 855 P.2d at 1029 & n.1, 1035; *Norman v. United States*, 63 Fed. Cl. 231, 260-61 (2004); *Cane Tenn., Inc., v. United States*, 60 Fed. Cl. 694, 705 (2004); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981); *see also Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991) (denial of wetland fill permit was not a taking where the plaintiff had knowledge of

the restrictions applicable to the property but nevertheless agreed to purchase restricted wetlands as part of a package deal that included developable uplands).

### 3. The Golf Course's Physical Characteristics Prevent Any Single Segment From Being Deemed The Whole Parcel

Under *Murr*'s second factor, physical characteristics of a parcel include the physical relationship of any distinguishable tracts, the parcel's topography, contiguity, and the surrounding human environment. 137 S. Ct. at 1945. In *Murr*, the Court held that contiguous lots should be treated as a unified parcel. *Id*. at 1948; *see also Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (concluding that the relevant parcel consists of 100 contiguous acres owned by the claimant, including 60 undevelopable acres and 40 developable acres).

Here, the Badlands consists of one contiguous open space and drainage area. 57(10144, 10146); 70(12337-12341). Peccole and the City designated the Badlands as golf course and drainage due to its topography – a series of washes and hills that provided natural drainage for the remainder of the PRMP. 57(10144, 10146). These physical characteristics warrant that the PRMP, or at a minimum, the Badlands, be treated as a single, integrated unit. *See id.*

#### 4. Peccole And The Developer Derived Significant Value From The PRMP And The Badlands

As to the third *Murr* factor, a determination of whether a regulatory taking has occurred requires a comparison of "the value that has been taken from property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). While "a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty." *Murr*, 137 S. Ct. at 1946. The value of using property as an integrated whole can outweigh a restriction to individual lot development. *Id*.

Here, Peccole and the City intended that the Badlands would provide recreation, open space, and drainage, enhancing the quality and value of the entire master planned area. 57(10144, 10146). The Council approved the PRMP and Phase I rezoning application after Peccole agreed to limit the overall density in Phase I and reserve 207.1 acres for golf course and drainage in Phase II. 57(10086-10087). By setting aside open space for the benefit of the community, Peccole *and this Developer* were able to construct commercial buildings and thousands of housing units in the PRMP. 57(10144, 10146); 61(11035, 11037). Notwithstanding having found in the PJR Order that "[t]he golf course was part of a comprehensive

development scheme, and the entire Peccole Ranch master planned area was built out around the golf course" (1(222)), when finding a taking of the 35-Acre Segment, the district court failed to acknowledge that the PR-OS amenity provided by the Badlands conferred significant value on the parcel as a whole, *i.e.*, the master planned area, just as Peccole intended. 57(10144, 10146); 109(19680).

Additionally, the district court failed to account for the significant value afforded the Developer from the City's approval of the 435-Unit Project, concluding that the City purportedly "clawed back" that entitlement. 109(19681). The evidence shows otherwise. 62(11117-11125). Not only did the City approve the project but, once this Court affirmed that approval, the City repeatedly informed the Developer that its entitlements would remain valid for an extra two years. 62(11117-11125). Moreover, any effort to revoke the 435-Unit Project approval would have required a majority vote of the Council in contempt of this Court's Order of Reversal, which did not occur. *See* NRS 241.0355(1); 62(11110). There simply is no evidence to support the district court's "claw-back" theory.

#### 5. The District Court Cited Faulty "Authority" For Its Parcel-As-A-Whole Analysis

Disregarding *Murr*, the district court concluded that because the 35-Acre Segment is a single assessor's parcel, it constituted the whole parcel for the purpose of a regulatory taking. 109(19680-19682). To reach this conclusion, the district court

relied entirely on a single, unpublished eminent domain decision, which holds that for purposes of valuation in eminent domain, the parcel as a whole is typically, but not always, a discrete assessor's parcel. 109(19681), citing *City of North Las Vegas v. Eighth Jud. Dist. Ct.*, 133 Nev. 995, 401 P.3d 211 (table) (May 17, 2017), 2017 WL 2210130 *2, Case No. 68263 (unpublished disposition). Yet *Murr* itself deemed two adjoining assessor's parcels as the whole parcel. 137 S.Ct at 1947. Additionally, in a published regulatory taking case, this Court rejected the notion that assessor's parcels are determinative of the whole parcel:

> Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of *all* economic use.... When viewed as a whole, we conclude that Kelly has not been deprived of all economic use; only the seven Hilltop lots have been affected by TRPA's regulations, not the entire Uppaway subdivision.

*Kelly*, 109 Nev. at 651, 855 P.2d at 1035 (citing *Penn Central*, 438 U.S. at 130) (emphasis in original). The "substantial profit" that derived from the sale of the unrestricted 32 lots obviated the taking claim. *Id.*

Just as in *Kelly*, the City's approval of residential and commercial development in 84% of the PRMP and the golf course in the remaining 16%, plus the 435-Unit Project that created $27 million in value, defeated any claim that the City "took" the 35-Acre Segment. 57(10144, 10146); 61(11035, 11037). *See Concrete Pipe*, 508 U.S. at 645; *Kelly*, 109 Nev. at 651, 855 P.2d at 1035.

### E. The Developer's Regulatory Takings Claims Failed As A Matter Of Law Because The Developer Had No Right To Force The City To Lift The Long-Established PR-OS Designation

#### 1. Maintaining The 35-Acre Segment's Existing Land Use Approved In The PRMP Was Not A Taking

Even if the 35-Acre Segment were deemed the whole parcel, having already approved the golf course for Peccole, the City did not "take" anything from the Developer. "[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). Because the 35-Acre Segment was designated PR-OS before and after the City's denial of the 35-Acre Application, the City's action did not change the value at all, negating a categorical or *Penn Central* taking. 58(10301, 10312. 10329, 10345).

Moreover, the Developer bought an operating golf course and drainage for $4.5 million, and the City never interfered with that use. 58(10398); 62(11058-11074). After closing the golf course, the Developer acknowledged that the Badlands still had use for "golf or golfing practice." 71(12407). Because the 35-Acre Segment had the same use (golf course and drainage) and value as it did when the Developer bought the property, the City did not "take" anything simply by maintaining the status quo. *See Colony Cove*, 888 F.3d at 451. As a result, the district

court should have granted summary judgment to the City on the categorical and *Penn Central* claims. *See id.*

### 2. The Developer's *Penn Central* Claim Failed As A Matter Of Law Because The Developer Could Not Have A Reasonable Investment-Backed Expectation That The Council Would Allow The Conversion Of Open Space To Housing

In light of the long-standing PR-OS designation, the City's disapproval of a housing development also could not have interfered with the Developer's investment-backed expectations, a core factor of the *Penn Central* test. 438 U.S. at 120. To satisfy this standard, the Developer's expectations must be objectively reasonable. *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 633-34 (9th Cir. 2020).

Here, the Developer knew at the time of purchase that it was buying a golf course and drainage property designated PR-OS in the City's General Plan. 59(10452). In its 2016 sales literature, before it filed redevelopment applications, the Developer acknowledged that the Badlands was designated PR-OS. 59(10452). In each of its applications to redevelop the 17, 35, and 133-Acre Segments, the Developer requested a change from PR-OS to a designation that allowed housing. 59(10479); 60(10696); 62(11076). Based on existing law, the Developer was on notice that the Council had discretion to approve (with or without conditions) or disapprove a General Plan amendment. *See Am. W. Dev., Inc. v. City of Henderson*,

111 Nev. 804, 807, 898 P.2d 110, 112 (1995); *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92, 98, 769 P.2d 721, 724 (1989); UDC 19.16.030(I).

*Penn Central* and its progeny confirm that, as a matter of law, the Developer could not have a reasonable expectation that the City would authorize the conversion of open space to housing. *See id.* 438 U.S. at 136 (New York City law that did not interfere with "present uses" of the property could not interfere with property owner's "primary expectation concerning the use of the parcel" ); *Bridge Aina Le'a*, 950 F.3d at 634-35 (developer could not have reasonably expected the Commission to not enforce conditions in place when it purchased the property); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120-21 (9th Cir. 2010) (takings claimants "bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had"); *Dodd v. Hood River Cty.*, 136 F.3d 1219, 1230 (9th Cir. 1998) (*Penn Central* claim rejected where owner had no reasonable investment-backed expectation to build housing in area designated exclusively for forest use at time owner purchased property).

*Kelly* is again on point:

> When considering the second [*Penn Central*] factor, Kelly's reasonable investment-backed expectations have been satisfied. At the time Kelly purchased Uppaway Estates in 1966, he had adequate notice that his development plans might be frustrated. At the time of the land purchase,

> the Lake Tahoe Regional Planning Commission had published the *Report of the Lake Tahoe Joint Study Committee*, and it discussed California and Nevada's concerns over rapid growth in the Lake Tahoe Basin and the need for land-use planning regulations. Moreover, Kelly's financial expectations have also been met because he purchased the original estate for $500,000.00, lived in the main house for nearly twenty years and then sold the main house alone for $1,100,000.00. Kelly also developed and sold most, if not all, of the parcels, with the exception of the seven Hilltop lots, yielding him a substantial profit.

109 Nev. at 651, 855 P.2d at 1035. Similarly, because the Developer could not have had an objectively reasonable expectation when it bought the Badlands that the Council would jettison the PR-OS designation, the district court should have entered judgment for the City on the *Penn Central* claim. *See id.* at 136.

### 3. The District Court Improperly Disregarded The Legal Effect Of The City's General Plan On The 35-Acre Segment

Nevada's land use regulatory framework requires cities to adopt General Plans (also called "master plans") governing the legal use of property. NRS 278.150(1). "Master plans contain long-term, comprehensive guides for the orderly development and growth of an area" to which zoning must conform. *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010) (citing NRS 278.150(1)-(2)).

Notwithstanding that the PR-OS designation determines this case, the district court stated - without any supporting evidence, legal citation, or analysis - "[T]he Court rejects the City's defenses that there is a Peccole Ranch Master Plan that

governs the 35 Acre Property and a City of Las Vegas Master Plan/land use designation of PR-OS that affects this Court's property interest determination." 109(19652). Yet in the PJR Order, the district court concluded the exact opposite:

> The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS) and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor.

1(222). When reversing Judge Crockett's Order, this Court noted that a General Plan amendment was one of the required approvals to convert the Badlands into housing, subject to the City's discretion. 62(11110), citing LVMC 19.16.030(I).

Because the 35-Acre Segment was designated PR-OS when the Developer bought the Badlands and PR-OS does not permit residential use, the district court erred as a matter of law when concluding the PR-OS designation was irrelevant to the takings analysis. 58(10239-10240, 10277, 10283-10286, 10300-10301, 10328-10329); 62(11110). Because the Council had discretion to deny a General Plan amendment that converted open space to houses, it cannot have effected a regulatory taking merely by leaving the PR-OS designation in place. NRS 278.250(4); *see Kelly*, 109 Nev. at 651, 855 P.2d at 1035.

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### F. RPD-7 Zoning Does Not Alter The Takings Analysis Because Housing Was Prohibited By The General Plan's PR-OS Designation, And Zoning Does Not Confer A Constitutional Right

#### 1. The District Court Failed To Interpret The Zoning Designation Consistently With The General Plan

By elevating the RPD-7 zoning designation over the General Plan's PR-OS designation, the district court turned all land use principles on their head. "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." NRS 278.250(2) (emphasis added); *see Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723. In implementing these mandates, the City's Unified Development Code provides:

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

UDC 19.00.040. Consistency with the General Plan has long been acknowledged by this Court. *See Citizens for Cold Springs*, 126 Nev. at 266, 236 P.3d at 12; *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112; *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723. NRS 278.150 and 278.250 provide that a city's General Plan designation governs allowable land uses regardless of the zoning designation. When exercising

their powers, land use decisionmakers have broad discretion and "may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate...." NRS 278.250(4).

Zoning does not invalidate or supersede the General Plan designation. *See* NRS 278.150; NRS 278.250(2). Indeed, the opposite is true; zoning "must" be consistent with General Plan designation of property. NRS 278.250(2); *see also Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112 ("municipal entities must adopt zoning regulations that are in substantial agreement with the master plan") (*quoting Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723); *Citizens for Cold Springs*, 126 Nev. at 266, 236 P.3d at 12 (zoning decisions must defer to the city's master plan).

Ignoring these authorities and citing *City of Las Vegas v. C. Bustos* for the proposition that zoning creates a property interest that can be "taken" by the denial of a discretionary land use application, the district court concluded that the R-PD7 zoning trumped the General Plan's PR-OS designation. 84(14733-14734); 109(19650-19652), citing 119 Nev. 360, 362, 75 P.3d 351, 362 (2003). However, *Bustos* addressed valuation in a direct condemnation case, not the agency's liability for a regulatory taking, and did not remotely hold that zoning confers a constitutional right to build. *See id.* Nor could it, because liability for the taking is not at issue in an eminent domain action. *See* NRS 37.120; *compare Fritz v. Washoe Cnty.*, 132

Nev. 580, 586, 376 P.3d 794, 798 (2016). Likewise, *Andrews v. Kingsbury Gen. Imp. Dist. No. 2*, 84 Nev. 88, 89, 436 P.2d 813, 813 (1968), on which the district court relied, was a direct condemnation case where the dispute was over damages. 109(19651). The mere fact that the 35-Acre Segment had an RPD-7 zoning overlay did not deprive the City of its discretion to maintain the PR-OS designation and deny the 35-Acre Application. NRS 278.250(4); *see Citizens for Cold Springs*, 126 Nev. at 266, 236 P.3d at 12.

### 2. This Court's Precedents Are Clear That Zoning Does Not Confer A Vested Right

The district court ignored the PR-OS designation based on the misguided notion that the RPD-7 zoning district conferred a "vested right" to obtain the City's approval of any project proposing no greater than 7 units/acre density. 109(19644, 19649, 19652). This ruling defied the voluminous authority of this Court that holds the exact opposite: "In order for rights in a proposed development project to vest, zoning or use approvals *must not be subject to further governmental discretionary action affecting project commencement*, and the developer must prove considerable reliance on the approvals granted." *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112 (emphasis added)*; see also Stratosphere*, 120 Nev. at 527, 96 P.3d at 759-60 (holding that because City's site development review process under Title 19.18.050 involved discretionary action by Council, the project proponent had no vested right

to construct). "[C]ompatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest." *Tighe*, 108 Nev. at 443, 833 P.2d at 1137 (affirming denial of an application, notwithstanding that "the land upon which [the applicant] intended to construct a tavern was zoned to accommodate such a commercial enterprise"); *see also Nevada Contractors v. Washoe Cty.*, 106 Nev. 310, 311, 792 P.2d 31, 31-32 (1990) (affirming county commission's denial of a special use permit even though property was zoned for the use).

This line of cases exists because the local decision maker has discretion over land uses: "Once it is established that an area permits several uses, it is within the discretion and good judgment of the municipality to determine what specific use should be permitted." *City of Reno v. Harris*, 111 Nev. 672, 679, 895 P.2d 663, 667 (1995); *see also 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."); *Nevada Contractors*, 106 Nev. at 314, 792 P.2d at 33 ("Because of the Board's particular expertise in zoning, courts must defer to and not interfere with the Board's discretion if this discretion is not abused."); *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112 ("In order for rights in a

proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting project commencement . . . "); *Bd. of Cty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983) (There are no vested rights against changes in zoning laws "unless zoning or use approvals are not subject to further governmental discretionary actions affecting project commencement.").

The broad discretion held by the City to limit the use of property cannot be reconciled with the district court's conclusion that the Developer has a constitutionally protected "right" to build 61 houses in designated open space that the City "took" when it denied discretionary land use applications. 109(19644, 19674-19675). The R-PD7 zoning district approved in the PRMP merely permits residential use but confers no "rights," constitutional or otherwise. *See Tighe*, 108 Nev. at 443, 833 P.2d at 1137.

In concluding that zoning confers a constitutional right to build, the district court also misconstrued the City's R-PD zoning ordinance, which provides:

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

> to ensure the proper amenities and to assure that the proposed development will be compatible with surrounding existing and proposed land uses.

UDC 19.10.050 (emphases added). UDC 19.18.020 defines the term "Permitted Use" as, "Any use allowed in a zoning district as a matter of right ***if it is conducted in accordance with the restrictions applicable to that district***." (emphasis added). Peccole availed itself of R-PD7 zoning's flexibility by setting aside the golf course as open space and an amenity for the PRMP. 57(10152, 10156-10158, 10160-10161, 10164-10165). The City's broad discretion to approve or deny development generally and, in particular, in an R-PD7 zoning district, is not compatible with the district court's conclusion that the Developer has a constitutional right to build houses in that part of the R-PD7 zone set aside for open space. *See* NRS 278.250(4); UDC 19.10.050(D).

If the Judgment is upheld, a vast body of land use law that (i) requires cities to adopt General Plan designations that govern the use of property; (ii) confers discretion to cities to keep or change those General Plan designations; and (iii) confers discretion to deny or condition development applications in the public interest, even where the proposed use is one of the permitted uses in the zone, will be nullified. *See Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60; *Tighe*, 108 Nev. at 443, 833 P.2d at 1137; *City of Reno*, 111 Nev. at 679, 895 P.2d at 667;

*Boulder City*, 110 Nev. at 246, 871 P.2d at 325; *Nevada Contractors*, 106 Nev. at 314, 792 P.2d at 33; *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112; *CMC of Nev.*, 99 Nev. at 747, 670 P.2d at 107.

### 3. The City's Discretion To Deny The 35-Acre Application Was The Same, Whether The Developer Filed A PJR, Sued For Inverse Condemnation, Or Both

The district court brushed off these authorities on the basis that they involved petitions for judicial review, rather than regulatory takings claims. 109(19683-19685). That excuse was unsound for two primary reasons. First, *Boulder City* denied a constitutional challenge to the denial of a permit, not a PJR, on the ground that owners have no property rights in zoning. *See* 110 Nev. at 242, 246, 871 P.2d at 322, 325. That case alone confirms the district court's legal error. *See id.*

Second, a PJR is merely a procedure for challenging government decisions that employs the same substantive law as an original claim; there is no separate substantive law of PJRs. *See*, *e.g.*, *Bombardier Transp. (Holdings) USA, Inc. v. Nevada Lab. Comm'r*, 135 Nev. 15, 18, 433 P.3d 248, 252 (2019) (reviewing de novo "statutory interpretation questions in the administrative context").

To support its illogical distinction between "PJR law" and "inverse condemnation law," the district court relied on a single authority, *City of Henderson v. Eighth Jud. Dist. Ct.*, 137 Nev. __, 489 P.3d 908 (2021). That case holds that

petitions for judicial review and inverse condemnation claims should not be combined in the same action because the evidence in a PJR is limited to an administrative record, and the standard of review is substantial evidence or failure to proceed by law. *Id.* at 911-12. Evidence in an inverse condemnation case, on the other hand, is not limited to the administrative record, and the standard of judicial review is a preponderance of the evidence. *Id*. Nothing in *City of Henderson*, however, leads to the conclusion that there exists a substantive law of PJRs. *See id.*

Legal rules do not vary depending on the type of suit that is asserted. The City had the same discretion to deny the 35-Acre Application whether the Developer then brought a PJR, regulatory taking claims, or both. *See Boulder City*, 110 Nev. at 242, 246, 871 P.2d at 322, 325; *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60. In another lawsuit filed by the Developer that raised constitutional claims (not a PJR) and involved the same parties and legal issue, the Ninth Circuit rejected the Developer's position that it had "vested zoning rights to develop residential units on the [Badlands]":

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

*180 Land Co. LLC v. City of Las Vegas*, 833 F. App'x 48, 51 (9th Cir. 2020)). Put simply, the facts and law articulated in the PJR Order did not change simply because the Developer also pled inverse condemnation claims.

### G. The District Court Erred In Finding A Physical Taking

Because the City did not occupy the 35-Acre Segment or authorize the public to do so, the physical taking claim (pled as a "per se regulatory taking") necessarily failed, as a matter of law. A physical taking requires that the public agency either physically occupy private property or restrict the owner's rights to exclude others from the property. *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 426, 436 (1982). "When the government physically takes possession of an interest in property for some public purpose," it may be liable for a physical taking. *Tahoe-Sierra*, 535 U.S. at 322. "In determining whether a property owner has suffered a per se taking by physical invasion, a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space." *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122 (internal citations omitted).

The district court confused regulations that limit the owner's *use* of property with regulations that compel the owner to allow others to physically *occupy* the property. 109(19675-19677). Even had the City denied the Developer all use of the

35-Acre Segment, it would not amount to a physical taking, which requires that the City compel the Developer to allow *others* to physically occupy the Property. *See Loretto*, 458 U.S. at 426, 436; *Tahoe-Sierra*, 535 U.S. at 321-22; *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122.

In holding that laws restricting the owner's use of property can constitute a physical invasion, the district court misconstrued the purpose of land use regulation. Virtually all limitations on an owner's use of property are for the community's benefit. *See generally* NRS 278.150; NRS 278.250. Land use regulation "arises from some public program adjusting the benefits and burdens of economic life to promote the common good...." *Tahoe-Sierra*, 535 U.S. at 324-35 (*quoting Penn Central*, 438 U.S. at 124). Courts have uniformly rejected the district court's conclusion that regulation of the owner's use constitutes a physical taking. *See*, *e.g.*, *Tahoe-Sierra*, 535 U.S. at 323 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."); *id*. at 325 ("Perhaps recognizing this fundamental distinction, petitioners wisely do not place all their emphasis on analogies to physical takings cases."); *Sisolak*, 122 Nev. at 662, 137 P.3d at 1122 (noting that a physical taking

exists only when a regulation "requires an owner to suffer a permanent physical invasion of her property").

#### 1. The City's Short-Lived Ordinances Regarding Golf Course Repurposing Did Not Authorize The Public To Trespass On The 35-Acre Segment

##### a. Bills 2018-5 And 2018-24 Did Not Apply To The 35-Acre Segment

The district court erroneously concluded that Bill 2018-5, adopted on May 16, 2018, and Bill 2018-24, adopted on November 7, 2018, both of which were repealed in January 2020, effected a physical taking of the 35-Acre Segment. 109(19675-19676); *see* 40(7402-7407); 63(11252-11265); 66(11717-11730). Those Bills, however, applied only to "any proposal by or on behalf of a property owner to repurpose a golf course or open space." 40(7402); 66(11717). During the short period in which the bills were in effect, the Developer filed no "proposals" to repurpose the 35-Acre Segment. 60(10696-10723). Indeed, the Council denied the 35-Acre Application on June 21, 2017, well before the bills were enacted. 60(10725-10732). Accordingly, Bills 2018-5 and 2018-24 never applied to the 35-Acre Segment. 40(7402); 66(11717).

##### b. Bills 2018-5 And 2018-24 Did Not Authorize A Physical Invasion Of The 35-Acre Segment

Even assuming *arguendo* the bills applied, they did not exact an easement that allowed the public to physically occupy the 35-Acre Segment. 40(7402-7407);

66(11718-11729). The bills required that landowners who proposed to convert golf courses to other uses provide certain impact studies and engage the community in discussion of their proposals. *Id.* Under the heading "Maintenance Plan Requirements," Bill 2018-24 required owners to "provide documentation regarding ongoing public access, access to utility easements, and plans to ensure that such access is maintained." 66(11726-11727). On its face, this provision did not authorize public use or effect a "physical taking" of the 35-Acre Segment. *See id.*

To reach the opposite conclusion that Bill 2018-24 effected a physical taking of the 35-Acre Segment, the district court pointed to *Sisolak* and *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). 109(19673-19677). The statutes at issue in those cases, however, authorized a physical invasion of private property. In *Sisolak*, the ordinance exacted an easement that required private property owners to submit to permanent occupation of their airspace by commercial airplanes. 122 Nev. at 667, 137 P.3d at 1125. In *Cedar Point*, a statute compelled owners of certain private industrial facilities to grant a permanent easement to labor union organizers to physically enter their property. 141 S.Ct. at 2072.

In contrast, neither Bill 2018-5 nor Bill 2018-24 exacted an easement for public access. 40(7402-7407); 66(11717-11729). Rather, they required a developer to discuss alternatives to a proposed golf course redevelopment project with

interested parties and report to the City. *Id.* Bill 2018-24's requirement that redevelopers of golf courses "ensure that such access is maintained" appears in a section requiring a maintenance plan. 66(11726-11728). The plan would require the owner to maintain existing access to the golf course from public streets for the convenience and safety of the public, *only if* a developer planned to *maintain* ongoing public access and *only* if requested by the City. *Id.* This provision cannot reasonably be interpreted to mean that the owner may not close the golf course and exclude the public from the property. *Id.*

Moreover, the City never notified the Developer that it should submit a plan under Bill 2018-24 and the Developer never did so, confirming that the bill simply did not apply to the Developer or the 35-Acre Segment. 66(11673-11674). Even if Bill 2018-24 could be construed to require the redeveloper of a golf course to maintain "ongoing public access," the Developer voluntarily shut down the golf course in 2016 and excluded the public from the property before Bill 2018-24 was enacted, so there was no "ongoing public access" to maintain. 66(11674).

In addition, there is no evidence that the public physically occupied the 35-Acre Segment as a consequence of any City regulation. Instead, the Developer's evidence showed that members of the public trespassed on the Badlands as early as

December 2015 (three years before enactment of the bills), while they were in effect, and after they were repealed. 50(8975-9027); 51(9039-9092, 9104-9159).

#### c. The Developer Did Not Allege, And The District Court Did Not Award, Damages For A Physical Taking

Had either bill compelled the Developer to allow the public to trespass, the physical taking claim nevertheless had to fail, as a matter of law, because the Developer suffered no resulting damage. The Developer's Appraiser found no evidence of physical damage to the 35-Acre Segment or lost value arising from the public walking on the Badlands, and the district court awarded no damages for the alleged physical taking. 87(15290-15392); 110(19855-19869).

### 2. The City's Requirement That The Developer File A Different Application For New Fencing Was Neither A Physical Occupation Nor An Exercise Of Possession

The City also did not physically occupy the 35-Acre Segment or prevent the Developer from excluding others by "denying" an application for new fencing around two ponds, neither of which is located on the 35-Acre Segment. 66(11670-11673, 11678, 11700-11707). For nearly 20 years, the Developer and its predecessor used, possessed, enjoyed and otherwise exercised their rights without the new fencing the Developer sought in 2017. 66(11678, 11712-11714). When the

Developer filed an application to construct additional fences, the Acting Planning Director simply informed the Developer that a different application was required:

> I have determined that the proximity to adjacent properties has the potential to have significant impact on the surrounding properties. As such, the Minor Development Review (Building Permit Level Review) is denied and an application for a Major Review will be required pursuant to LVMC 19.16.100(G)(l)(b).

66(11704).

On its face, nothing in this letter constituted a physical occupation or a decision to prevent the Developer from excluding others. 66(11672-11673, 11704). Rather, the City simply required the Developer to complete a different application and invited the Developer to "coordinate with the Department of Planning the submittal of a Major Site Review," which the Developer failed to do. 66(11672, 11704). The Developer also did not file a petition for judicial review. The requirement that the Developer submit a different application for fencing did not constitute "possession" of the 35-Acre Segment that amounted to a "per se" taking. *Compare Sisolak*, 122 Nev. at 662-663, 137 P.3d at 1122.

### 3. The City's Requirement That The Developer File A Different Application For New Access Points Was Neither A Physical Occupation Nor An Exercise Of Possession

Similarly, the City did not physically occupy or deprive the Developer of its possession and use of the 35-Acre Segment by "denying" its application for new

vehicular access points. 66(11672, 11698). For nearly 20 years, the Developer and its predecessor used, possessed, enjoyed and otherwise exercised their rights to the Badlands with the existing access points, which included vehicular access from public streets at multiple locations. 66(11678, 11712-11714). After the Developer closed the golf course in 2016, the Badlands retained the same vehicular access. *Id.* In addition to the two entrances historically used to access the Badlands golf course, in approving the 435-Unit Project, the City granted the Developer's request for an *additional* vehicle access point from South Rampart Blvd. 66(11678, 11693-11694).

When the Developer filed an application in 2017 to construct three more access points, the Acting Planning Director simply informed the Developer that a different application would be required:

> After reviewing the permit submitted (L17-00198) for perimeter wall modifications and controlled access gates on the subject site, I have determined that the proximity to adjacent properties has the potential to have significant impact on the surrounding properties. As such, the Minor Development Review (Building Permit Level Review) is denied and an application for a Major Review will be required pursuant to LVMC 19.16.100(G)(1)(b).

66(11696). On its face, nothing in this letter constituted an occupation of the property or a decision that prevented the Developer from possessing the property. 66(11696). To the contrary, the City simply invited the Developer to file a different application and to "coordinate with the Department of Planning for the submittal of

a Major Site Review." 66(11696). The Developer never did so (66(11673)) and did not file a petition for judicial review.

The district court's citation to *Schwartz v. State* is misplaced because that case involved the state highway department cutting off the owner's existing access to the highway abutting its property. 109(19677), *citing* 111 Nev. 998, 1001, 900 P.2d 939, 941 (1995). In contrast, here, the City did not impair the Developer's existing access rights. 66(11672, 11678). And the Developer does not have a "right" to construct new access points wherever and however it wants that can be "taken" simply because the City requires compliance with its Code. *See* LVMC 19.16.100(G)(1)(b). The City has discretion to implement its Code provisions to ensure that modifications to existing land uses are compatible with their surroundings. *See* UDC 19.00.030. "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense." *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985); *see Adams v. U.S.*, 255 F.3d 787, 794-95 (9th Cir. 2001) ("[Plaintiffs'] argument that requiring them to apply for a permit or special use authorization effects an unconstitutional taking is unavailing").

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### H. The District Court Erred In Finding The City Liable For A Non-Regulatory Taking Because All City Actions Challenged By The Developer Involved Regulations That Did Not Interfere With The Property's Approved Use

A non-regulatory taking can occur "if the government has 'taken steps that directly and substantially interfere[] with [an] owner's property rights to the extent of *rendering the property unusable or valueless to the owner*.'" *State*, 131 Nev. at 421, 351 P.3d at 743 (alteration in original; emphasis added) (quoting *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed. Cir. 2013)). A non-regulatory taking occurs only in "extreme cases" involving either (a) a physical taking arising from something other than a regulation, such as flooding of property caused by a public improvement, or (b) unreasonable actions that interfere with use or diminish the value of property after the agency has officially announced an intent to condemn the property. *See id.* at 421-23.

For example, in describing the limited circumstances in which a non-regulatory taking claim might be possible, this Court relied on *Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), a case involving extreme and unreasonable actions, including repeatedly flooding property before a planned condemnation. *See State*, 131 Nev. at 421-23, 351 P.3d at 743. The Court concluded that the alleged agency actions taken in advance of a

planned condemnation did not rise to the "extrem[e]" level shown in *Richmond Elks*, as required for a non-regulatory taking claim. *Id.* at 422, 351 P.3d at 743.

To hold the City liable for a non-regulatory taking, the district court stated that "the aggregate of City actions, set forth above, substantially interfered with the use and enjoyment of the Landowners' 35 Acre Property, rendering the 35 Acre Property unusable or valueless to the Landowners." 109(19679). The district court cited no evidence, however, that the City did anything to prevent the Developer from using the 35-Acre Segment as it had been for the previous 25 years; *i.e.*, for a golf course and drainage. 109(19679). Likewise, the district court cited no evidence that the City even diminished the 35-Acre Segment's value, much less rendered it valueless, as required for a non-regulatory taking. 109(19679). Nor is there any evidence that the City condemned the 35-Acre Segment or made an official announcement of an intent to condemn that could give rise to a non-regulatory taking claim. *Compare State*, 131 Nev. at 421-23, 351 P.3d at 743. To the contrary, the City approved significant development in the Badlands, and the Developer never gave the City an opportunity to consider a modified project for the 35-Acre Segment. 64(11414-11419).

Finally, the "aggregate of the City's actions above" referenced by the district court were all *regulatory*. 109(19679). Denial of the 35-Acre Application, denial

of an MDA, and denial of new fencing and access applications *regulated* the owner's use of the 35-Acre Segment. 109(19679). Indeed, those actions are precisely what the district court cited as the basis for its finding of a regulatory taking. 109(19673-19679). By its very name, a "non-regulatory" taking cannot be a "regulatory" taking. Because the district court failed to identify any specific *non-regulatory* action by the City, it could not, as a matter of law, find the City liable for a non-regulatory taking. 109(19679).

## I. The Amount Of The Judgment Is Unsupportable

### 1. Erroneous Evidentiary Rulings Barred The City's Relevant And Admissible Evidence That Undermined The District Court's Valuation

#### a. The District Court Erred In Excluding The PR-OS Designation And PRMP From Evidence At The Trial

Just compensation in a regulatory taking case is measured by the difference in the value of the property immediately before and immediately after the regulation is imposed. *Calvo v. U.S.*, 303 F.2d 902, 909 (9th Cir. 1962); *U.S. v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999); *Loveladies Harbor, Inc. v. U.S.*, 21 Cl. Ct. 153, 160, 161 (1990). In awarding $34.1 million to the Developer for the categorical and *Penn Central* takings, the district court relied on an appraisal ("Appraisal") conducted by The DiFederico Group ("Appraiser") purporting to determine the difference in the value of the 35-Acre Segment before and after the

City's alleged regulatory restriction. 110(19859-19865), *citing* 87(15290-15392). That Appraisal failed to accurately determine the before and after values because it deemed residential use a "legally permissible" use in the before condition, in contravention of the PR-OS designation. *Compare* 87(15355) *to* 58(10239-10240, 10283-10286, 10300-10301, 10328-10329, 10344-10345). Accordingly, the district court's reliance on the Appraisal was legal error. 110(19859-19865).

Nevada law and the Uniform Standards of Professional Appraisal Practice ("USPAP") required the Appraiser to base his opinion of value on the highest and best use of the property. NAC 645C.400(1); NAC 645C.244. In determining the highest and best use, "the finder of fact may consider such factors as would be considered by a prudent businessperson before purchasing such property," which includes "the property's possible legal uses." *Skyland Water Co. v. Tahoe-Douglas Dist.*, 95 Nev. 289, 291, 593 P.2d 1066, 1067 (1979) (internal citations omitted). The highest and best use must be, among other things, "legally permissible." *Id*.

Here, the Appraiser concluded that "the legally permissible ... use of this site, as of the effective date of value, was a residential use." 87(15355). He then compared the 35-Acre Segment with sales of properties whose legally permissible use was residential to conclude the value in the "before condition" was $34,135,000. 87(15358-15384). The Appraiser then opined that due to the City's regulatory

restrictions on residential development, after September 14, 2017, residential use was not "legally permissible" on the 35-Acre Property and, as a result, valued the property in the "after condition" at zero. 87(15390). Based on this evidence, the district court awarded compensation to the Developer of the difference between the before and after values, or $34,135,000. 109(19671); 110(19868).

Because residential use is not legally permissible in areas designated PR-OS, the "before" value used by the district court was based on a faulty premise. 58(10239-10240, 10253, 10283-10286, 10300-10301, 10328-10329, 10344-10345). The 35-Acre Segment had long been designated PR-OS and was still designated PR-OS on the date of value. 58(10263, 10328-10329, 10344-10345). Although the PR-OS designation was a matter of public record and is the primary legal constraint on its use, the Appraiser's report did not mention it, much less evaluate its effect. *Compare* 87(15290-15401) *to* 58(10345). Because residential use was prohibited by the PR-OS designation, according to the Appraiser's own analysis, the before value should have been zero, resulting in no damages as a result of the City's actions. 58(10344-10345).

Notwithstanding that the PR-OS designation is the primary legal constraint on the 35-Acre Segment, the district court granted the Developer's motion in limine to exclude any evidence of it from the trial. 110(19835-19838). The district court

also barred evidence of the PRMP, which showed that the golf course was approved as a recreational and open space amenity and served as drainage for (and therefore was just one segment of) the master planned area. 110(19835-19838). This was reversible error because it barred the City from demonstrating at trial that had the Appraiser only considered legally permissible uses and the significant development the City already approved in the PRMP, the Developer could prove no damages. *See Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008).

**b. The District Court Erred In Excluding The Purchase Price From Evidence At The Trial**

The district court also committed reversible error in barring from trial evidence of the purchase price paid by the Developer for the 35-Acre Segment. Under the Membership Purchase and Sale Agreement between Peccole and the Developer dated March 2015, the Developer purchased the 250-acre Badlands golf course in an arms-length transaction for less than $7,500,000, which amounted to $30,000 per acre. 62(11059). The City established from records provided by the Developer and from Peccole's deposition that $3,000,000 of the purchase price was consideration for other property interests not part of the Developer's takings claims, putting the price paid for the Badlands at less than $4,500,000, or $18,000 per acre. 66(11774-11849); 67(11862-11987); 68(11989-12081); 93(16660-16665).

Therefore, the Developer paid less than $630,000 for the 35-Acre Segment ($18,000/acre x 35 acres = $630,000). *See id.*

That purchase price is highly probative of the "before condition." *See New Jersey Highway Auth. v. Rudd*, 114 A.2d 721, 722-23 (N.J. 1955) (in valuing property in an eminent domain action, "evidence of the price which the owner paid for the subject property ... if it meets certain qualifications it is said to be an exceedingly important piece of evidence") (*citing* 5 Nichols, Eminent Domain 266 §21.2). In *Rudd*, the court noted that evidence of the purchase price must be bona fide, "such as to exemplify the bargain of a willing seller and a willing buyer, and that the sale occurred within a reasonable time of the value date in the condemnation proceedings." *Id.* at 723. When evidence of the sale "possesses the requisite essentials and is not destitute of probative worth because of special circumstances, it is admissible." *Id.* (*citing* Jahr, Eminent Domain, §136 pp. 209, 210). The Developer's 2015 purchase price easily meets the standards for admissible evidence. *See* NRS 48.025.

This Court has affirmed the admission of evidence of a property's purchase price as shedding light on the property's value at a later date. *See, e.g.*, *State, Dept. of Transp. v. Cowan*, 120 Nev. 851, 858, 103 P.3d 1, 5-6 (2004). There, the Court held that the five-year gap in time between the purchase and the taking was "not so

remote, nor any increase in business value so extensive, that the original purchase price was an unfair criterion for the jury to consider in calculating damages." *Id.*

Being closer in time than what the Court approved in *Cowan*, the March 2015 purchase price is highly probative of the 35-Acre Segment's value in September 2017. *Compare id.* Indeed, the Appraiser relied on a February 2015 comparable sale and conceded that there had been no significant changes in the market for the 35-Acre Segment or physical changes in the property between March 2015 and the September 2017 date of value. 87(15344, 15364-15367, 15372-15373). The price the Developer paid for the 35-Acre Segment was also highly probative of its legal uses at the time of purchase and the Developer's expectations regarding those uses. *See Guggenheim*, 638 F.3d at 1120 (noting that because a rent control ordinance was in place and public record, "the price [plaintiffs] paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.*

*Guggenheim* is directly on point. *See id.* The Developer's $18,000/acre purchase price is strong and direct evidence that the Developer and Peccole, both experienced real estate developers, were aware that the PR-OS designation precluded residential development absent a General Plan amendment. *See id.* Moreover, the actual purchase price undermined the Appraiser's opinion that the 35-Acre Segment was worth $34.1 million in the "before" condition. 87(15384). As a

result, the district court's exclusion of this highly probative evidence was reversible error. *See Cook*, 124 Nev. at 1006, 194 P.3d at 1219.

### 2. The District Court Failed To Determine The Proper Date Of The Alleged Taking

In a regulatory taking case, the date of value is the date on which the agency imposed the regulation that allegedly took the property. *Alper*, 100 Nev. at 391, 685 P.3d at 949; *see also Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 10 (1984) ("'Just compensation' ... means in most cases the fair market value of the property on the date it is appropriated.") (citing *U.S. v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979)).

The Appraiser valued the 35-Acre Segment in the "after condition" "considering the City's actions to prevent the legal use of the property," without identifying the specific regulation(s) that prevented use of the 35-Acre Segment or when the City imposed them. 87(15293). Instead, the Appraiser assumed – and the district court accepted – that the date of value is when the Developer first served a summons in this case, September 14, 2017. 87(15296); 110(19867). Although that might be true in an eminent domain case (*see* NRS 37.120), because the Developer's filing a complaint against the City was not an action *by the City* that regulated the Developer's use of its property, September 14, 2017 was not a proper date of value in a regulatory takings case. *See Alper*, 100 Nev. at 391, 685 P.3d at 949.

Underscoring the arbitrariness of its rulings, the district court used September 14, 2017 as the date of value for calculating just compensation, but used August 2, 2017 for calculating the property tax award and prejudgment interest, even though the Council denied the 35-Acre Application on June 21, 2017. 110(19859, 19864, 19867); 126(23030-23031); 127(23176). Although the difference in value between June 21, 2017 and August 2 or September 14, 2017 is not necessarily a significant amount, it is one of many examples of the district court's systematic errors in blindly applying eminent domain rules to this regulatory takings case.

Even if the Judgment could stand (it cannot), the district court erred as a matter of law by failing to order the Developer to convey title to the City upon payment. *See Richmond Elks*, 561 F.2d at 1332.

### J. The Post-Judgment Awards Of Additional Sums Are Legally Flawed

Because the Judgment must be reversed, the post-Judgment awards of fees, costs, prejudgment interest, and property taxes cannot stand.

#### 1. Because The Judgment Conferred A Windfall, No Additional Sums Were Required To Make The Developer "Whole"

The Developer pointed to Nev. Const. Art. 1, Sec. 22(4) to contend that the Additional Sums were needed to make the Developer "whole," and the district court relied on that provision as a basis for the cost, fees, and prejudgment interest it

awarded. 112(20363, 20102); 126(23041, 23055); 127(23095). By its terms, Section 22(4) applies to eminent domain actions, not inverse condemnation actions. Even if Section 22(4) applied here, because the Developer bought the 35-Acre Segment for $630,000, but was awarded damages of $34,135,000, it was made "whole" by a factor of 54 through the just compensation award alone. The Additional Sums exacerbated the windfall.

### 2. The District Court Erred In Requiring The City To Reimburse The Developer $1 Million In Property Taxes

Relying on *Alper*, the district court ordered the City to reimburse the Developer for property taxes based on a finding that the City "dispossessed" the Developer from the property. 126(23030). In *Alper*, unlike here, the county took physical possession and started construction of a road-widening project but failed to initiate formal eminent domain proceedings. 100 Nev. at 391, 685 P.2d at 949. The property owner then filed an inverse condemnation action, at which point the parties stipulated to the county's liability for physically taking the property. *Id.* The Court required the County to reimburse the property taxes the owner paid after the City physically dispossessed the owner. *Id*.

No such circumstances exist in this regulatory taking case. The district court awarded property taxes from August 2, 2017, the date on which the Council denied

the Developer's MDA application, which was not an act of physical possession. 126(23030). The district court did not cite any evidence that the City "dispossessed" the Developer on that date or any other. 126(23030). As long as the Developer owns the property, which it continues to do, it must pay all taxes due.

Additionally, the Developer's alleged harm from property taxes was largely self-inflicted. After the Developer voluntarily closed the golf course in December 2016, the Clark County Tax Assessor increased the property taxes assessed. 70(12363). The Developer appealed the determination yet did not argue that the Badlands should continue to be valued as open space due to the PR-OS designation, as had Peccole. 71(12401-12410). Instead, the Developer stipulated with the Assessor that the highest and best use of the Badlands is residential and that the property can be assessed at the higher rate. 70(12361-12363). Having made this strategic decision, the Developer – not the City – was responsible for the increased property tax assessment.

### 3. The Fee Award Was Legally Unsupported And Unreasonable

Having been made "whole" 54 times over from the Judgment, a fee award of additional amounts was not justified by Nevada Const. Art. 1, Section 22(4) or any other authority. 126(23049-23062). Contrary to the district court's conclusion, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,

42 U.S.C. §§ 4601 et seq. did not apply because the alleged taking here did not involve federal funds. 126(23053-23054). Likewise, a fee award pursuant to NRS 18.010(2)(b) was not justified because the City's defense was reasonable and supported by law, and the district court made no findings to the contrary. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 968, 194 P.3d 96, 107 (2008) (approving denial of fee motion because "appellants raised reasonably supportable, if not ultimately successful, arguments"). Finally, because the amount of fees was not supported by billing statements, the district court lacked sufficient evidence to determine that it was reasonable and did not include amounts incurred in other cases.

## CONCLUSION

Because the General Plan designated the 35-Acre Segment PR-OS when the Developer bought the property, the City cannot be liable for categorical and *Penn Central* claims merely by maintaining that designation. Ignoring this clear law, the district court found that Nevada's mandate that cities adopt General Plans limiting land uses and zoning ordinances to implement those limitations are unconstitutional. In addition, the Developer's physical and non-regulatory taking claims are unsupported by evidence or law. As a result, the Court should reverse the Judgment, vacate the post-Judgment awards, and enter judgment for the City.

**AFFIRMATION**

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 17th day of October, 2022.

BY: /s/ Debbie Leonard


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| LAS VEGAS<br>CITY ATTORNEY'S OFFICE<br>Bryan K. Scott (#4381)<br>Philip R. Byrnes (#166)<br>Rebecca Wolfson (#14132)<br>495 S. Main Street, 6th Floor<br>Las Vegas, NV 89101<br>Phone: 702.229.6629<br>Fax: 702.386.1749<br>bscott@lasvegasnevada.gov<br>pbyrnes@lasvegasnevada.gov<br>rwolfson@lasvegasnevada.gov | McDONALD CARANO LLP<br>George F. Ogilvie III (#3552)<br>Amanda C. Yen (#9726)<br>Christopher Molina (#14092)<br>2300 W. Sahara Ave, Suite 1200<br>Las Vegas, NV 89102<br>Phone: 702.873.4100<br>Fax: 702.873.9966<br>gogilvie@mcdonaldcarano.com<br>ayen@mcdonaldcarano.com<br>cmolina@mcdonaldcarano.com |
| LEONARD LAW, PC<br>Debbie Leonard (#8260)<br>955 S. Virginia St., Suite #220<br>Reno, NV 89502<br>775-964-4656<br>debbie@leonardlawpc.com | SHUTE, MIHALY & WEINBERGER, LLP<br>Andrew W. Schwartz<br>(CA Bar No. 87699)<br>(Admitted pro hac vice)<br>Lauren M. Tarpey<br>(CA Bar No. 321775)<br>(Admitted pro hac vice)<br>396 Hayes Street<br>San Francisco, California 94102 |

*Attorneys for City of Las Vegas*

## NRAP 28.2 ATTORNEY'S CERTIFICATE

I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief exceeds the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 21,675 words. A motion to exceed the word limit is filed concurrently with this brief.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of October, 2022

LEONARD LAW, PC

BY: /s/ Debbie Leonard
Debbie Leonard (#8260)
955 S. Virginia St., Suite #220
Reno, NV 89502
775-964-4656
debbie@leonardlawpc.com

(additional counsel listed above)

*Attorneys for City of Las Vegas*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on October 17, 2022, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants below who are registered as E-Flex users will be served by the EFlex system upon filing. All others will be served by first-class mail.

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

Claggett & Sykes Law Firm
Micah S. Echols, Esq.
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
*Attorneys for 180 Land Co., LLC and Fore Stars, Ltd.*

EHB Companies
Elizabeth Ham, Esq.
1215 S. Fort Apache Road, Suite 120
Las Vegas, NV 89117
*Attorneys for 180 Land Co., LLC and Fore Stars, Ltd.*

*/s/ Tricia Trevino*
An employee of Leonard Law, PC