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

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

CITY OF LAS VEGAS' REPLY IN SUPPORT OF MOTION TO STRIKE "LANDOWNERS' APPENDIX" AND ANSWERING BRIEF

LAS VEGAS CITY ATTORNEY'S OFFICE Bryan K. Scott (#4381) Jeffrey Galliher (#8078) Rebecca Wolfson (#14132) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 bscott@lasvegasnevada.gov jgalliher@lasvegasnevada.gov rwolfson@lasvegasnevada.gov	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com

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

Attorneys for City of Las Vegas

POINTS AND AUTHORITIES

A. The Developer Does Not Dispute That The "Landowners' Appendix" Consists Of Extra-Record Materials That The Court's Jurisprudence Requires Be Stricken

The Developer's Opposition is notably silent on a key dispositive point: the documents in the "Landowners' Appendix" are outside the record, and an appellate court "cannot consider matters not properly appearing in the record on appeal." *Tabish v. State*, 119 Nev. 293, 312, 72 P.3d 584, 596 (2003). The Developer makes no effort to address, much less distinguish, this and the other determinative authorities cited by the City. That failure amounts to a concession that: (1) the district court's Judgment cannot stand on the record; and (2) the extra-record materials and non-conforming brief must be stricken. *See* NRAP 30(g)(1); *In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. 232, 238 n.4, 277 P.3d 449, 453 n.4 (2012) (granting motion to strike excerpts from administrative record not filed below).

B. The Developer Had Ample Opportunity Below To Counteract The City's Position That Approval Of The 435-Unit Project Prevented The District Court From Finding A Taking

The keystone of the Developer's Opposition is that it **needs** extra-record documents to refute the arguments in the City's opening brief that: (1) the City's approval of the 435-Unit Project increased the Badlands' value and prevented the district court from finding a taking; and (2) the Developer seeks to profit off of taxpayers by prosecuting inverse condemnation claims, rather than build the

approved project. Opp. 1-8. However, these are the same arguments the City made in the district court. 55(9879-9883, 9950-9954); 92(16541-16542).

To the extent the Developer contends that the City presents a "false narrative," it must rebut that with *record* evidence. *See Tabish*, 119 Nev. at 312, 72 P.3d at 596. Although the Developer submitted reams of documents to the district court, the Developer's inability to refute the City's arguments on appeal demonstrates a total lack of record evidence to support the district court's Judgment. The absence of evidence contrary to the City's proof stems from the Developer's own failures, not from the City "opening the door" to the submission of *ultra vires* documents. The Developer cannot now shore up the faulty Judgment by pointing to similarly flawed decisions in other Badlands cases. *See Tabish*, 119 Nev. at 312, 72 P.3d at 596.

C. Judicial Notice Cannot Substitute For The Lack Of Record Evidence

1. Controverted Findings In Another Judicial Proceeding Are Not Judicially Noticeable

The vast majority of documents of which the Developer seeks judicial notice are contested findings and conclusions made in its other Badlands lawsuits, which are not subject to judicial notice. To be judicially noticeable, a fact must be: "(a) Generally known within the territorial jurisdiction of the trial court; or (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." NRS 47.130(2). "As a general rule, [the Court] **will not** take judicial notice of records in

another and different case, even though the cases are connected." *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (emphasis added) (citing *Giannopulos v. Chachas*, 50 Nev. 269, 270, 257 P. 618, 618 (1927)); *see also In re Amerco Derivative Litig.*, 127 Nev. 196, 221 n.9, 252 P.3d 681, 699 n.9 (2011) ("[G]enerally, this court **will not** take judicial notice of facts in a different case, **even if connected in some way**, unless the party seeking such notice demonstrates a valid reason for doing so.") (emphases added and citations omitted).

Giannopulos presented similar circumstances as exist here, with the Court concluding that the movant "fails to satisfy us that we can … so relax the rule as to consider an interlocutory judgment in a case pending and undetermined in the lower court, even though the cases are connected. To do so would not only violate, but would abrogate the [general] rule" that "courts cannot in one case take judicial notice of their records in another and different case, even though the cases are connected." 50 Nev. at 269, 257 P. at 618.

Analyzing the equivalent federal rule, the Ninth Circuit likewise concluded that "taking judicial notice of findings of fact from another case exceeds the limits of Rule 201." *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). "[J]udicial notice is limited to the existence and terms of the record; it does not extend to the truth of statements quoted in the record **or to factual findings**." *Ferris v. Wynn Resorts Ltd.*,

462 F. Supp. 3d 1101, 1118 (D. Nev. 2020) (emphasis added); *see also Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1117 n.14 (9th Cir. 2005) (denying request for judicial notice of an order in another case because party was "offering the factual findings contained in the order for the purpose of proving the truth of the factual findings contained therein"); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (while court may take judicial notice of "matters of public record," it may not take judicial notice of any fact "subject to reasonable dispute"). "A disputed fact does not become undisputed merely because a judge or other adjudicative body decides it." *Tate v. Univ. Med. Ctr. Of S. Nev.*, No. 209CV01748JADNJK, 2016 WL 7045711, at *6 (D. Nev. Dec. 2, 2016), *aff'd sub nom. Tate v. Univ. Med. Ctr.*, 773 F. App'x 405 (9th Cir. 2019).

Here, the Developer offers the "Landowners' Appendix" precisely for the unauthorized purpose rejected by these decisions; for the "truth" of disputed findings made in other cases. Answer. Br. 8-11, 21-22, 39, 42, 48, 56-57, 83, 107-108, 116. As the City argued in those cases, the disputed findings derived from the Developer's misrepresentations. In other words, their accuracy is seriously in question, rendering the documents outside the purview of NRS 47.130 and 47.150.

2. The Court Cannot Consider Extra-Record Materials Simply Because They May Be Judicially Noticeable

Even if the "Landowners' Appendix" contained matters that could be subject to judicial notice, the Court must still limit its review to the record. Simply because

the cases involve the same parties and segments of the same Badlands property does not render them fair game for consideration. Although the Court has recognized an exception to the general rule against judicial notice when there is a "closeness of the relationship between the two cases," the circumstances in which it has invoked this exception bear no resemblance to what the Developer tries to do here. *See Mack v. Est. of Mack*, 125 Nev. 80, 91–92, 206 P.3d 98, 106 (2009).

For example, in *Mack*, the Court invoked the exception to take judicial notice of one discrete fact; namely, that a husband who sought in a civil case to financially benefit from his wife's death was adjudged guilty of murdering her. *Id.* at 92, 206 P.3d at 106. *Occhiuto* involved the appellate court deciding whether the district court should have taken judicial notice of the parties' prior divorce decree when it applied res judicata. *Id.* at 145, 625 P.2d at 569. *Cannon v. Taylor* involved the Court taking notice of "an incontrovertible fact, verifiable from records in the building where we sit" contained within the Attorney General opinion. 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972). In *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, the Court took judicial notice of a declaratory judgment that deemed an agency regulation legally invalid, as a matter of law. 114 Nev. 535, 539, 958 P.2d 733, 735 (1998).

None of these cases authorizes the sweeping judicial notice sought by the Developer of various interlocutory district court decisions in other contested cases that, once final, will themselves be subject to a separate appeal on a different record,

or of post-Judgment proceedings. If the Developer's argument were accepted, there would be no limit to the documents the Developer could present in this appeal, so long as they are from a different Badlands case. That is not the law. *See Tabish*, 119 Nev. at 312, 72 P.3d at 596.

The Developer segmented the Badlands and filed four separate lawsuits to circumvent the parcel-as-a-whole doctrine. It cannot now mix and match documents from each case as it pleases to expand the Court's scope of review. In so doing, the Developer has distorted the "close relationship" language from *Occhiuto* and *Mack* beyond recognition. The narrow exception should not be interpreted to swallow the general rule **against** judicial notice. *Giannopulos*, 50 Nev. at 269, 257 P. at 618.

D. Deferring A Decision On The Motion To Strike Until The Court Decides The Merits Violates The City's Due Process Rights And Transforms This Court Into A Factfinder

1. The Court Should Not Condone The Developer's Sanctionable Conduct By Deferring A Decision On The Motion To Strike

In an attempt to excuse its clear violation of the rules, the Developer cites an Order from another case in which the Court deferred a decision on a motion to strike until considering the merits. Opp. Ex. 1. That Order is not precedential and contravenes the Court's published jurisprudence. *Compare In re Nevada State Eng'r Ruling No. 5823*, 128 Nev. at 238 n.4, 277 P.3d at 453 n.4 (granting motion to strike documents that were "never filed with the district court"). Even if a non-binding Order could inform the process, in that case, the Developer's appellate counsel took

the exact same position advanced by the City here, confirming his knowledge of the rules and that the Developer violates them here. *See* Motion to Strike and Reply thereto, Case No. 76436. The Court ultimately denied the motion to strike because the movant's appendix included exhibits that referenced the document the movant sought to strike. Order of Affirmance, Case No. 76436. Because no such facts exist here, that case supports the City's position, not that of the Developer.

The City's brief relies exclusively on record evidence. Should the Court defer ruling on the motion to strike, it would reward the Developer and its counsel for knowingly and intentionally violating the rules. Because the rules protect a litigant from having to respond to extra-record documents and materials that post-date the Judgment, the Court should not delay a decision on the Motion to Strike. NRAP 10(a); NRAP 30(c)(1); *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

2. The Developer's Widespread Reference To Extra-Record Materials Unfairly Prejudices The City

The "Landowners' Appendix" consists primarily of district court orders from other cases that were based on arguments the Developer advanced in those cases but not in this case. By submitting and requesting judicial notice of court orders instead of the evidence underlying those orders and then citing in its Answering Brief to the "evidence" on which the orders were based, the Developer seeks to do an end-run around the universal rule that limits appellate review to the evidence the parties

submitted to the lower court. Should the Court consider the Developer's extra-record materials, basic notions of fair play require that the City be given the opportunity to submit rebuttal evidence. Where a decision maker relies on extra-record facts, it must follow procedures that are "fair under the circumstances." *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (reversing order where board took administrative notice of extra-record facts without notice and opportunity to respond).

Here, to comport with due process, if the Court defers a decision on the Motion to Strike, it must allow the City the opportunity to submit its own extra-record materials in support of its reply brief. This Court would then need to conduct its own trial, consider the evidence, sit as fact finder, and make its own findings. That is not the role of an appellate court, which is precisely why appellate review is limited to the record. The Developer's strategy of submitting court orders under the guise of "judicial notice" should not be rewarded.

E. The Developer's Opposition Confirms That Sanctions Are Warranted

Nowhere in the Developer's Opposition does it refute the obligations imposed by NRAP 30(g)(1). Nor does it dispute that the Developer's counsel filed the "Landowners' Appendix" knowing that it violated NRAP 30(g)(1). The Developer's citation to the proceedings in Case No. 76436 demonstrates that its filing of the nonconforming "Landowners' Appendix" was "willful." NRAP 30(g)(1). Sanctions are therefore warranted.

CONCLUSION

Because the Developer's Appendix and the portions of the brief that cite to it violate NRAP 30 and NRAP 28.2, they should be stricken and the Developer and its counsel sanctioned with the fees and costs incurred to bring the motion and reply. The City respectfully requests that the Court order the Developer to re-file its brief with all offending portions omitted.

AFFIRMATION

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

DATED: February 28, 2023

By: /s/ Debbie Leonard

LAS VEGAS CITY ATTORNEY'S OFFICE Bryan K. Scott (#4381) Jeffrey Galliher (#8078) Rebecca Wolfson (#14132) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 bscott@lasvegasnevada.gov jgalliher@lasvegasnevada.gov rwolfson@lasvegasnevada.gov	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com

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

Attorneys for City of Las Vegas

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on this date a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court on today's date by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the E-Flex system. All others will be served by U.S. mail.

Kermitt L. Waters
James J. Leavitt
Michael A. Schneider
Autumn L. Waters
Law Offices of Kermitt L. Waters
704 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Landowners

Micah S. Echols
Claggett & Sykes Law Firm
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
Attorneys for Landowners

Elizabeth Ham
EHB Companies
1215 S. Fort Apache Road, Suite 120
Las Vegas, NV 89117
Attorneys for Landowners

Karl Hall
Jonathan Shipman
City of Reno
1 E. First Street
P. O. Box 1900
Reno, NV 89505
Attorneys for Amicus Curiae

Steven M. Silva
Nossaman, LP
895 Pinebrook Road
Reno, NV 89509
Attorneys for Amicus Curiae

Brandon P. Kemble
Amanda B. Kern
Nicholas G. Vaskov
Henderson City Attorney's Office
P.O. Box 95050, MSC 144
Henderson, NV 89009
Attorneys for Amicus Curiae

Micaela Moore
North Las Vegas City Attorney's Office
2250 Las Vegas Blvd. North, #810
North Las Vegas, NV 89030
Attorneys for Amicus Curiae

Robert D. Sweetin
Davison Van Cleve
300 South 4th Street, Suite 1400
Las Vegas, NV 89101
Attorneys for Amicus Curiae

Nancy Porter
Lauren A. Landa
Goicoechea, Di Grazia, Coyle & Stanton, Ltd.
530 Idaho Street
Elko, NV 89801
Attorneys for Amicus Curiae

Leo Cahoon
501 Mill Street
Ely, NV 89301
Attorneys for Amicus Curiae

Dated: February 28, 2023

/s/ Tricia Trevino
Tricia Trevino