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 APPENDIX
VOLUME 2

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CHRONOLOGICAL INDEX TO CITY'S REPLY APPENDIX

DATE	DOCUMENT	VOLUME	PAGE RANGE
2022-08-10	Plaintiff Landowners' Motion to Determine Take and for Summary Judgment on the Third and Fifth Claims for Relief, Case No. A-18-773268-C	1	REPLY APP 0001 - REPLY APP 0030
2022-08-11	Plaintiff Landowners' Appendix of Exhibits in Support of: Plaintiff Landowners' Motion to Determine Take and for Summary Judgment on the Third and Fifth Claims for Relief, Volume 22, Exhibit 214, Case No. A-18-773268-C	1	REPLY APP 0031 - REPLY APP 0227
2022-08-24	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Renewed Motion for Summary Judgment and Motions in Limine Volume 26, Exhibits KKKKK - LLLLL, Case No. A-18-773268-C	2	REPLY APP 0228 - REPLY APP 0364
2022-09-12	Plaintiff Landowners Reply Re: Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the Third and Fifth Claims for Relief, Case No. A-18-773268-C	2	REPLY APP 0365 - REPLY APP 0395

DATE	DOCUMENT	VOLUME	PAGE RANGE
2022-09-13	Defendant City of Las Vegas' Second Supplemental Appendix of Exhibits in Support of City's Renewed Motion for Summary Judgment and Motions in Limine Volume 32, Case No. A-18-773268-C	2	REPLY APP 0396 - REPLY APP 0432
2022-11-23	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Countermotion for Summary Judgment on Just Compensation Volume 34, Case No. A-18-773268-C	3	REPLY APP 0433 - REPLY APP 0652
2022-11-23	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Countermotion for Summary Judgment on Just Compensation Volume 35, Case No. A-18-773268-C	4 5	REPLY APP 0653 - REPLY APP 0902 REPLY APP 0903 - REPLY APP 0907
2022-11-23	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Countermotion for Summary Judgment on Just Compensation Volume 36, Case No. A-18-773268-C	5	REPLY APP 0908 - REPLY APP 1096
2022-11-23	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Countermotion for Summary Judgment on Just Compensation Volume 37, Case No. A-18-773268-C	6	REPLY APP 1097 - REPLY APP 1240

DATE	DOCUMENT	VOLUME	PAGE RANGE
2022-11-23	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Countermotion for Summary Judgment on Just Compensation Volume 38, Case No. A-18-773268-C	7	REPLY APP 1241 - REPLY APP 1406
2022-11-23	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Countermotion for Summary Judgment on Just Compensation Volume 39, Case No. A-18-773268-C	7	REPLY APP 1407 - REPLY APP 1476
2023-01-23	Defendant City of Las Vegas' Appendix of Exhibits in Support of Motion to Retax Memorandum of Costs, Volume 1, Exhibits B - C, Case No. A-18-773268-C	8	REPLY APP 1477 - REPLY APP 1667
2022-09-12	Plaintiff Landowners Second Supplement to Appendix of Exhibits in Support of Motion to Determine Take and for Summary Judgment on the Third and Fifth Claims for Relief Volume 24, Excerpt from Exhibit 228, Case No. A-18-773268-C	9	REPLY APP 1668 - REPLY APP 1742

ALPHABETICAL INDEX TO CITY'S REPLY APPENDIX

DATE	DOCUMENT	VOLUME	PAGE RANGE
2023-01-23	Defendant City of Las Vegas' Appendix of Exhibits in Support of Motion to Retax Memorandum of Costs, Volume 1, Exhibits B - C, Case No. A-18-773268-C	8	REPLY APP 1477 - REPLY APP 1667
2022-09-13	Defendant City of Las Vegas' Second Supplemental Appendix of Exhibits in Support of City's Renewed Motion for Summary Judgment and Motions in Limine Volume 32, Case No. A-18-773268-C	2	REPLY APP 0396 - REPLY APP 0432
2022-08-24	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Renewed Motion for Summary Judgment and Motions in Limine Volume 26, Exhibits KKKKK - LLLLL, Case No. A-18-773268-C	2	REPLY APP 0228 - REPLY APP 0364
2022-11-23	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Countermotion for Summary Judgment on Just Compensation Volume 34, Case No. A-18-773268-C	3	REPLY APP 0433 - REPLY APP 0652
2022-11-23	Defendant City of Las Vegas' Supplemental Appendix of Exhibits in Support of City's Countermotion for Summary Judgment on Just Compensation Volume 35, Case No. A-18-773268-C	4 5	REPLY APP 0653 - REPLY APP 0902 REPLY APP 0903 - REPLY APP 0907

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2022-09-12	Plaintiff Landowners Reply Re: Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the Third and Fifth Claims for Relief, Case No. A-18-773268-C	2	REPLY APP 0365 - REPLY APP 0395

DATE	DOCUMENT	VOLUME	PAGE RANGE
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2022-08-11	Plaintiff Landowners' Appendix of Exhibits in Support of: Plaintiff Landowners' Motion to Determine Take and for Summary Judgment on the Third and Fifth Claims for Relief, Volume 22, Exhibit 214, Case No. A-18-773268-C	1	REPLY APP 0031 - REPLY APP 0227
2022-08-10	Plaintiff Landowners' Motion to Determine Take and for Summary Judgment on the Third and Fifth Claims for Relief, Case No. A-18-773268-C	1	REPLY APP 0001 - REPLY APP 0030

DATED this 2nd day of May, 2023.

BY: /s/ Debbie Leonard

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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 Appendix Volumes 2-9 were 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 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.

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DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD, SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X,

Plaintiffs,

CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT 24 (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entities I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendants.

Case No. A-18-773268-C
Dept. No. XXIX

SUPPLEMENTAL APPENDIX OF EXHIBITS IN SUPPORT OF CITY'S RENEWED MOTION FOR SUMMARY JUDGMENT AND MOTIONS IN LIMINE

VOLUME 26

The City of Las Vegas ("City") submits this Supplemental Appendix of Exhibits in support of its Renewed Motion for Summary Judgment and Motions in Limine.

Exhibit	Exhibit Description	Vol.	Bates No.
A	City records regarding William Peccole's Petition to Annex 2,246 acres to the City of Las Vegas	1	0001-0011

Exhibit	Exhibit Description	Vol.	Bates No.
B	City records regarding the Peccole Land Use Plan and the Z-34-81 rezoning application	1	0012-0030
C	City records regarding the Venetian Foothills Master Plan and the Z-30-86 rezoning application	1	0031-0050
D	Excerpts of the 1985 City of Las Vegas General Plan	1	0051-0061
E	City records regarding Peccole Ranch Master Plan and phase I rezoning application (Z-139-88)	1	0062-0106
F	City records regarding Z-40-89 rezoning application	1	0107-0113
G	Ordinance No. 3472 (establishing the Gaming Enterprise District) and related records	1	0114-0137
H	City records regarding the Amended Peccole Ranch Master Plan and phase II rezoning application (Z-17-90)	1	0138-0194
I	Excerpts of 1992 City of Las Vegas General Plan	2	0195-0248
J	City records related to Badlands Golf Course expansion	2	0249-0254
K	Excerpt of land use case files for GPA-24-98 and GPA-6199	2	0255-0257
L	Ordinance No. 5250 and Excerpts of Las Vegas 2020 Master Plan	2	0258-0273
M	Miscellaneous Southwest Sector Land Use Maps from 2002-2005	2	0274-0277
N	Ordinance No. 5787 and Excerpts of 2005 Land Use Element	2	0278-0291
O	Ordinance No. 6056 and Excerpts of 2009 Land Use & Rural Neighborhoods Preservation Element	2	0292-0301
P	Ordinance No. 6152 and Excerpts of 2012 Land Use & Rural Neighborhoods Preservation Element	2	0302-0317
Q	Ordinance No. 6622 and Excerpts of 2018 Land Use & Rural Neighborhoods Preservation Element	2	0318-0332
R	Ordinance No. 1582	2	0333-0339
S	Ordinance No. 4073 and Excerpt of the 1997 City of Las Vegas Zoning Code	2	0340-0341
T	Ordinance No. 5353	2	0342-0361
U	Ordinance No. 6135 and Excerpts of City of Las Vegas Unified Development Code adopted March 16, 2011	2	0362-0364
V	Deeds transferring ownership of the Badlands Golf Course	2	0365-0377
W	Third Revised Justification Letter regarding the Major Modification to the 1990 Conceptual Peccole Ranch Master Plan	2	0378-0381

Exhibit	Exhibit Description	Vol.	Bates No.
X	Parcel maps recorded by the Developer subdividing the Badlands Golf Course	3	0382-0410
Y	EHB Companies promotional materials	3	0411-0445
Z	General Plan Amendment (GPA-62387), Rezoning (ZON-62392) and Site Development Plan Review (SDR-62393) applications	3	0446-0466
AA	Staff Report regarding 17-Acre Applications	3	0467-0482
BB	Major Modification (MOD-63600), Rezoning (ZON-63601), General Plan Amendment (GPA-63599), and Development Agreement (DIR-63602) applications	3	0483-0582
CC	Letter requesting withdrawal of MOD-63600, GPA-63599, ZON-63601, DIR-63602 applications	4	0583
DD	Transcript of February 15, 2017 City Council meeting	4	0584-0597
EE	Judge Crockett's March 5, 2018 order granting Queensridge homeowners' petition for judicial review, Case No. A-17-752344-J	4	0598-0611
FF	Docket for NSC Case No. 75481	4	0612-0623
GG	Complaint filed by Fore Stars Ltd. and Seventy Acres LLC, Case No. A-18-773268-C	4	0624-0643
HH	General Plan Amendment (GPA-68385), Site Development Plan Review (SDR-68481), Tentative Map (TMP-68482), and Waiver (68480) applications	4	0644-0671
II	June 21, 2017 City Council meeting minutes and transcript excerpt regarding GPA-68385, SDR-68481, TMP-68482, and 68480.	4	0672-0679
JJ	Docket for Case No. A-17-758528-J	4	0680-0768
KK	Judge Williams' Findings of Fact and Conclusions of Law, Case No. A-17-758528-J	5	0769-0793
LL	Development Agreement (DIR-70539) application	5	0794-0879
MM	August 2, 2017 City Council minutes regarding DIR-70539	5	0880-0882
NN	Judge Sturman's February 15, 2019 minute order granting City's motion to dismiss, Case No. A-18-775804-J	5	0883
OO	Excerpts of August 2, 2017 City Council meeting transcript	5	0884-0932
PP	Final maps for Amended Peccole West and Peccole West Lot 10	5	0933-0941
QQ	Excerpt of the 1983 Edition of the Las Vegas Municipal Code	5	0942-0951

Exhibit	Exhibit Description	Vol.	Bates No.
RR	Ordinance No. 2185	5	0952-0956
SS	1990 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0957
TT	1996 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0958
UU	1998 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0959
VV	2015 aerial photograph identifying Phase I and Phase II boundaries, retail development, hotel/casino, and Developer projects, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0960
WW	2015 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0961
XX	2019 aerial photograph identifying Phase I and Phase II boundaries, and current assessor parcel numbers for the Badlands property, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0962
YY	2019 aerial photograph identifying Phase I and Phase II boundaries, and areas subject to inverse condemnation litigation, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0963
ZZ	2019 aerial photograph identifying areas subject to proposed development agreement (DIR-70539), produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0964
AAA	Membership Interest Purchase and Sale Agreement	6	0965-0981
BBB	Transcript of May 16, 2018 City Council meeting	6	0982-0998
CCC	City of Las Vegas' Amicus Curiae Brief, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481	6	0999-1009
DDD	Nevada Supreme Court March 5, 2020	6	1010-1016

Exhibit	Exhibit Description	Vol.	Bates No.
	Order of Reversal, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481		
EEE	Nevada Supreme Court August 24, 2020 Remittitur, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481	6	1017-1018
FFF	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlements on 17 Acres	6	1019-1020
GGG	September 1, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Final Entitlements for 435-Unit Housing Development Project in Badlands	6	1021-1026
HHH	Complaint Pursuant to 42 U.S.C. § 1983, *180 Land Co. LLC et al. v. City of Las Vegas, et al.*, 18-cv-00547 (2018)	6	1027-1122
III	9th Circuit Order in *180 Land Co. LLC; et al v. City of Las Vegas, et al.*, 18-cv-0547 (Oct. 19, 2020)	6	1123-1127
JJJ	Plaintiff Landowners' Second Supplement to Initial Disclosures Pursuant to NRCP 16.1 in 65-Acre case	6	1128-1137
LLL	Bill No. 2019-48: Ordinance No. 6720	7	1138-1142
MMM	Bill No. 2019-51: Ordinance No. 6722	7	1143-1150
NNN	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 65 Acres	7	1151-1152
OOO	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 133 Acres	7	1153-1155
PPP	April 15, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 35 Acres	7	1156-1157
QQQ	Valbridge Property Advisors, Lubawy & Associates Inc., Appraisal Report (Aug. 26, 2015)	7	1158-1247
RRR	Notice of Entry of Order Adopting the Order of the Nevada Supreme Court and Denying Petition for Judicial Review	7	1248-1281

Exhibit	Exhibit Description	Vol.	Bates No.
SSS	Letters from City of Las Vegas Approval Letters for 17-Acre Property (Feb. 16, 2017)	8	1282-1287
TTT	Reply Brief of Appellants 180 Land Co. LLC, Fore Stars, LTD,, Seventy Acres LLC, and Yohan Lowie in *180 Land Co LLC et al v. City of Las Vegas*, Court of Appeals for the Ninth Circuit Case No. 19-16114 (June 23, 2020)	8	1288-1294
UUU	Excerpt of Reporter's Transcript of Hearing on City of Las Vegas' Motion to Compel Discovery Responses, Documents and Damages Calculation and Related Documents on Order Shortening Time in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (Nov. 17, 2020)	8	1295-1306
VVV	Plaintiff Landowners' Sixteenth Supplement to Initial Disclosures in *180 Land Co., LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (Nov. 10, 2020)	8	1307-1321
WWW	Excerpt of Transcript of Las Vegas City Council Meeting (Aug. 2, 2017)	8	1322-1371
XXX	Notice of Entry of Findings of Facts and Conclusions of Law on Petition for Judicial Review in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-17-758528-J (Nov. 26, 2018)	8	1372-1399
YYY	Notice of Entry of Order *Nunc Pro Tunc* Regarding Findings of Fact and Conclusion of Law Entered November 21, 2019 in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-17-758528 (Feb. 6, 2019)	8	1400-1405
ZZZ	City of Las Vegas Agenda Memo – Planning, for City Council Meeting June 21, 2017, Re: GPA-68385, WVR-68480, SDR-68481, and TMP-68482 [PRJ-67184]	8	1406-1432
AAAA	Excerpts from the Land Use and Rural Neighborhoods Preservation Element of the City's 2020 Master Plan adopted by the City Council of the City on September 2, 2009	8	1433-1439
BBBB	Summons and Complaint for Declaratory Relief and Injunctive Relief, and Verified Claims in Inverse Condemnation in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-18-780184-C	8	1440-1477

Exhibit	Exhibit Description	Vol.	Bates No.
CCCC	Notice of Entry of Findings of Fact and Conclusions of Law Granting City of Las Vegas' Motion for Summary Judgment in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-18-780184-C (Dec. 30, 2020)	8	1478-1515
DDDD	Peter Lowenstein Declaration	9	1516-1522
DDDD-1	Exhibit 1 to Peter Lowenstein Declaration: Diagram of Existing Access Points	9	1523-1526
DDDD-2	Exhibit 2 to Peter Lowenstein Declaration: July 5, 2017 Email from Mark Colloton	9	1527-1531
DDDD-3	Exhibit 3 to Peter Lowenstein Declaration: June 28, 2017 Permit application	9	1532-1533
DDDD-4	Exhibit 4 to Peter Lowenstein Declaration: June 29, 2017 Email from Mark Colloton re Rampart and Hualapai	9	1534-1536
DDDD-5	Exhibit 5 to Peter Lowenstein Declaration: August 24, 2017 Letter from City Department of Planning	9	1537
DDDD-6	Exhibit 6 to Peter Lowenstein Declaration: July 26, 2017 Email from Peter Lowenstein re Wall Fence	9	1538
DDDD-7	Exhibit 7 to Peter Lowenstein Declaration: August 10, 2017 Application for Walls, Fences, or Retaining Walls; related materials	9	1539-1546
DDDD-8	Exhibit 8 to Peter Lowenstein Declaration: August 24, 2017 Email from Steve Gebeke	9	1547-1553
DDDD-9	Exhibit 9 to Peter Lowenstein Declaration: Bill No. 2018-24	9	1554-1569
DDDD-10	Exhibit 10 to Peter Lowenstein Declaration: Las Vegas City Council Ordinance No. 6056 and excerpts from Land Use & Rural Neighborhoods Preservation Element	9	1570-1577
DDDD-11	Exhibit 11 to Peter Lowenstein Declaration: documents submitted to Las Vegas Planning Commission by Jim Jimmerson at February 14, 2017 Planning Commission meeting	9	1578-1587
EEEE	GPA-72220 application form	9	1588-1590
FFFF	Chris Molina Declaration	9	1591-1605
FFFF-1	Fully Executed Copy of Membership Interest Purchase and Sale Agreement for Fore Stars Ltd.	9	1606-1622

Exhibit	Exhibit Description	Vol.	Bates No.
FFFF-2	Summary of Communications between Developer and Peccole family regarding acquisition of Badlands Property	9	1623-1629
FFFF-3	Reference map of properties involved in transactions between Developer and Peccole family	9	1630
FFFF-4	Excerpt of appraisal for One Queensridge place dated October 13, 2005	9	1631-1632
FFFF-5	Site Plan Approval for One Queensridge Place (SDR-4206)	9	1633-1636
FFFF-6	Securities Redemption Agreement dated September 14, 2005	9	1637-1654
FFFF-7	Securities Purchase Agreement dated September 14, 2005	9	1655-1692
FFFF-8	Badlands Golf Course Clubhouse Improvement Agreement dated September 6, 2005	9	1693-1730
FFFF-9	Settlement Agreement and Mutual Release dated June 28, 2013	10	1731-1782
FFFF-10	June 12, 2014 emails and Letter of Intent regarding the Badlands Golf Course	10	1783-1786
FFFF-11	July 25, 2014 email and initial draft of Golf Course Purchase Agreement	10	1787-1813
FFFF-12	August 26, 2014 email from Todd Davis and revised purchase agreement	10	1814-1843
FFFF-13	August 27, 2014 email from Billy Bayne regarding purchase agreement	10	1844-1846
FFFF-14	September 15, 2014 email and draft letter to BGC Holdings LLC regarding right of first refusal	10	1847-1848
FFFF-15	November 3, 2014 email regarding BGC Holdings LLC	10	1849-1851
FFFF-16	November 26, 2014 email and initial draft of stock purchase and sale agreement	10	1852-1870
FFFF-17	December 1, 2015 emails regarding stock purchase agreement	10	1871-1872

Exhibit	Exhibit Description	Vol.	Bates No.
FFFF-18	December 1, 2015 email and fully executed signature page for stock purchase agreement	10	1873-1874
FFFF-19	December 23, 2014 emails regarding separation of Fore Stars Ltd. and WRL LLC acquisitions into separate agreements	10	1875-1876
FFFF-20	February 19, 2015 emails regarding notes and clarifications to purchase agreement	10	1877-1879
FFFF-21	February 26, 2015 email regarding revised purchase agreements for Fore Stars Ltd. and WRL LLC	10	1880
FFFF-22	February 27, 2015 emails regarding revised purchase agreements for Fore Stars Ltd. and WRL LLC	10	1881-1882
FFFF-23	Fully executed Membership Interest Purchase Agreement for WRL LLC	10	1883-1890
FFFF-24	June 12, 2015 email regarding clubhouse parcel and recorded parcel map	10	1891-1895
FFFF-25	Quitclaim deed for Clubhouse Parcel from Queensridge Towers LLC to Fore Stars Ltd.	10	1896-1900
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Dated this 24th day of August, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 24th day of August, 2022, I caused a true and correct copy of the foregoing **SUPPLEMENTAL APPENDIX OF EXHIBITS IN SUPPORT OF CITY'S RENEWED MOTION FOR SUMMARY JUDGMENT AND MOTIONS IN LIMINE – VOLUME 26** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

EXHIBIT “KKKKK”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEVENTY ACRES, LLC, a Nevada Limited Liability Company,

Appellant,

vs.

JACK B. BINION, an individual; DUNCAN R. and IRENE LEE, individuals and Trustees of the LEE FAMILY TRUST; FRANK A. SCHRECK, an individual; TURNER INVESTMENTS, LTD., a Nevada Limited Liability Company, ROGER P. and CAROLYN G. WAGNER; individuals and Trustees of the WAGNER FAMILY TRUST; BETTY ENGLESTAD as Trustee of the BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLD; JASON and SHEREEN AWAD as Trustees of the AWAD ASSET PROTECTION TRUST; THOMAS LOVE as Trustee of the ZENA TRUST; STEVEN and KAREN THOMAS as Trustees of the STEVE and KAREN THOMAS TRUST; SUSAN SULLIVAN as Trustee of the KENNETH J. SULLIVAN FAMILY TRUST; and DR. GREGORY BIGLER and SALLY BIGLER,

Respondents.

Electronically Filed
Nov 06 2018 03:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 75481

APPELLANT'S OPENING BRIEF

Appeal from the Eighth Judicial District Court, the Honorable Jim Crockett Presiding

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NRAP 26.1 DISCLOSURE

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.

Seventy Acres, LLC ("Seventy Acres"), a Nevada limited liability company, is not a publicly traded company, nor is more than 10% of its stock owned by a publicly traded company.

Seventy Acres was represented in the District Court by Kaempfer Crowell and Marquis Aurbach Coffing, and it is represented in this Court by Marquis Aurbach Coffing.

Dated this 5th day of November, 2018.

MARQUIS AURBACH COFFING

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I. JURISDICTIONAL STATEMENT

Appellant, Seventy Acres, LLC ("Seventy Acres"), timely appealed on March 23, 2018 from the District Court's order granting judicial review in favor of Respondents (collectively "the Queensridge Elite"), which was noticed on March 6, 2018. 97 Appellant's Appendix ("AA") 23831–23846, 23847–23864. NRS 233B.150 specifically authorizes an appeal from a district court's final judgment in a judicial review proceeding. "An order granting or denying a petition for judicial review…is an appealable final judgment if it fully and finally resolves the matters as between all parties." *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 303, 300 P.3d 724, 726 (2013); NRAP 3A(b)(1) (authorizing an appeal from a final judgment). Therefore, appellate jurisdiction is properly before this Court.

II. ROUTING STATEMENT

The Supreme Court should retain this appeal according to NRAP 17(a)(10) and (11) since this appeal presents issues of first impression that have a broad application beyond the parties to this appeal. According to NRAP 17(b)(10), agency cases, except those involving tax, water, or public utilities commission determinations are presumptively assigned to the Court of Appeals. This appeal presents several issues of error correction, along with at least two issues of first impression. First, this appeal asks this Court to interpret certain provisions within the Unified Development Code ("UDC"). Specifically, consistent with the City's

approvals, Seventy Acres asks this Court to determine that (i) UDC 19.10.040 PD (Planned Development District) and UDC 19.10.050 R-PD (Residential Planned Development District) are separate and distinct Special Area and Overlay Districts, each with distinct specific standards and guidelines, and (ii) that the 17.49-acre parcel at issue in this appeal, by virtue of its R-PD7 (Residential Planned Development-7 units per acre) zoning classification, is governed by UDC 19.10.050 R-PD, not UDC 19.10.040 PD. 1 AA 225; 10 AA 2471–2472; 71 AA 17433–17440. This distinction is critical because the District Court added conditions, such as a major modification, to the City approvals that are only relevant to a Planned Development District ("PD"), which is governed by a different provision of the UDC, Section 19.10.040. 1 AA 225; 10 AA 2471–2472. 97 AA 23831–23846. *Falcke v. Douglas Cnty.*, 116 Nev. 583, 587, 3 P.3d 661, 664 (2000) ("[L]and use and development are important public policy issues confronting Douglas County as well as other counties in Nevada.").

Second, although only one parcel consisting of 17.49 acres is the subject of this judicial review proceeding, the City and the Queensridge Elite are attempting to apply the District Court's order to all 250 acres of the Land owned by separate entities in other proceedings. 97 AA 23831–23846.

Finally, the District Court's order amounts to a judicial taking under the United States Supreme Court case *Stop the Beach Renourishment, Inc. v. Fla.*

Dep't of Envtl. Prot., 560 U.S. 702, 130 S.Ct. 2592 (2010), which has not yet been litigated in this case, due to the special nature of judicial review proceedings. Therefore, the Supreme Court should retain this appeal.

III. ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED BY APPLYING THE INCORRECT SECTION OF THE UNIFIED DEVELOPMENT CODE, UDC 19.10.040, THEREBY MANDATING A MAJOR MODIFICATION.

B. WHETHER THE CITY'S APPROVALS OF SEVENTY ACRES' APPLICATIONS FOR HIGH-END CONDOMINIUMS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

C. WHETHER THE DISTRICT COURT EXCEEDED THE NARROW SCOPE OF JUDICIAL REVIEW BY REWEIGHING UNAUTHENTICATED EVIDENCE AND MAKING ITS OWN INCORRECT FACTUAL FINDINGS.

D. WHETHER THE VENUE FOR SEVENTY ACRES' JUDICIAL TAKING CLAIM SHOULD BE IN A SEPARATE ACTION IN THE DISTRICT COURT, DUE TO THE SPECIAL NATURE OF JUDICIAL REVIEW PROCEEDINGS.

IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is a judicial review appeal in which the District Court improperly reweighed unauthenticated evidence and arbitrarily discarded the extensive work performed by the City to approve Seventy Acres' development applications for 435 luxury condominium units at the southwest corner of Alta Drive and South Rampart Boulevard in Las Vegas, Nevada ("the Property"). 11 AA 2477. Since this Court looks directly to the agency's decision in judicial review appeals,

Seventy Acres presents three main issues demonstrating the correctness of the City's approvals and the reversible error of the District Court's judicial review order. *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (looking directly to the agency record in judicial review proceedings, with no deference to the district court).

First, the City correctly interpreted and applied the Unified Development Code, including UDC 19.10.050, which governs land use of R-PD districts and does not require a major modification. "[A]n administrative agency's interpretation of its own regulation or statute is entitled to consideration and respect," especially where the agency "has a special familiarity and expertise." *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1994) (holding that a city's "interpretation of its own land use laws is cloaked with a presumption of validity"). Very simply, the Property's hard zoning of R-PD7 shows it is to be governed by the Residential Planned Development (R-PD) District—UDC 19.10.050 and, therefore, cannot be governed by the Planned Development District (PD)—UDC 19.10.040 or any other inapplicable provisions requiring a major modification. Therefore, based upon the City's correct interpretation of the UDC, this Court should reverse the District Court's judicial

review order, reinstate the City's approvals, and extend Seventy Acres' entitlements to develop the Property for two years.

Second, the City's approvals of Seventy Acres' applications for a general plan amendment, rezoning, and a site development review plan are supported by substantial evidence. The extensive record before the City demonstrates that judicial review should have been denied. The City staff recommended approval of the three applications relevant to the Property. 47 AA 11299, 11300–11302; 71 AA 17342. *City Council of City of Reno v. Traveler's Hotel, Ltd.*, 100 Nev. 436, 438–439, 683 P.2d 960, 961 (1984) (staff reports and recommendations contribute to substantial evidence). The City staff detailed that the Property involved an "independent, standalone project." 71 AA 17342. The zoning of the Property is R-PD7, as repeatedly confirmed by the City and a prior court order. 70 AA 17102; 96 AA 23491–23492, 23550, 23615, 23624–23625. As a matter of law, the Property's hard zoned R-PD7 takes precedence over any other master plan designations pursuant to NRS 278.349(3)(e).[1] Therefore, after considering the substantial evidence in the record before the City, this Court should reverse the

[1] NRS 278.349(3)(e) ("[I]f any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence."); Nev. Att'y Gen. Op. 84-6, at *3 ("[The] Nevada legislature has always intended local zoning ordinances to control over general statements or provisions of a master plan.").

District Court's judicial review order, reinstate the City's approvals, and extend Seventy Acres' entitlements to develop the Property for two years.

Third, the District Court exceeded the proper scope of judicial review by reweighing unauthenticated evidence and making its own incorrect factual findings. Instead of deferring to the administrative record of over 23,000 pages, the District Court cherry-picked a handful of statements to support its erroneous conclusions. 97 AA 23831–23864. However, the District Court was not legally permitted to substitute its own judgment for the City's factual determinations. NRS 233B.135(3) ("The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact."); *State, Dep't of Motor Vehicles v. Jenkins*, 99 Nev. 460, 462, 663 P.2d 1186, 1188 (1983). Furthermore, the District Court's conclusion that Seventy Acres was required to process and receive approval for a major modification under UDC 19.10.040 is not only a misapplication of the UDC, it is a moot point because the City already approved Seventy Acres' zoning change, which is an identical process. 71 AA 17434–17439; UDC 19.110.040(G)(2) ("A Major Modification shall be processed in accordance with the procedures and standards applicable to a rezoning application…."). Since the District Court reached its findings and conclusions based upon an unlawful procedure, this Court should now reverse the District

Court's judicial review order, reinstate the City's approvals, and extend Seventy Acres' entitlements to develop the Property for two years.

As a related matter, the District Court's judicial review order constitutes a judicial taking. In *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 130 S.Ct. 2592 (2010), the United States Supreme Court recognized a judicial taking claim. The Supreme Court explained that the takings clause of the Fifth Amendment of the United States Constitution does not limit a taking of private property to only certain government actors. *Id.*, 560 U.S. at 713, 130 S.Ct. at 2601 ("Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary."). Since 2001, the Property was hard zoned R-PD7. 1 AA 225; 10 AA 2471–2472. Here, the District Court's order meets the judicial taking standards by purporting to convert the 17.49-acre Property from hard zoned R-PD7, with an approval to develop 435 units for which "no residential units [are] permitted." 97 AA 23837, ¶13; *Stop the Beach*, 560 U.S. at 713, 130 S.Ct. at 2601 ("States effect a taking if they recharacterize as public property what was previously private property."). In other words, prior to the District Court's review, Seventy Acres had an approved rezoning of the 17.49-acre Property to R-3 in order to develop 435 units (71 AA 17434–17439), and after the review, not only was the R-3 rezoning overturned, but the original R-PD7 hard zoning was errantly trumped

and effectively taken because, according to the order, a "PR-OS" general plan designation does not allow any residential development. 97 AA 23837, ¶13. As explained, this judicial taking claim is currently pending in Eighth Judicial District Court Case No. A773268 and is only raised with this Court out of an abundance of caution to avoid waiver. Therefore, the Court should defer to the pending District Court proceedings involving the judicial taking claim.

In summary, this Court should (1) reverse the District Court's judicial review order based upon the governing effect of UDC 19.10.050 and the inapplicability of UDC 19.10.040 to the Property; (2) reinstate the City's approvals of Seventy Acres' applications for a general plan amendment, rezoning, and a site development review plan for the Property based upon substantial evidence; (3) toll the entitlements for Seventy Acres to allow development of the 17.49 acres for two years from the time that the City's approvals are reinstated, consistent with the City's original approvals; and (4) conclude that the venue for Seventy Acres' judicial taking claim should be in District Court Case No. A773268 due to the special nature of judicial review proceedings.

V. FACTUAL AND PROCEDURAL BACKGROUND

A. THE DEVELOPER.

The principals of Seventy Acres are recognized as experienced, premier, independent developers/builders in the City of Las Vegas, having developed over

3 million square feet of retail and residential properties resulting in an investment of more than $1 billion in the City of Las Vegas. Seventy Acres' principals have over 25 years of experience developing luxurious and distinctive commercial and residential projects in the City, including the development of the community surrounding the Property, among others: (1) renowned One Queensridge Place (near the southwest corner of Rampart Blvd/Alta Dr.), which consists of two 20-floor luxury residential high rises; (2) Tivoli Village (on the northeast corner of Rampart Blvd/Alta Dr.), which consists of 18 unique, Old World designed retail, restaurant, and office space; and (3) over 300 custom and semi-custom homes (including approximately 40% of the custom homes in the Queensridge common interest community ("Queensridge CIC"). 42 AA 10105–10110. The principals of Seventy Acres live in the Queensridge CIC and/or One Queensridge Place and are the single largest owners of real property within both developments. 52 AA 12612.

B. THE LAND, ITS ZONING, AND THE ACQUISITION BY THE DEVELOPER.

Seventy Acres, Fore Stars Ltd. ("Fore Stars"), and 180 Land Co. LLC ("180 Land") (collectively, "Landowners"), collectively through the various parcels owned by each entity, own approximately 250 acres of real property (the "Land" or "250-Acre Residential Zoned Property") upon which the former Badlands Golf

Course was operated. The Land is located within the boundaries of the City and abuts the Queensridge CIC, as defined and governed by NRS Chapter 116, established in 1996 and located in parts adjacent to the Land. The Land has never been a part of the Queensridge CIC. 52 AA 12618–12620; 60 AA 14732; 70 AA 17074, ¶¶65–66.

Throughout the years, the City has repeatedly confirmed the R-PD7 zoning on the Land. "25 years ago or more when the hard zoning went into place, it covered the entire golf course…." 4 AA 804:1492–1493. Significantly, in 2001, by unanimous vote of the Las Vegas City Council, Ordinance 5353 was "PASSED, ADOPTED and APPROVED" unconditionally zoning the Land "R-PD7," which, as defined by the City, means Residential Planned Development-7 units per acre. 1 AA 225; 10 AA 2471–2472. Ordinance 5353 provides, "All ordinances or parts of ordinance or sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Las Vegas, Nevada 1982 Edition, in conflict herewith are hereby repealed." Accordingly, any reliance on prior actions conflicting with the R-PD7 zoning of the Land is moot since anything in conflict was ***repealed***.

On or about March 15, 2015, Fore Stars, the owner of the Land, was acquired by its current principals. Prior to the time of acquisition of Fore Stars, the City of Las Vegas issued a routine zoning verification letter, dated December 30,

2014, confirming the R-PD7 zoning. 1 AA 225. The City has repeatedly confirmed the R-PD7 zoning, including prior to the purchase of Fore Stars and during the applications that are the subject of this appeal. 4 AA 803–804, 871, 881–882; 6 AA 1343. Moreover, this Court recently affirmed in Case Nos. 72410 and 72455 a district court decision, confirming the hard zoning of R-PD7. 70 AA 17077, ¶82.

In June 2015, through the City's parcel map process, Fore Stars legally realigned the parcel boundaries of the various lots that comprised the Land, transferred approximately 180 acres of its land to 180 Land and approximately 70 acres of its land to Seventy Acres, and retained approximately 4.5 acres of land. 70 AA 17069, ¶41. Seventy Acres acquired the Property more particularly described by the Clark County Assessor as APN 138-31-801-003, totaling 5.44 acres; APN 138-32-301-007, totaling 47.59 acres; and APN 138-32-301-005, totaling 17.49 acres. It is the 17.49-acre Property located on the corner of Alta and Rampart that was the subject of the development applications that are at issue in this case.

C. THE QUEENSRIDGE ELITE.

In late 2015, a handful of wealthy and influential homeowners living in the Queensridge CIC and One Queensridge Place (the "Queensridge Elite") schemed to oppose any and all development or use of the Land unless a significant portion

of the property abutting the custom homes (180 acres out of 250 acres) was deeded to them gratis, (66 AA 16014:7449–7452) notwithstanding that:

a. The Land is not part of the Queensridge CIC, the Queensridge Master Declaration expressly stated that the "golf course commonly known as "Badlands Golf Course" is not a part of the Property or the Annexable Property [of the Queensridge CIC]." 40 AA 9809;

b. The Queensridge CIC custom Lot Purchase Agreements expressly disclosed:

   i. "Seller has made no representations or warranties concerning zoning or the future development of phases of the Planned Community [Queensridge] or the surrounding area or nearby property." 24 AA 5721;

   ii. "Purchaser shall not acquire any rights, privileges, interest, or membership in the Badlands Golf Course or any other golf course, public or private, or any country club membership by virtue of its purchase of the Lot." 24 AA 5728;

   iii "The view may at present or in the future include, without limitation, adjacent or nearby single-family homes, multiple family residential structures, commercial structures, utility facilities, landscaping and other items." *Id.*;

c. The One Queensridge Place purchase documents expressly disclosed:

i. in the Purchase Contract, "Seller makes no representation as to the subdivision, use or development of any adjoining or neighboring land…views from the Unit may be obstructed by future development of adjoining or neighboring land and Seller disclaims any representation that views from the Unit will not be altered or obstructed by development of neighboring land," and "Neither Seller nor its affiliates made any representation whatsoever relating to the future development of neighboring or adjacent land and expressly reserve the right to develop this land in any manner that Seller or Seller's affiliates determine in their sole discretion." 69 AA 16943–16944;

ii. In the Public Offering Statement (2007), "current zoning on the contiguous parcels is as follows: [to the] South R-PD7 Residential up to 7 du." 69 AA 16930–16931.

After the Landowners refused to turn over the Land, the Queensridge Elite threatened more lawsuits and have attempted to impede development at every step of the process by taking extreme actions, including removal of a City Councilman that was in favor of the development, stacking the Queensridge HOA with board members who are actively opposed to the development, mounting a ferocious

slanderous campaign against the principals and managing member of the Landowners throughout the Queensridge CIC, and publicly threatening the City.[2] 52 AA 12618–12620, 12622. Accordingly, it was and is clear to the homeowners living in Queensridge that no restrictive covenants for their benefit of their properties exist upon the Land, and that the Land is zoned for residential development. With no legal rights to the Land, the Queensridge Elite filed several lawsuit claiming: (i) that the City illegally approved Seventy Acres' Parcel Maps reconfiguring the various parcels that comprise the Land; (ii) that the Queensridge CIC homeowners have rights to the Land asserting it is a "Planned Unit Development" under NRS 278A by virtue of a defunct "conceptual" Peccole Ranch Master Plan amendment approved by the City of Las Vegas in 1990 ("Conceptual Master Plan"); (iii) that the Land is controlled by the Queensridge Master Declaration/CC&Rs; (iv) the Queensridge CIC has vested rights over the Land.

[2] "[W]e operate in good faith with this City and the funding and partnerships that we personally have had, the Animal Foundation, CSN, Opportunity Village, UNLV, the beginning of the UNLV Medical school, 200 running active scholarships to name a few. I don't bring these up because I'm trying to tell you our accomplishments or what we've done. I bring those up because it has been our honor to be able to partner with this city, and nothing makes me sadder, truly, than to tell you we can't continue those partnerships if this project goes through. Thank you." 71 AA 17362:1415–1422)

District Court Judge Smith ruled that Landowners "properly followed procedures for approval of a parcel map over [their] property pursuant to NRS 278.461(1)(a) because the division involved four or fewer lots; the parcel map is a legal merger and re-subdividing of land within their own boundaries; the Land is not annexed into the Queensridge CIC and therefore is not subject to the terms of the Master Declaration/CC&Rs; keeping the golf course zoned for potential future development was an intentional part of the plan; the Queensridge CIC have no vested rights over the Land; none of the deeds involving the Land make any reference to such land being subject to, or restricted by, the Queensridge Master Declaration/CC&Rs; the developer has the right to develop the Land as the Land has hard zoning of R-PD7. 70 AA 17069, ¶41–17077, ¶82. With respect to the claim that the Conceptual Master Plan gives rights to the Queensridge CIC homeowners, LuAnn Holmes, City Clerk, testified that the UDC and City ordinances concerning planned developments "do not contain provisions adopted pursuant to NRS 278A." 25 AA 6078.

In response to having no rights under Nevada real property laws, no rights under NRS Chapter 116—Common Interest Ownership (Uniform Act), and no rights under NRS Chapter 278A—Planned Development, the Queensridge Elite invented a new legal theory. Namely, that the Land is governed by UDC 19.10.040 relating to "PD" zoning because the Land's zoning acronym "R-PD"

contains a "P" and a "D" in it, notwithstanding that the PD and R-PD zoning districts are separate and distinct from each other governed by different sections of Title 19 of the UDC.

The Queensridge Elite's intent is to confuse the zoning code sufficient to cause the Land to be governed as a PD District development under UDC 19.10.040, notwithstanding that the Land is not a "PD" zoning district, and cause the defunct Conceptual Master Plan to be deemed a binding "master development plan" upon the Land as defined in UDC 19.10.040(B)(1) thereby converting the almost 30 year old planning tool into a real property encumbrance. 1 AA 1–12. Under this distortion of the UDC (Title 19), the Queensridge Elite argued that the City's approval was supposedly not supported by substantial evidence. *Id.*

D. SEVENTY ACRES' DEVELOPMENT PLANS FOR THE PROPERTY.

When a property owner is seeking to develop property, it submits applications dictated by the City Planning Department in accordance with Title 19 of the UDC. The applications are then reviewed by the City Planning Department staff, ("City Staff"), which provides a recommendation of DENIAL or APPROVAL, and are heard by the City of Las Vegas Planning Commission via a public meeting. UDC 19.16. Once the Planning Commission votes to recommend

APPROVAL or DENIAL of an application, it proceeds to a public meeting before the City Council of Las Vegas. *Id.*

In November 2015, Seventy Acres submitted three applications for 720 high-end condominiums (the "High-End Condominiums") to the City relating only to the 17.49-acre Property. 11 AA 2475-2523; 71 AA 17462; 72 AA 17518, 17523.

Application	Purpose for Application
ZON-62392	An application for rezoning under UDC 19.16.090, changing the zoning district from the R-PD7 district (UDC 19.10.050 – Residential Planned Development) to the R-4 district (UDC 19.06.120 – High Density Residential).
SDR-62393	A Site Development Review (UDC 19.16.100 – Site Development Plan) for 720 units.
GPA-62387	An application for a General Plan Amendment (UDC 19.16.030 General Plan Amendment) from PR-OS land use designation to H land use designation.

Generally, development applications take 3-6 months for approval by the City. NRS Chapter 278. In this case, the City took an excessive 15 months to process and eventually vote on the development applications, abeying the matter

no less than five times. 71 AA 17436–17439; 82 AA 19972–19974. During this time, at the behest of the City, 180 Land, a separate entity that owns separate property, filed a separate set of applications for a Master Development Agreement ("MDA") relating to development of the entire 250-Acre Residential Zoned Property. This MDA initially included a document entitled major modification. Thus, there were two separate sets of development applications tracking at the same time before the Planning Commission and City Council; (1) applications for the development of 720 High-End Condominiums and; and (2) an MDA for the entire 250-Acre Residential Zoned Property. 47 AA 11300–11302. Consequently, the hearings that took place sometimes overlapped with discussion on both sets of applications. During this time, the City staff and the Landowners continued to emphasize that the High-End Condominiums must be considered as a stand-alone project. 71 AA 17342–17343. Ultimately, prior to the approval of the High-End Condominiums, the MDA application was withdrawn by the applicant. 71 AA 17436–17439.

The City spent an unprecedented amount of time in the review process of the High-End Condominium project, and, throughout that entire period, the neighbors from the Queensridge CIC were active in their opposition to any development whatsoever on the Land, despite the existing vested R-PD7 zoning. Accordingly,

the City, the Landowners, and the neighbors were actively involved in examining the High-End Condominium project.

E. CITY STAFF RECOMMENDS APPROVAL OF SEVENTY ACRES' HIGH-END CONDOMINIUMS.

Initially the development of the Property contemplated a 720-unit luxury rental/condominium project with a mix of unit types ranging from studios to three-bedrooms in four buildings. 11 AA 2521–2523. Nestled under the 20-floor One Queensridge Place Towers, the four buildings were configured to wrap around multi-level parking structures, designed to be more aesthetically appealing than complexes with at-grade parking lots. *Id.* The project was designed with an overall goal of providing high-end condominiums in a resort-like environment, creating a walkable lifestyle, given its close proximity to areas with shopping and restaurants, such as Boca Park and Tivoli Village. *Id.*

As part of the application process, Seventy Acres provided an economic and fiscal benefits study, a traffic study, a drainage study, a fire marshal study, and all other City required studies and data relating to the project. 1 AA 187–224; 71 AA 17342–17343. The Staff Report evaluated the High-End Condominium development on an independent stand-alone basis, including summarizing the data and studies and found that the applications complied with Title 19—Unified

Development Code and NRS Chapter 278. The City staff made the following findings in its report:

> The proposed development is located at the intersection of two primary arterial roadways and is adjacent to multi-family residential to the west, a hotel casino to the north, general commercial development to the northeast, and limited commercial to the east. The project is designed to provide increased density while minimizing impacts to neighboring properties through the use of a podium-wrapped construction method, thereby increasing the amount of open space and amenities offered on the property. This is in contrast to the traditional multi-family development construction method that precipitates large areas of surface parking. The building elevations are compatible with the Parisian architectural style employed by the One Queensridge Place buildings to the west of the site. Furthermore, the buildings would be situated at a lower grade than the surrounding area, thereby preserving the existing views from the adjacent residential areas. The development as proposed would be consistent with goals, objectives, and policies of the Las Vegas 2020 Master Plan that call for walkable communities, access to transit options, access to recreational opportunities and urban hubs at the intersections of primary roads. Staff finds the proposed development to be compatible with the surrounding development and is in substantial conformance with Title 19 and is recommending approval of all applications. *Id.* (emphasis added).

Following months of research and negotiations, on or about July 12, 2016, the City staff provided a detailed staff report recommending APPROVAL of Seventy Acres' High-End Condominiums. 47 AA 11299.

F. THE PLANNING COMMISSION APPROVES SEVENTY ACRES' HIGH-END CONDOMINIUMS

On October 18, 2016, nearly one year after Seventy Acres' applications were submitted, the Planning Commission held a lengthy public meeting and ultimately recommended APPROVAL of the Applications.

During the 5-hour meeting, Mr. Lowenstein, acting Director of Planning ("Lowenstein"), summarized the Planning Staff's recommendation of approval for both sets of applications, the High-End Condominiums and the MDA for the entire 250-Acre Residential Zoned Property. Lowenstein emphasized that the two sets of applications were being considered separately. Lowenstein also made it clear that "the proposed major modifications specifically relates only to the approximate 250 acres…." 96 AA 23510.[3] With regard to the Applications for the High-End Condominiums, Lowenstein concluded, *"**Staff finds the proposed development to be compatible with the surrounding development and is in substantial conformance with Title 19 and is recommending approval of all applications***." 96 AA 23512.

[3] Even for the Master Development Agreement ("MDA") applications to develop the entire 250 acres, the record makes clear that a major modification was "requested" by the City as an administrative housekeeping matter, but not required. Ultimately, the applications for the entire 250 development agreement were withdrawn, rendering moot even the discussion of a major modification to the Conceptual Master Plan. 1 AA 32.

The Planning Commissioners received and heard an unprecedented amount of information encompassing everything from wildlife to infrastructure. 4 AA 756–758, 897–898. The City staff and Planning Commission evaluated customary development impacts such as schools, drainage, compatibility, and density, among others. 71 AA 17342–17343. Neighbors from the adjacent (but separate) Queensridge CIC expressed opposition to any development whatsoever on the Land because, notwithstanding having acknowledged express written disclosures and recorded CC&Rs to the contrary,[4] they only desired a golf course view. 71 AA 17452; 72 AA 17489–17498; *Probasco v. City of Reno*, 85 Nev. 563, 565, 459 P.2d 772, 774 (1969) ("Nevada has expressly repudiated the doctrine of implied negative easement of light, air and view for the purpose of a private suit by one landowner against a neighbor."). All of the expressed concerns were adequately and appropriately addressed by Seventy Acres, consistent with standard development practices, code requirements, and substantial evidence supporting approval of the High-End Condominiums. 96 AA 23512, 23550; 71 AA 17342–17343.

[4] The Covenants, Conditions and Restrictions of the Queensridge CIC expressly provide that the 250-Acre Residential Zoned Property is "NOT A PART" of the Queensridge CIC and that the Land is developable. 25 AA 6002–6003.

With regard to zoning and density, City Attorney, Brad Jerbic ("Jerbic"), explained that the Land "***is hard zoned R-PD7 according to our records. That is Residential Planned Development up to, up to 7.49 units per acre***." 4 AA 881. Jerbic also clarified, "***Many other golf courses here in town are zoned specifically for civic use or for open space use. This golf course was <u>not</u>.*** I don't know why, but 25 years ago or more ***when the hard zoning went into place, it covered the entire golf course***, the 250 [acres].…As a result, ***the developer has a right to come in [to] ask for some development there***." 96 AA 23550 (emphases added). He further commented that the "*Residential Plan Development [RPD] makes the developer come in with projects that are compatible with surrounding land uses*." *Id.* Jerbic explained that traffic, drainage, and fire studies have already been approved, and that "**the developer has the right to come in and ask for things that are compatible with the surrounding land uses**." 4 AA 882.

After hours of review and consideration of evidence supporting the applications, in addition to presentations by Queensridge neighbors in opposition, the Planning Commissioners voted to APPROVE the Applications for the 17.49 acres. Specifically, they approved a ZON from R-PD7 (Residential Planned Development) to R-4 (High Density Residential), in accordance with 19.16.090 Rezoning; a SDR for a proposed 720-unit high-end condominium project, in accordance with 19.16.100 Site Development Review; and a GPA from PR-OS

(Parks Recreation—Open Space) to H (High Density Residential), in accordance with UDC 19.16.030 General Plan Amendment. 4 AA 898. After the APPROVAL vote, the applications were scheduled to be considered by the City Council. *Id.* At this time, the MDA covering the entire 250-Acre Residential Zoned Property was withdrawn without prejudice. 1 AA 32.

G. THE CITY COUNCIL VOTES TO APPROVE 435 HIGH-END CONDOMINIUMS.

On November 16, 2016, a meeting was held before the City Council to consider the High-End Condominium development applications. It lasted approximately seven hours with all the same information being presented to the City Council. 5 AA 1104–6 AA 1374. Notwithstanding the existing R-PD7 zoning established in 2001 under Ordinance 5353, the neighbor opponents, their attorneys and consultants (opponents) pressed their position that there was no right whatsoever to build on the Land. The Queensridge Elite, seeking to convert a nearly 30 year old planning tool into a present day real property encumbrance, argued that the Conceptual Master Plan restricts the use of the Land. They further argued that the Conceptual Master Plan prevails over the R-PD7 hard zoning and that a "major modification" under Title 19.10.040 is required in order to develop. The City Director of Planning, Tom Perrigo ("Perrigo"), again addressed the 'major modification' encumbrance argument stating, "staff has evaluated the

proposed project on its own merits, and per the land use element of the 2020 Master Plan a major modification is not required for these items." 5 AA 1166:1817, 1819. Even with the oppositions' position that zero units can be built, the Mayor urged Seventy Acres to, yet again, meet with the neighbors in opposition. By this time, over 50 meetings had been held with the neighbors. 71 AA 17339:728–730. Abeyance having become the rule as opposed to the exception, the City abeyed the applications until February, 2017. 27 AA 6520.

Finally, on February 15, 2017, consideration of Seventy Acres' development applications proceeded to a vote before the City Council. As a further compromise on the part of Seventy Acres in favor of the opposing neighbors, and at the request of the City, Seventy Acres agreed to: (1) a reduction from 720 proposed units for rent to 435 units for sale (71 AA 17319); (2) keeping the height of the structure no higher than the level of the podium of the neighboring Queensridge Towers (71 AA 17320); and (3) to have all entries and exits on Rampart Boulevard rather than Alta, to alleviate traffic concerns. *Id.* These changes were significant because the decrease to 435 units made the density 24.9 units per acre, which was exactly the density of the Queensridge Towers, the immediate neighbor to the north. 71 AA 17319–17320.

Perrigo presented the staff report reiterating that *"[t]he Case Planning Team evaluates every single item on every agenda that comes before you*." 71 AA

17319–17320. Perrigo described in detail the findings of the staff that addressed traffic, density, impact to neighboring properties, compatibility with adjacent properties, and determined "***the development as proposed would be consistent with goals, objectives, and policies of the Las Vegas 2020 Master Plan that call for walkable communities, access to transit options, access to recreational opportunities and urban hubs at the intersections of primary roads. Staff finds the development to be compatible with the surrounding development and is in substantial conformance with Title 19 and is recommending approval of all applications***." *Id.* With the reduction in units and other concessions, Seventy Acres urged the City Council to evaluate the applications on its standalone merits. *Id.* After a 4-hour meeting, the City Council voted to APPROVE all of Seventy Acres' applications as revised for development of the High-End Condominiums.

The City voted to APPROVE: (A) the general plan amendment, from PR-OS to M (71 AA 17433–17434); (B) the zoning change from R-PD7 to R-3 (71 AA 17434–17435); and (C) the site development review with a maximum of 435 units for sale only. 71 AA 17436–17439.

H. THE PETITION FOR JUDICIAL REVIEW.

The Queensridge Elite, filed a petition for judicial review of the City's approval of the High-End Condominiums. 1 AA 1–12. Both Seventy Acres' and the City's answering briefs demonstrated from the record that the Queensridge

Elite's arguments were both legally flawed and factually incorrect, and the answering briefs restated the substantial evidence that was relied upon in the record by which the City APPROVED the Applications. 97 AA 23666–23696, 23697–23727. Simply put, there can only be one zoning district on a parcel of land, so with the property being indisputably zoned "R-PD" district, it could not also concurrently be zoned "PD" district.

In January 2018, a hearing on the petition for judicial review was held in the District Court. 97 AA 23745–23799. During that hearing, the District Court took the position that a major modification was required before Seventy Acres' applications for the development of High-End Condominiums could be approved. 97 AA 23749. The District Court then recited representations from the Queensridge Elite's filings, as if to supplant the lengthy approval process before the City. 97 AA 23749–23752. Despite the detailed answering briefs from Seventy Acres and the City, the District Court made the sweeping conclusion that there was no substantial evidence to support Seventy Acres' applications and granted the petition for judicial review. 97 AA 23758, 23787–23788. Although the District Court specifically limited its oral ruling to "a purely legal one" (97 AA 23787–23788), the written order prepared and tendered by the Queensridge Elite contains dozens of unsubstantiated purported facts outside the record and objected to by Seventy Acres and the City. 97 AA 23831–23846. Of particular importance

is the District Court's characterization of the Property as having "no residential units" due to the PR-OS general plan designation, despite the R-PD7 zoning to the contrary. 97 AA 23837, ¶ 13. *Because the District Court ruling effectively converts R-PD districts into PD districts it affects all of properties within the City of Las Vegas that are zoned R-PD.* Seventy Acres now appeals from the District Court's judicial review order. 97 AA 23847–23846.

VI. STANDARDS OF REVIEW

The Nevada Supreme Court has long held and repeatedly expressed the standard for review of decisions of an administrative agency. An administrative agency decision is reviewed for clear error or an arbitrary abuse of discretion. *Employers Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1014, 145 P.3d 1024, 1027 (2006). Judicial review is limited to the record before the administrative agency. *City of Las Vegas v. Laughlin*, 111 Nev. 557, 558, 893 P.2d 383, 384 (1995) ("Like the district court, this [C]ourt is limited to the record made before the City in reviewing the City's decision."); NRS 233B.135(1)(b). Accordingly, "when this [C]ourt examines an order disposing of a judicial review petition, this [C]ourt's function is the same as the district court: **to determine, based on the administrative record, *whether substantial evidence supports the administrative decision***." *Kay*, 122 Nev. at 1105, 146 P.3d at 805 (citing *State, Emp. Sec. Dep't v. Harich Tahoe*, 108 Nev. 175, 177, 825 P.2d 1234, 1236 (1992)); *Brocas v.*

Mirage Hotel & Casino, 109 Nev. 579, 583, 854 P.2d 862, 865 (1993) ("The central inquiry is whether substantial evidence in the record supports the agency decision."). For this reason, the Court "affords no deference to the district court's ruling." *Kay*, 122 Nev. at 1105, 146 P.3d at 805.

Importantly, in reviewing administrative matters, this Court is cautious **not to substitute its judgment of the evidence for that of the administrative agency**. *State DMV v. Becksted*, 107 Nev. 456, 458, 813 P.2d 995, 996 (1991); *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 271, 236 P.3d 10, 14 (2010); NRS 233B.135(3) ("The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact."). Consistent with NRS 233B.135(2), this Court also presumes that an administrative agency's decision was "reasonable and lawful." *McKenzie v. Shelly*, 77 Nev. 237, 242, 362 P.2d 268, 270 (1961) (noting that zoning decisions are "clothed with the presumption of validity"). As such, an agency's final decision must be upheld unless the party attacking the decision meets the difficult burden of proving that the decision is clearly erroneous or characterized by an abuse of discretion. NRS 233B.135(2) & (3); *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 97, 787 P.2d 782, 783 (1990) ("[T]he court may interfere with an agency's decision only when there is a manifest abuse of discretion.").

VII. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY APPLYING THE INCORRECT SECTION OF THE CITY CODE AND MANDATING A MAJOR MODIFICATION.

The City correctly interpreted and applied the Unified Development Code, including UDC 19.10.050, which does not require a major modification. "[A]n administrative agency's interpretation of its own regulation or statute is entitled to consideration and respect," especially where the agency "has a special familiarity and expertise." *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1994) (holding that a city's "interpretation of its own land use laws is cloaked with a presumption of validity"). The Property's hard zoning of R-PD7 cannot be governed by UDC 19.10.040 relating to PD Districts or any other inapplicable provisions requiring a major modification because it is governed by UDC 19.10.050, the R-PD District. Therefore, based upon the City's correct interpretation of the UDC, this Court should reverse the District Court's judicial review order, reinstate the City's approvals, and extend Seventy Acres' entitlements to develop the Property for two years.

In administrative matters, purely legal issues, including statutory construction, are still subject to de novo review. *American Int'l Vacations v. MacBride*, 99 Nev. 324, 326, 661 P.2d 1301, 1302 (1983); *Kay*, 122 Nev. at 1108,

246 P.3d at 805; NRS 233B.135(3)(a). Yet, no deference is given to the district court's legal decisions when reviewing an order regarding a petition for judicial review. *Kay*, 122 Nev. at 1105, 146 P.3d at 805; *S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 450, 117 P.3d 171, 173 (2005) (questions of law are reviewed de novo without deference to the district court's conclusions). Courts also apply a de novo standard of review when interpreting municipal code provisions. *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 272, 236 P.3d 10, 16 (2010) (citing *United States v. Iverson*, 162 F.3d 1015, 1019 (9th Cir. 1998); *Asphalt Specialties v. City of Commerce City*, 218 P.3d 741, 745 (Colo. App. 2009)). But, when the agency's conclusions of law are necessarily and closely related to the agency's view of the facts, the agency's decision is entitled to deference, which will not be disturbed if it is supported by substantial evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986).

In this case, the District Court erroneously concluded that UDC 19.10.040 applies to the Property and compelled Seventy Acres to obtain a major modification of the master plan before the City could approve their applications. 97 AA 23842–23843. In doing so, the District Court erroneously disregarded UDC 19.10.050, which clearly applies in this case because the Property is within a residential planned development or "R-PD" district and zoned R-PD7. 70 AA 17102; 96 AA 23491–23492, 23550, 23625. The District Court stated that its

decision to grant the petition for judicial review was "a purely legal one" (97 AA 23772) that was "based completely on a finding that Subsection (D) of 19.10.040 applies to this property." 97 AA 23773. In its written order, the District Court then relied on its own mistaken understanding of UDC 19.10.040, while rejecting the City's plain meaning interpretation of UDC 19.10.050 as "purely [ ] a litigation strategy." 97 AA 23842–23843. This Court should reverse the District Court's judicial review order because the language of these code sections is unambiguous, and the District Court's interpretation of them is contrary to well-established rules of statutory construction. Further, this Court should reinstate the City's approval of Seventy Acres' three applications and toll Seventy Acres' entitlements to develop the Property for two years because the City based its decision on a correct application of local zoning laws.

1. A Major Modification Is Not Required in This Case.

Nevada law "authorize[s] and empower[s]" the governing bodies of cities to "regulate and restrict the improvement of land." NRS 278.020(1); *Serpa v. Cnty. of Washoe*, 111 Nev. 1081, 1084, 901 P.2d 690, 692 (1995). In September 2000, the City adopted the Las Vegas 2020 master plan. 4 AA 763. Predictably, land use is an essential element of the City's 2020 Master Plan. Las Vegas, Nev. Ordinance 2000-62 (Sept. 6, 2000) (adopting City of Las Vegas Master Plan 2020). In an effort to deal with complex land-use questions, the City later adopted a land

use and neighborhoods preservation element, which is "intended to guide the growth and development of the city of Las Vegas." 69 AA 16829.

The City adopted the UDC in accordance with NRS Chapter 278. UDC 19.00.020. Within the Special Area and Overlay Districts portion of the UDC, there are 18 different sections including "Planned Communities" (19.10.030 P-C), "Planned Development (19.10.040 PD), "Traditional Developments" (19.10.070 T-D), and "Residential Planned Development" (19.10.050 R-PD). Each section includes a color-coded map which highlights the portions of the City that are subject to the specific ordinance standards. The definitions, development standards, permitted uses, and other requirements vary by area. The various code sections specifically and intentionally provide ***different*** development standards and guidelines for the ***different*** districts so as to achieve ***different*** purposes. *Id*. If the same development standards were intended for all districts, a single, comprehensive code section articulating a single "district" would have sufficed.

With respect to planned development or "PD" districts, the City's intent is to "permit and encourage comprehensively planned developments." UDC 19.10.040(A). Consistent with the word "comprehensively," UDC 19.10.040(G) specifies that development of property within a planned development district "may proceed only in strict accordance with the [adopted] Master Development Plan and Development Standards." And, with the exception

of certain enumerated "minor modifications," any request or proposal that deviates from a master development plan requires a "major modification." Notably, a major modification under a Planned Development district "shall be processed in accordance with UDC 19.16.090 (I) to (M) (rezoning)". UDC 19.10.040(G). In contrast, residential planned development or "R-PD" districts—***where the Seventy Acres' Property is located***—is governed by UDC 19.10.050 and *does not require major modifications*. UDC 19.10.050.

In approving Seventy Acres' applications, the City addressed the major modification requirements outlined in the land use and neighborhoods preservation element ***and*** the UDC. 71 AA 17342–17343. In doing so, the City correctly noted that a major modification was unnecessary in this case because the 17.49 acres is hard zoned R-PD7 and subject to UDC 19.10.050—***not*** UDC 19.10.040. 70 AA 17102; 96 AA 23491–23492, 23550, 23625. Likewise, the Property is not one of the "special area plans" enumerated in the land use and neighborhoods preservation element, so the City also concluded that a major modification was not required under the City's 2020 master plan either. 71 AA 17348; 69 AA 16877–16878. Because these determinations were based on a plain reading of the relevant laws, as well as the City's specialized knowledge of planning and zoning, they should have been "cloaked with a presumption of validity." *Cinnamon Hills Assocs.*, 110 Nev. at 247, 871 P.2d at 326. The District Court's failure to reach the

same conclusion based on the plain meaning of UDC 19.10.040 and UDC 19.10.050 was erroneous as a matter of law.

2. A "Major Modification" Is Procedurally Identical to a Rezoning Which Was Applied for and Approved in This Case.

The crux of the District Court's order is that Seventy Acres did not submit to the City an application entitled "major modification." 97 AA 23842–23843. The District Court specifically stated that its decision was "a purely legal one" (97 AA 23772) that was "based completely on a finding that Subsection (D) of 19.10.040 applies to this property" (97 AA 23773) to require a major modification application. Although Seventy Acres strongly disagrees with this analysis, even if it were proper, Seventy Acres already fully complied with all major modification requirements as part of the zoning applications it initially filed with the City, thereby rendering the District Court order entirely moot. *NCAA v. University of Nevada*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981) ("A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights."). It is undisputed that Seventy Acres filed all of the proper applications for a zoning change under UDC 19.16.090 to R-3, which involves the exact same procedures by which a major modification is processed. 71 AA 17434–17439; UDC 19.110.040(G)(2) ("A Major Modification shall be processed in accordance with the procedures and standards applicable to *a rezoning application*…."). In

fact, the major modification language the District Court cites to in Subsection (D) of 19.10.040 to support its decision merely requires an applicant to follow the zoning change procedures (which Seventy Acres indisputably followed) to be in compliance with the major modification requirements. 97 AA 23842–23843. Accordingly, even if a major modification were required, which it is not, Seventy Acres fully complied with all major modification requirements by virtue of the successful zoning change, and this Court should treat the District Court's requirement for a major modification as a nullity. Therefore, this Court should reverse the District Court's judicial review order to correct the misuse of judicial review. *Nev. Employment Sec. Dep't v. Weber*, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (1984) ("It is not the district court's function to choose among the various decisions made during an administrative proceeding.").

3. It Was Improper for the District Court to Reject the City's Interpretation of Its Own Ordinances as a "Litigation Strategy."

Throughout the development process the City consistently determined and expressed that UDC 19.10.040 does ***not*** apply to the 17.49-acre Property. 96 AA 23510–23511. Indeed, while City staff noted that 180 Land's wholly separate application involved a potential major modification, members of the City staff, repeatedly clarified that 180 Land's application was a separate issue. 96 AA 23510–23513. Moreover, in discussing Seventy Acres' applications, the City staff

also explained that a major modification was ***not*** necessary because Peccole Ranch is not a "special area plan," as that term is used in the City's land use and rural neighborhoods preservation element of the Las Vegas 2020 master plan. 71 AA 17348.

In the judicial review proceedings, the City expressed that UDC 19.10.050 (Residential Planned District), 19.16.030(I) (General Plan Amendment), 19.16.090(L) (Rezoning), and 19.16.100(E) (Site Development Review) are actually the most relevant ordinances for purposes of this case. 97 AA 23715, 23720–23723. In addition, the City explained that any reliance on UDC 19.10.040 would be misplaced because *the subject property is not in a "planned development district."*[5] 97 AA 23715, 23724–23725. Further, because Peccole Ranch is not a "special area plan," the City also explained that a major modification is not necessary under the land use and neighborhoods preservation element. 97 AA 23724–23725. The City advanced the same points during the hearing before the District Court. 97 AA 23765–23768, 23770, 23773, 23786–23787. Thus, while the District Court rejected the City's interpretation of its laws as a "litigation strategy," the record supports the City's consistent—and correct—interpretation of

[5] Since "planned development district" is a term of art, the District Court erred by focusing on Peccole Ranch's "master plan" or "master development plan." 97 AA 23843–23844.

the relevant provisions. As such, the District Court erred by refusing to give due deference to the City's presumptively valid interpretation of its land use laws, and this Court should reverse the judicial review order.

4. The District Court's Judicial Review Order Violates Basic Notions of Statutory Interpretation.

"[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Edgington v. Edgington*, 119 Nev. 577, 582–583, 80 P.3d 1282, 1286 (2003); *S. Nev. Homebuilders Ass'n*, 121 Nev. at 450, 117 P.3d at 173. This Court "avoid[s] statutory interpretation that renders language meaningless or superfluous." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). Whenever possible, the Court "will interpret a rule or statute in harmony with other rules or statutes." *Watson Rounds v. Dist. Ct.*, 358 P.3d 228, 232 (Nev. 2015); *S. Nev. Homebuilders Ass'n*, 121 Nev. at 450, 117 P.3d at 173 (court interprets provisions within a common statutory scheme harmoniously).

As noted, the text of UDC 19.10.040 provides for development standards, permitted uses, and other requirements for planned development or "PD" districts in Las Vegas. Among other things, the text expressly defines minor and major modifications of the master development plan, sets forth requirements of applicants to obtain them, and provides for site development plan review.

UDC 19.10.040(G)(1)–(2), (H). On the other hand, UDC 19.10.050 addresses residential planned development or "R-PD" districts, likewise providing development standards, permitted uses, and for site development plan review. UDC 19.10.050(B), (C), (D). Conspicuously absent from the text of UDC 19.10.050 are any provisions whatsoever related to minor or major modifications, and courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean v. U.S.*, 556 U.S. 568, 572 (2009). Given that nothing in the plain language of UDC 19.10.040 suggests that it applies beyond PD districts, because only PD districts adopt a "Master Development Plan and Design Standard" which are strictly applied, together with the fact that R-PD districts are comprehensively addressed in UDC 19.10.050, the District Court's conclusion that UDC 19.10.040 applies to R-PD districts was contrary to the rules of statutory construction and erroneous as a matter of law. *S. Nev. Homebuilders Ass'n*, 121 Nev. at 451, 117 P.3d at 174 (when a statute does not express specific requirements, it is not the business of this Court to fill in alleged legislative omissions based on conjecture).

Moreover, the District Court's application of UDC 19.10.040 to Seventy Acres' Property renders UDC 19.10.050 meaningless and superfluous. If UDC 19.10.040 applies to R-PD districts, as well as PD districts, then UDC 19.10.050 is wholly unnecessary to address development standards for R-PD districts. Yet,

statutory interpretation should not render any part of a statute meaningless or superfluous. *S. Nev. Homebuilders Ass'n*, 121 Nev. at 450, 117 P.3d at 173. This Court recognize the City's correct interpretation and reject the District Court's erroneous application of UDC 19.10.040, which renders UDC 19.10.050 meaningless and superfluous.

As such, the District court should not have looked beyond the plain language of the code because doing so frustrates the legislative purpose. *S. Nev. Homebuilders Ass'n*, 121 Nev. at 450–451, 117 P.3d at 173–174 (statutory provisions interpreted to give effect to legislative intent); *DeStefano v. Berkus*, 121 Nev. 627, 629, 119 P.3d 1238, 1240–1241 (2005) (courts are not permitted to look beyond the statute for a different or expansive meaning or construction).

5. The District Court's Interpretation of UDC 19.10.040 and UDC 19.10.050 Violates Additional Rules of Statutory Construction.

Additional rules of statutory construction demonstrate that the District Court's deviation from the plain meaning of the relevant code sections is erroneous as a matter of law. For example, the title may be considered when interpreting a statute or municipal code. *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 230, 19 P.3d 245, 250 (2001). A title is typically prefixed to a statute or a subsection in the form of a descriptive heading or a brief summary of the contents of the statute or subsection. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY, 1350 (2d ed.

1997); BLACK'S LAW DICTIONARY, 1032 (6th ed. 1991). Specifically, UDC 19.10.040 is entitled "PD Planned Development Districts," indicating the contents of that code section deals solely with planned development or "PD" districts. In contrast, UDC 19.10.050 bears the title "R-PD Residential Planned Development District." This title indicates that the contents of UDC 19.10.050 relates to residential planned development or "R-PD" districts. Because the Property is indisputably located in an R-PD district, these titles suggest that UDC 19.10.050, rather than UDC 19.10.040, governs Seventy Acres' applications. This distinction is consistent with the general/specific canon of statutory interpretation, stating the more specific provision takes precedence. *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005).

Another important canon of statutory interpretation is the presumption that a variation in language indicates a variation in meaning. *Williams v. State*, 402 P.3d 1260, 1264 (Nev. 2017). The plain language of UDC 19.10.040(G) expressly provides for major modifications of the "Master Development Plan and Design Standards" in PD districts. In contrast, UDC 19.10.050 contains no such language because R-PD districts do not a "Master Development Plan and Design Standards" so there is nothing to modify. *S. Nev. Homebuilders Ass'n*, 121 Nev. at 450–451, 117 P.3d at 174 (recognizing that express language in one section of statute, and absence of similar language in another section, reflects legislative intent to limit

requirement to certain circumstances). Both UDC 19.10.040 and UDC 19.10.050 include language requiring site development plan review, however, the adoption of "Master Development Plan and Design Standards" was purposeful. *Id.*

6. This Court's Reinstatement of the City's Approvals Must Also Reinstate the Two-Year Period for Seventy Acres to Develop the Property.

This Court's reinstatement of the City's approvals of Seventy Acres' three applications must also reinstate the two-year period for Seventy Acres to complete the development of the Property. UDC 19.16.100(J)(1) ("The 'approval period' for a Site Development Plan is the time period specified in the approval, if one is specified, and is two years otherwise."); *Nova Horizon v. City Council of Reno*, 105 Nev. 92, 95, 769 P.2d 721, 722 (1989) ("[Z]oning boards may not unreasonably or arbitrarily deprive property owners of legitimate, advantageous land uses."). Once the Queensridge Elite filed their petition for judicial review, Seventy Acres lost the ability to begin carrying out the City's approvals of the three applications. *Westside Charter Serv., Inc. v. Gray Line Tours of S. Nev.*, 99 Nev. 456, 459, 664 P.2d 351, 353 (1983) ("It is generally accepted that where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved."). Moreover, once the District Court granted the petition for judicial review, the City's approvals of Seventy Acres' applications were no longer enforceable. 97

AA 23831–23846. Yet, this Court has the authority to reinstate the City's approvals and reset the two-year period for Seventy Acres to complete the development on the 17.49 acres. NRS 2.110 (Power on Appeal) ("When the judgment or order appealed from is reversed or modified, this Court may make, or direct the inferior court to make, complete restoration of all property and rights lost by the erroneous judgment or order."). Thus, this Court should reinstate the City's approvals of Seventy Acres' three applications because the path the City took is reasonably discerned and acceptable under the controlling ordinances. The Court should also extend the entitlements for Seventy Acres to develop the 17.49 acres for two years from the time that the City's approvals are reinstated, consistent with the City's original approvals.

B. THE CITY'S APPROVALS OF SEVENTY ACRES' APPLICATIONS FOR A GENERAL PLAN AMENDMENT, REZONING, AND A SITE DEVELOPMENT REVIEW PLAN ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The City's approvals of Seventy Acres' applications for 435 High-End Condominium units are supported by substantial evidence. The extensive record before the City demonstrates that judicial review should have been denied. The City staff recommended approval of the three applications relevant to the Property. 47 AA 11299, 11300–11302; 71 AA 17342. *City Council of City of Reno v. Traveler's Hotel, Ltd.*, 100 Nev. 436, 438–439, 683 P.2d 960, 961 (1984) (staff

reports and recommendations contribute to substantial evidence). The City staff detailed that the Property involved an "independent, standalone project." 71 AA 17342.

Importantly, the zoning of the Property is R-PD7, as confirmed by the City and in a prior court order. 70 AA 17102; 96 AA 23491–23492, 23550, 23615, 23624–23625. As a matter of law, the Property's hard zoned R-PD7 takes precedence over any master plan designations, negating any reason whatsoever for a major modification under the City of Las Vegas 2020 Master Plan. NRS 278.349(3)(e) ("[I]f any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence."); Nev. Att'y Gen. Op. 84-6, at *3 ("[The] Nevada legislature has always intended local zoning ordinances to control over general statements or provisions of a master plan."). Consistent with these authorities, the City agreed in the District Court that "[i]n the hierarchy, the land use designation is subordinate to the zoning designation, for example, because land use designations indicate the intended use and development density for a particular area, while zoning designations specifically define allowable uses and contain the design and development guidelines…." 97 AA 23701. Therefore, a major modification was never required under either UDC 19.10.040(G)(2), nor the City of Las Vegas 2020 Master Plan, and after considering the substantial evidence in the record before the City, this Court should reverse the District Court's judicial

review order, reinstate the City's approvals, and extend Seventy Acres' entitlements to develop the Property for two years.

The "central inquiry" in assessing a petition for judicial review is "whether substantial evidence in the record supports the agency decision." *Brocas*, 109 Nev. at 583, 854 P.2d at 865. In reviewing an administrative record for substantial evidence, courts need not—and should not—weigh the evidence to determine whether the administrative agency's decision satisfies a burden of proof. *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608 n.1, 729 P.2d 497, 498 n.1 (1986); *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) ("[J]ust because there was conflicting evidence does not compel interference with the [agency's] decision.").

Instead, substantial evidence is simply "evidence that a reasonable mind could accept as adequately supporting the agency's conclusions." *Nassiri v. Chiropractic Physicians' Bd.*, 327 P.3d 487, 489 (Nev. 2014); NRS 233B.135(3); *Constr. Indus. Workers' Comp. Grp. ex rel. Mojave Elec. v. Chalue*, 119 Nev. 348, 354, 74 P.3d 595, 598 (2003) ("NRS 233B.135(3) precludes us from weighing evidence or determining the credibility of witnesses."). In other words, an agency's decision based upon conflicting evidence will not be disturbed. *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617 (1992). This principle is due to this Court's standard for reviewing agency decisions, and the fact that this Court

"does not act as fact-finder…." *State v. Ruscetta*, 123 Nev. 299, 304, 163 P.3d 451, 455 (2007). Since this Court looks directly to the City proceedings for substantial evidence, Seventy Acres only needs to demonstrate that at least some evidence in the record supports the City's approvals to prevail in this Court.

Here, the District Court erroneously found that the City's approvals of Seventy Acres' applications were not supported by substantial evidence. 97 AA 23754, 23787. Nevertheless, the voluminous record supports the City's decision to approve Seventy Acres' applications for a GPA, ZON, and SDR, including the following reasons:

(1) The City staff recommended approval of the three applications. 47 AA 11299;

(2) The City staff concluded that each element for evaluation of the general plan amendment application (UDC 19.16.030(I)) from PR-OS to M was satisfied and the proposed development for "Area" 1, the density and intensity, was compatible with surrounding properties, including the existing adjacent One Queensridge Place condominium development to the north. 71 AA 17318–17328; 17342–17343; 96 AA 23463–23513, 23633–23636; 97 AA 23720:16–19;

(3) Zoning designations allowed by the proposed amendment for medium density are compatible with existing zoning which allows for multi-family residences. 71 AA 17319–17320. The zoning of the Land is R-PD7, a residential

planned development. This fact was also in a Court order, binding upon the City prior to its approvals. 70 AA 17102; 96 AA 23491–23492, 23550, 23615, 23624–23625;

(4) There is adequate transportation and utilities for the development as the proposed development is located at the intersection of two primary arterial roadways and is adjacent to multi-family residential to the west, a hotel casino to the north, general commercial development to the northeast and limited commercial to the east. 71 AA 17342–17343;

(5) The City Attorney clarified any ambiguity and found that no major modification was needed 71 AA 17348; 69 AA 16877–16878;

(6) The staff report concluded that each element of the rezoning application from R-PD7 to M was satisfied and the proposed development of 435 units is compatible with the adjacent One Queensridge Place Towers and surrounding development in the area. 71 AA 17342–17343;

(7) Jerbic explained to the City that Peccole Ranch is not a special area plan under the City of Las Vegas land use and rural neighborhood preservation element. 71 AA 17348;

(8) The City staff reported that the golf course is not feasible in the future and the elevated residential density is an appropriate use of the site given its location to major intersections, current market conditions and proximity to nearby

services; over 90 neighboring property owners voiced their support for approval of Seventy Acres' three applications. 47 AA 11299; 96 AA 23465 (statement from Chad Stratton that he is "highly accepted to this development"); 96 AA 23578 (statement from Summer Davies, "I support this and I hope you do as well."); 96 AA 23582 ("I fully support the project….Not to permit this project to go forward would be a drastic mistake.");

(9) The staff report provided to the City Council included details on the development, outlined how the development "as proposed would be consistent with goals, objectives, and policies of the Las Vegas 2020 Master Plan." 71 AA 17342;

(10) Council received evidence regarding the roadways and its impact on nearby communities and whether the R-3 rezoning (medium density) was equally compatible to nearby units. 71 AA 17402–17403. Evidence before the planning commission and the City Council also indicated that the proposed project would beautify the area in question and would be a significant improvement compared to the brown land that was once a golf course which currently occupies the area. 4 AA 833–835;

(11) City staff concluded that each element of the Site Development Plans (UDC 19.16.100 (E)) was satisfied and that the proposed development would be

located to an established multi-family condominium development with comparable density 71 AA 17433–17434;

(12) The City staff report concluded that the proposed design is consistent with the City's 2020 Master Plan and Title 19 requirements and would have no negative traffic implications throughout the neighborhood and surrounding community as the major roadways could sustain additional travelers. 71 AA 17342; and

(13) The City Council received significant evidence that the project would have significant fiscal benefits, including economic gains for nearby businesses, increased revenue from property taxes, and the benefits that come with employing locals for a significant construction project. 71 AA 17323; 96 AA 23592–23593.

Thus, if this Court adheres to its "general appellate standard" and examines the record for substantial evidence, *Kay*, 122 Nev. 1100, 1107, 146 P.3d 801, 806, there is little question that the City's decision should have been upheld in the District Court on judicial review. There is no legal basis upon which to second-guess the City's well-reasoned decision supported by substantial evidence. NRS 233B.135(3) ("The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact."). Even the Queensridge Elite's mention of conflicting evidence does not disturb the City's approvals of Seventy Acres' applications. *Waldman*, 108 Nev. at 471, 836 P.2d at 617.

Therefore, this Court should reverse the District Court's judicial review order, reinstate the City's approvals, and extend Seventy Acres' entitlements to develop the Property for two years.

C. THE DISTRICT COURT EXCEEDED THE PROPER SCOPE OF JUDICIAL REVIEW BY REWEIGHING UNAUTHENTICATED EVIDENCE AND MAKING ITS OWN INCORRECT FACTUAL FINDINGS.

The District Court exceeded the proper scope of judicial review by reweighing unauthenticated evidence and making its own incorrect factual findings. Instead of deferring to the administrative record of over 23,000 pages, the District Court cherry-picked a handful of statements to support its erroneous conclusions. 97 AA 23831–23864. However, the function of the District Court is to ascertain as a matter of law whether there was substantial evidence before the City ***which would sustain the City's actions***. *State, Emp. Security v. Hilton Hotels,* 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). The District Court was not legally permitted to substitute its own judgment for the City's factual determinations. NRS 233B.135(3) ("The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact."); *State, Dep't of Motor Vehicles v. Jenkins*, 99 Nev. 460, 462, 663 P.2d 1186, 1188 (1983). Furthermore, the District Court's conclusion that Seventy Acres was required to process and receive approval for a major modification is a moot point because the City already

approved Seventy Acres' zoning change, which as discussed above, is the identical process. 71 AA 17434–17439; UDC 19.10.040(G)(2) ("A Major Modification shall be processed in accordance with the procedures and standards applicable to a rezoning application…."). Since the District Court reached its findings and conclusions based upon an unlawful procedure, this Court should now reverse the District Court's judicial review order, reinstate the City's approvals, and extend Seventy Acres' entitlements to develop the Property for two years.

In this case, the District Court endeavored to find fault with the City's zoning decisions. 97 AA 23749 (rejecting the importance of the 23,000-page administrative record); 97 AA 23753 (stating that the "Court's not bound by" the City Attorney's interpretation of the law); 97 AA 23755 ("[I]t's ironic that the city and Seventy Acres, they want to point to staff recommendations that were made toward the end of the process."); 97 AA 23787 ("[T]here is a great deal of opposition evidence that was presented."). In fact, while the District Court purportedly resolved the petition for judicial review on a legal basis, it, nevertheless, engaged in a substantial reweighing of unauthenticated evidence and a discussion of disputed facts that allegedly supported a different outcome than the City's approvals.

For example, within the nine pages of factual findings, the District Court exhaustively detailed ***outdated and inapplicable*** staff recommendations in an

improper attempt to discredit the final decision that the City reached with respect to Seventy Acres' applications. 97 AA 23838, 23840. Further, the District Court erroneously revisited the necessity of a major modification application, as an irrelevant matter. 97 AA 23841, 23843 (finding the "pre-litigation" staff recommendations "highly revealing"). And, in doing so, the District Court improperly made its own findings, even after acknowledging that the director of the department of planning has, by ordinance, the final say in assessing the applications." 97 AA 23843; UDC 19.10.040(G); 97 AA 23845 (finding fault with the "gradual retreat from talking about a major modification"). On a related note, the District Court's incorrect description of the parties and their respective roles also added a level of confusion and error that permeated the findings of fact. 97 AA 23837, 23839–23840 (alternating between Seventy Acres and 180 Land as the "developer").

To make matters worse, the District Court also made prohibited original findings of fact in a judicial review proceeding, without holding an evidentiary hearing. NRS 233B.135(1)(b) ("Judicial review of a final decision of an agency must be…[c]onfined to the record."). Instead, the District Court relied upon the argument of counsel. But, as a matter of law, "[a]rguments of counsel are not evidence and do not establish the facts of the case." *Jain v. McFarland*, 109 Nev. 465, 475–476, 851 P.2d 450, 457 (1993). In particular, the District Court

addressed what Peccole allegedly knew about building in a "flood zone" when deciding to build a golf course rather than homes. 97 AA 23836. In addition, the District Court also found that Lowie "elected to take on the risk" by purchasing property that "did not provide for typical contingencies." 97 AA 23837; 97 AA 23756–23757 (stating that Lowie was effectively "buying a pig in a poke").

Overall, the District Court's erroneous findings had no bearing on whether the City abused its discretion in approving Seventy Acres' applications. As such, the District Court's emphasis on select bits and pieces from the record (97 AA 23836–23838) is notable because it shows that the District Court's refusal to follow established law and a deliberate indifference to the evidence that was most important to the City—including the recommendations from staff, interpretation of the UDC, and the other substantial evidence. Therefore, the District Court's findings on appeal were undoubtedly outside the scope of a judicial review proceeding, which contributed to its reversible error.

D. THE VENUE FOR SEVENTY ACRES' JUDICIAL TAKING CLAIM SHOULD BE IN A SEPARATE ACTION IN THE DISTRICT COURT, DUE TO THE SPECIAL NATURE OF JUDICIAL REVIEW PROCEEDINGS.

The venue for Seventy Acres' judicial taking claim should be in a separate action in the District Court, due to the special nature of the judicial review proceedings. In *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*,

560 U.S. 702, 130 S.Ct. 2592 (2010), the United States Supreme Court recognized a judicial taking claim. The Supreme Court explained that the takings clause of the Fifth Amendment of the United States Constitution does not limit a taking of private property to only certain government actors. *Id.*, 560 U.S. at 713, 130 S.Ct. at 2601 ("Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary."). The Property was hard zoned as R-PD7 in 2001 by Ordinance 5353 vesting the constitutional right to develop. 1 AA 225; 10 AA 2471–2472; *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006) ("The term 'property' includes all rights inherent in ownership, including the right to possess, use, and enjoy the property."). Here, the District Court's order meets the judicial taking standards by reaching beyond the scope of a judicial review and not only overturning the rezoning to R-3 (for 435 units), but by stripping the right to develop under the R-PD7 by ruling "no residential units [are] permitted. 97 AA 23837, ¶13; *Stop the Beach*, 560 U.S. at 713, 130 S.Ct. at 2601 ("States effect a taking if they recharacterize as public property what was previously private property.").

In other words, prior to the District Court's order, Seventy Acres had an approved rezoning of the 17.49-acre Property to R-3 in order to develop 435 units (71 AA 17434–17439), and after the judicial review order, not only was the R-3

rezoning overturned, but the original vested hard zoning of R-PD7 was errantly trumped and effectively converted to property that does not allow any residential development. 97 AA 23837, ¶13. As explained, this judicial taking claim is currently pending in Eighth Judicial District Court Case No. A773268 and is only raised with this Court out of an abundance of caution to avoid waiver. Therefore, the Court should defer to the pending proceedings involving the judicial taking claim.

1. Seventy Acres' Judicial Taking Claim Is Currently Pending in District Court Case No. A773268 But Is Raised Here to Avoid Waiver.

Seventy Acres' judicial taking claim has been filed in District Court Case No. A773268, and it is Seventy Acres' position that this judicial taking claim should be litigated in that separate pending lawsuit. The basis for this position is two-fold. First, Justices Kennedy and Sotomayor in *Stop the Beach* argue that the judicial taking claim should be brought as a separate lawsuit, as Seventy Acres has done in this case. *Stop the Beach*, 560 U.S. at 723, 130 S.Ct. at 2617. Second, the nature of the proceedings before the District Court and this Court prohibit bringing the judicial taking claim in this proceeding. This matter involves judicial review proceedings, and this Court has held that "[a] petition for judicial review is not meant as an avenue to bring original claims," such as Seventy Acres' judicial taking claim. *Nationstar Mortg. v. Rodriguez*, 375 P.3d 1027, 1029 (Nev. 2016).

Additionally, EDCR 2.05 states that "a complaint or other initial pleading must first be filed with the clerk," and EDCR 2.49(b) differentiates between an "initial complaint" and "petition."

However, out of an abundance of caution to avoid any potential waiver, Seventy Acres presents to this Court for the first time the judicial taking claim. *Stop the Beach* suggests that a judicial taking claim should be raised on appeal in the case where the District Court order is entered. *Stop the Beach*, 560 U.S. at 727–728, 130 S.Ct. at 2609–2610. But, the Supreme Court did not address the very unique venue issue presented here where the court order amounting to a judicial taking, arises out of a petition for judicial review and, an original action, such as a judicial taking, may not be brought within a petition for judicial review.

Seventy Acres understands that this Court generally does not consider new issues for the first time on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52–53, 623 P.2d 981, 983–984 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). However, this Court has discretion to entertain constitutional issues raised for the first time on appeal. *Levingston v. Washoe Cnty.*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996) ("[I]ssues of a constitutional nature may be addressed when raised for the first time on appeal."); *FDIC v. Rhodes*, 336 P.3d 961, 965 (Nev. 2014) (recognizing that issues raised implicitly in

the district court can be reviewed on appeal). Additionally, this is the first opportunity Seventy Acres has to raise this issue ***in this proceeding***, as the District Court decision was the result of a petition for judicial review. Seventy Acres could not have filed a complaint for eminent domain at the time the petition for judicial review was pending. Moreover, Seventy Acres could not have been aware of the potential judicial taking issues until such time as the District Court order was entered.

Seventy Acres prefers to litigate its judicial taking claim in District Court Case No. A773268. Yet, if the Court cannot conclude that this Court is an improper forum to raise these judicial taking issues, the Court should address Seventy Acres' judicial taking claim on its merits.

2. The United States Supreme Court Has Recognized a Judicial Taking Claim.

If this Court determines that this appeal is the proper venue for Seventy Acres to raise its judicial taking claim, the Court should order the payment of just compensation for the taking. The issue of whether the judicial branch can engage in action that amounts to a taking was presented to the United States Supreme Court in *Stop the Beach*. Justices Scalia, Roberts, Thomas, and Alito expressly agreed that the judicial branch can take action that amounts to a taking. Justices Breyer and Ginsburg concurred in part and concurred in the judgment, deciding

that the "Florida Supreme Court's decision did not amount to a 'judicial taking,'" thereby implying that a judicial taking is a recognized claim. *Id.*, 560 U.S. at 716, 130 S.Ct. at 2603. Justices Kennedy and Sotomayor, in their concurring opinion, did not outright reject the judicial taking doctrine, but rather thought it was not necessary to decide the issue to resolve the case. *Id.*, 560 U.S. at 733, 130 S.Ct. at 2613 (Kennedy, J., opinion concurring in part). Therefore, although there are three separate opinions, a majority of the Supreme Court recognized the existence of a judicial taking claim.[6]

A closer look at the *Stop the Beach* case shows the basis for the Supreme Court adopting the judicial taking doctrine. In *Stop the Beach*, the Court first determined that, although the traditional taking is the transfer of property from a private owner to the government, the takings clause also applies to "other state actions that achieve the same thing." *Id.*, 560 U.S. at 713, 130 S.Ct. at 2601. The Supreme Court then gave several examples: (1) when the government uses its own property in such a way that destroys private property; (2) government actions that "are functionally equivalent to the classic taking;" (3) government action that forces a private owner to submit to a permanent physical taking; (4) government

[6] Some argue that only a plurality of the Court recognized a judicial taking claim. Even if this is the case, the opinion of four members of the Court "should obviously be the point of reference for further discussion of the issue." *Texas v. Brown*, 460 U.S. 730, 737 (1983).

action that deprives a private owner of all economic use of the property; and (5) government action that "recharacterizes as public property what was previously private property." *Id.* This Court has also recognized a taking where 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 v. Dist. Ct.*, 351 P.3d 736, 743 (Nev. 2015).

Second, *Stop the Beach* explained that the takings clause is concerned with the "act" that results in the taking and does not focus on the particular "government actor." *Id.*, 560 U.S. at 713–714, 130 S.Ct. at 2601–2602. To support this statement, the Supreme Court concluded that that there is no textual justification for suggesting that the right to payment of just compensation varies depending upon which branch of the government effects the taking. *Id.* The Supreme Court even sternly stated, "It would be absurd to allow a state to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Id.*

Third, *Stop the Beach* cites two cases to support the judicial taking doctrine: *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–165, 101 S.Ct. 446 (1980) and *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035 (1980). In *Webb's Fabulous Pharmacies*, the Supreme Court held that "[n]either the Florida Legislature by statute nor the Florida Court by judicial decree…may accomplish the result the county seeks [which the Court found to be

a taking] simply by recharacterizing the principal as 'public money.'" *Id.*, 449 U.S. at 164, 101 S.Ct. 446. In *PruneYard Shopping Center*, the Supreme Court held, "We treated the California Supreme Court's application of the constitutional provisions as a regulation of the use of private property, and evaluated whether that regulation violated the property owners' 'right to exclude others.'" *Id.*, 447 U.S. at 80, 100 S.Ct. 2035.

Finally, the Supreme Court provided the reasoning for the judicial taking doctrine: "In sum, the Takings Clause bars ***the State*** from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. **But the particular *state actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.** "[A] State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies*, 449 U.S. at 164, 101 S.Ct. 446 (italics in original; bold added). In *Stop the Beach*, the Court recognized the importance of the judicial taking doctrine, holding that "[w]e are talking here about judicial elimination of

established private property rights." *Id.*, 560 U.S. at 725, 130 S.Ct. at 2608. Accordingly, if this Court determines that this Court is the proper venue for Seventy Acres' judicial taking claim, this Court should recognize the existence and availability of a judicial taking claim.

3. Other Courts Support a Long-Standing Judicial Taking Doctrine.

Judicial takings have been recognized as a long-standing doctrine. For example, the United States Court of Appeals for the Federal Circuit held that *Stop the Beach* "recognized that a takings claim can be based on the action of a court" and that this was established prior to the *Stop the Beach* case: "[T]he theory of judicial takings existed prior to 2010. The Court in *Stop the Beach* did not create the law, but applied it." *Smith v. U.S.*, 709 F.3d 1114, 1116–1117 (Fed. Cir. 2013); *Ultimate Sportsbar, Inc. v. U.S.*, 48 Fed. Cl. 540 (Fed. Cl. 2001) (recognizing claim for judicial taking); *Jodway v. Fifth Third Bank of Fifth Third Bank Mortgage Co.*, 574 B.R. 654 (Bankr. E.D. Mich. 2017) (recognizing claim for judicial taking); *Vandevere v. Lloyd*, 644 F.3d 957 (9th Cir. 2011) ("[A]ny branch of state government could, in theory, effect a taking."); *Rose Nulman Park Found. ex rel. Nulman v. Four Twenty Corp.*, 93 A.3d 25 (R.I. 2014) (finding that certain court action can amount to a judicial taking for a private benefit); *Proctor v. Huntington*, 238 P.3d 1117 (Wash. 2010) (refusal by court to enforce landowner's

property rights is a judicial taking of property for a private benefit). Therefore, together with the United States Supreme Court and these other jurisdictions, this Court should adopt the judicial taking doctrine.

4. Public Policy Demands the Recognition of a Judicial Taking Claim.

Property rights are so profoundly important in our nation that they are covered with the same protections as life and liberty. The United States Constitution provides, in relevant part: "No person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST., AMEND. V. Additionally, the Nevada Constitution lists as its very first inalienable right "acquiring, possessing, and protecting property." NEV. CONST., ART. 1, § 1. It would be incongruous to preclude the legislative and executive branches from taking these important property rights without payment of just compensation, but then allow the judicial branch to do just that. Regardless of which branch is the "state actor" taking the property, the impact will be the same to Nevada landowners—a loss of important property rights without payment of just compensation. Allowing this would be an express violation of the United States and Nevada Constitutions. Accordingly, there is strong public policy to support the judicial taking doctrine in Nevada.

5. The District Court's Judicial Review Order Unequivocally Gives Rise to Seventy Acres' Claim for a Judicial Taking.

Simply put, prior to the District Court's judicial review order, Seventy Acres had approval to develop 435 units on the 17.49-acre Property and had that approval been denied, then the Property would have remained R-PD7. 1 AA 225; 10 AA 2471–2472; 71 AA 17433–17440. But, after the District Court's judicial review order, Seventy Acres' Property is now entitled to "no residential units" due to an unlawfully placed PR-OS use designation. 97 AA 23837, ¶13. Notably, the District Court's judicial review order vitiates NRS 278.349(3)(e), which was first added in 1977, that zoning (R-PD7) trumps the general plan designation (PR-OS) to instead conclude that the general plan trumps zoning. NRS 278.349(3)(e): "[I]f any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence." The District Court's reversal of this decades' old Nevada property law converts the 17.49-acre Property from a hard zoned residential property to nothing more than a public park, which gives rise to Seventy Acres' judicial taking claim. Therefore, this Court should also conclude that the District Court's judicial review order constitutes a judicial taking, and remand for further proceedings, or defer to the pending litigation in District Court Case No. A773268.

VIII. CONCLUSION

In summary, this Court should (1) reverse the District Court's judicial review order based upon the governing effect of UDC 19.10.050 and the inapplicability of UDC 19.10.040 to the Property; (2) reinstate the City's approvals of Seventy Acres' applications for a general plan amendment, rezoning, and a site development review plan for the Property based upon substantial evidence; (3) extend the entitlements for Seventy Acres to develop the 17.49 acres for two years from the time that the City's approvals are reinstated, consistent with the City's original approvals; and (4) conclude that the venue for Seventy Acres' judicial taking claim should be in District Court Case No. A773268, due to the special nature of judicial review proceedings.

Dated this 5th day of November, 2018.

MARQUIS AURBACH COFFING

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CERTIFICATE OF COMPLIANCE

1. 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 Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 13,798 words; or

☐ does not exceed _____ pages.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 5th day of November, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Todd Bice
Dustun Holmes

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

EXHIBIT “LLLLL”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEVENTY ACRES, LLC, a Nevada Limited Liability Company,

Appellant,

vs.

JACK B. BINION, an individual; DUNCAN R. and IRENE LEE, individuals and Trustees of the LEE FAMILY TRUST; FRANK A. SCHRECK, an individual; TURNER INVESTMENTS, LTD., a Nevada Limited Liability Company, ROGER P. and CAROLYN G. WAGNER; individuals and Trustees of the WAGNER FAMILY TRUST; BETTY ENGLESTAD as Trustee of the BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC; JASON and SHEREEN AWAD as Trustees of the AWAD ASSET PROTECTION TRUST; THOMAS LOVE as Trustee of the ZENA TRUST; STEVEN and KAREN THOMAS as Trustees of the STEVE and KAREN THOMAS TRUST; SUSAN SULLIVAN as Trustee of the KENNETH J. SULLIVAN FAMILY TRUST; and DR. GREGORY BIGLER and SALLY BIGLER,

Respondents.

Case No.: 75481

APPELLANT'S AMENDED REPLY BRIEF

Appeal from the Eighth Judicial District Court, the Honorable Jim Crockett Presiding

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I. INTRODUCTION

This matter concerns Seventy Acres LLC's ("Landowner") right to develop 17.49 acres of property ("Property") (approved by the City of Las Vegas ("CLV") for residential since 1986) and opposition by a few neighbors ("Opponents"). The Property and adjacent land comprise ***250 acres of residentially zoned property ("Residential Acreage") always intended for residential development*** as evidenced by the adjacent Queensridge Common Interest Community ("Queensridge CIC") CC&Rs.

Opponents' brief is a distortion of law and confusion of facts to prevent Landowner from developing its Property. Opponents offer meritless arguments and conclude that nothing can ever be built on the Residential Acreage:[1]

- The conceptual Peccole Ranch Master Plan ("Conceptual Plan") encumbers the Property;
- The Property is zoned 'Planned Development District' ("PD") not 'Residential Planned Development' ("R-PD"); therefore, Landowner is required to file a "major modification" of the Conceptual Plan under Title 19.10.040; and
- The PR-OS (Parks Recreation Open Space) land use designation supersedes existing R-PD7 residential zoning.

[1] Due to the overreaching, erroneous conclusions that "no residential units are permitted on a "PR-OS" land use designation," the District Court's errant order has been waved in courtroom after courtroom to obfuscate all matters relating to the Residential Acreage.

Opponents use the fact that two projects were tracking with the City concurrently (one for the full Residential Acreage and one for condominiums) by cutting and pasting inapplicable code and facts from both to confuse matters.[2] Opponents' arguments are red-herrings used to entirely avoid the limited standard of review.

The condominiums were a stand-alone project which the City spent over 15 months reviewing and processing studies, information and factors that led to an approval of the applications. During the process, the City rejected the same arguments made in Opponents' Answering Brief. Notwithstanding Opponents' obfuscation, **this Court need only verify that *substantial evidence supports the City's approvals of Landowner's applications***.

Opponents failed to satisfy their heavy burden of demonstrating a lack of substantial evidence before the City supporting approval of the applications. Instead, Opponents offer manufactured encumbrances and, assuming at best, competing evidence from the City proceedings. However, competing evidence is insufficient to defeat the City's approvals for development.

[2] Specifically, the Opponents combine 19.16.040 with 19.16.050; the Conceptual Plan with Peccole Ranch and the application for development of the entire 250 Acres (Master Development Agreement) with Landowner application for High-End Condominiums.

The City complied with its Unified Development Code ("UDC" aka "Title 19") in approving Landowner's Title 19.10 applications.

Nevada Revised Statutes and the 2020 City of Las Vegas Master Plan both provide that zoning takes precedence over inconsistent land use designations and master plans of any type. This Court has affirmed that Landowner has the right to develop its Property and change its zoning.[3] To now hold otherwise would derogate land use law and render zoning meaningless.[4]

Although Landowner is not required to demonstrate error in the District Court proceedings, Landowner reemphasizes that the District Court far exceeded its allowable scope of review.

Finally, regarding the judicial taking claim, Opponents tacitly agree that venue for Landowner's judicial taking claim is proper in District Court Case No. A773268.

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[3] *See* Orders affirmed by the Nevada Supreme Court upholding Landowner's right to develop the Property which is hard zoned R-PD7 and confirming zoning trumps any master plan; 1984 Nev. Op. Atty. Gen. No 6 at 3 ("Nevada legislature has always intended local zoning ordinances to control over general statements or provisions of a master plan"); and NRS 278.349(3)(e) which requires conformity between zoning and the master plan but provides if inconsistency exists "zoning takes precedence." 1 Appellant's Reply Appendix ("ARA") 23–27; 1 ARA 203–205.

[4] Zoning is relied on by landowners, lenders, title companies, real estate experts and even the government to name a few. 1 ARA 37–39.

For these reasons, this Court must reverse the District Court's judicial review order, reinstate the City's approvals, extend Landowner's entitlements for two years, and determine that the District Court is the proper venue for the judicial taking claim.

II. LEGAL ARGUMENT

A. THE STANDARDS FOR REVIEWING THE CITY'S APPROVALS MUST BE UPHELD.

In its brief, Landowner outlined the applicable standards of review for this appeal. Appellant's Opening Brief ("AOB") 28–29. Opponents fail to address the standards and instead offer broad arguments that this Court *should* re-review the City's approvals of Landowner's applications. Respondents' Answering Brief ("RAB") 30–31. Yet, standards of review cannot be changed by mere argument of counsel. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that appellate courts need not consider issues that are not cogently argued); *Jain v. McFarland*, 109 Nev. 465, 475–476, 851 P.2d 450, 457 (1993) ("Arguments of counsel are not evidence and do not establish the facts of the case.").

Here, both the de novo standard of review and the substantial evidence test apply because the District Court's decision stated it "is a purely legal one" yet signed an order (drafted entirely by Opponents' counsel) with 44 findings and 12 conclusions of law." Purely legal questions are reviewed de novo with

deference to the agency's conclusions of law, while factual decisions are reviewed by considering whether the decision is supported by substantial evidence. *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) ("[A]n administrative agency's interpretation of its own regulation or statute is entitled to consideration and respect," especially where the agency "has a special familiarity and expertise.").

To avoid the standards of review, Opponents present their own factual assertions and hyperbole of *ipse dixit* which this Court must disregard. RAB 2–30. NRAP 28(e)(1) ("[E]very assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number...."); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) (confirming that this Court does not need to consider the contentions in a brief lacking citations to the record).

The burden of proof lies with Opponents to demonstrate that there is no substantial evidence to support the City's approvals. *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (concluding that for administrative appeals, this Court "affords no deference to the district court's ruling"). *Id.* ("[W]hen this [C]ourt examines an order disposing of a judicial review petition, this [C]ourt's function is the same as the district court: to determine, based on the administrative record, whether substantial evidence supports the administrative decision.");

NRS 233B.135(2). Opponents have failed to satisfy this burden. Instead they argue that there is no need to consider if substantial evidence existed to approve the applications, concurrently arguing that the evidence they presented outweighs the evidence relied on by the City. However, standards of review are the very foundation upon which this Court reviews cases. As outlined below, this Court must apply the standards of review, reverse the District Court's judicial review order, and reinstate the City's approvals.

B. THE CITY PROPERLY APPLIED ITS CODE IN APPROVING LANDOWNER'S APPLICATIONS.

To manufacture an encumbrance on the Property using the Conceptual Plan, Opponents borrow the major modification change of use mechanism within 19.10.040 PD districts. *See* 19.10.040(G)(2).

Opponents then argue the Property went from 'R-PD' to 'PD' zoning by operation of law, stating that R-PD is "no longer favored" and therefore the R-PD zoning district (19.10.050) subsumed into PD (19.10.040). This is an absurd interpretation of the UDC.

First, there is no question the Property was in an R-PD zoning district. Every document from the zoning action, to the zoning verification letter, to the City Attorneys' declarations, and beyond, all confirms the Property was zoned R-PD.

- (2001) Ordinance 5353, zoned the Property to R-PD7 and abolished anything previously conflicting. 23 AA 5514–5520.
- (2014) Zoning Verification Letter: The subject properties are zoned R-PD7 (Residential Planned Development District–7 units per Acre). 1 AA 225.
- (2017) It is hard zoned R-PD7 according to our records. 4 AA 881.
- The Property "has always been hard zoned as R-PD7." 97 AA 23702.
- But the golf course is not a planned development district, it's R-PD. 97 AA 23767.
- This property is R-PD, not PD. 97 AA 23770.
- It's already R-PD, been R-PD since 1990 or so. 97 AA 23786.

There cannot be any genuine argument that the Property *was not* R-PD zoning prior to the approved rezoning, and remains such if the District Court's order is upheld.

Second, Opponents' argument that R-PD zoning no longer exists is belied by the UDC itself. UDC 19.10.050(A) specifically states "new development under the R-PD District is not favored and will not be available under this code." Moreover, the Official Zoning Map located in the UDC Title 19.00.100 provides for zoning classifications that are no longer available for new zoning by reiterating they will be honored until reclassified via a rezoning action, the very action filed by Landowner:

Transitional Rules:

> Property which, on the effective date of this Title, was classified under a zoning classification which no longer exists under this Title will be reclassified by the City to an existing classification by subsequent Rezoning action. ***Until that action occurs, such property shall be governed by the requirements and limitations applicable to the zoning classification in effect just before the adoption of this Title***. UDC 19.00.100 (emphasis added).

Thus, while the R-PD zoning district is no longer available to be granted via rezoning, it does not take away the existing zoning.[5]

Regardless, Opponents' argument is moot, because Landowner was NOT attempting to develop the Property within either the R-PD or PD districts. Rather, Landowner applied for a ***zoning change***. *When rezoning, the existing zoning subchapter does not govern the application process,* UDC 19.16.090-Rezoning does. Title 19.16.090(L) provides the factors for rezoning approvals. The Planning Commission and City Council, made specific findings commensurate with those factors and concluded that the applications for development are "compatible with the surrounding development and is in substantial conformance

[5] 19.00.100 provides a footnote to the R-PD zoning district "Development *within an R-PD District,* except as provided for in LVMC 19.10.050 or elsewhere in this Title, *is not available after the effective date of this Title*." (emphasis added).

with Title 19."[6] 47 AA 11305–11307. The City Council voted to approve the applications. 71 AA 17277; 71 AA 17284; 47 AA 11295–11296.

Notably, the Answering Brief doesn't challenge the merits of the rezoning application's compliance with the code (UDC 19.16.090). It doesn't matter what zoning district the Property was in *before it was rezoned*. What matters is that Landowner and the City complied with the code for Rezoning (19.16.090). This is undisputed. The District Court erred when it ruled that UDC 19.10.040 governs zoning applications. As a matter of law, this Court must conclude that the City properly applied its rezoning code in approving Landowner's applications.

C. COMPETING EVIDENCE DOES NOT OVERCOME THE CITY'S FACTUAL FINDINGS BASED UPON SUBSTANTIAL EVIDENCE.

The substantial evidence test is used to determine whether the City's decision is arbitrary and capricious. Factual findings of the City should only be overturned if they are not supported by substantial evidence. Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Nassiri v. Chiropractic Physicians' Bd.*, 327 P.3d 487, 489 (Nev. 2014); NRS 233B.135(4).

[6] Although R-4 high density zoning was approved by the planning department and the planning commission, as additional concession to neighbors, Landowner reduced the units from 720 to 435 dropping to medium density zoning (R-3). 71 AA 17319, 17324–17327.

Opponents have the burden to demonstrate that there is no substantial evidence to support the City's approvals of Landowner's applications. *Kay*, 122 Nev. at 1105, 146 P.3d at 805 ("[W]hen this [C]ourt examines an order disposing of a judicial review petition, this [C]ourt's function is the same as the district court: to determine, based on the administrative record, whether substantial evidence supports the administrative decision."); NRS 233B.135(3).

Opponents disregard the substantial evidence standard and claim evidence existed supporting denial. RAB 42–46. Opponents' burden is to demonstrate the complete absence of evidence to support the City's approvals. Indeed, whether competing evidence[7] exists is not the standard. *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) ("[J]ust because there was conflicting evidence does not compel interference with the [agency's] decision."); *Constr. Indus. Workers' Comp. Grp. ex rel. Mojave Elec. v. Chalue*, 119 Nev. 348, 354, 74 P.3d 595, 598 (2003) ("NRS 233B.135(3) precludes us from weighing evidence or determining the credibility of witnesses."); *State v. Garaventa Land & Livestock Co.*, 61 Nev. 407, 411, 131 P.2d 513, 514 (1942) (**a finding supported by substantial evidence will not be set aside "even**

[7] This "evidence" presented by Opponents is entirely self-serving as the unsworn "expert testimony" is from paid representatives of the opposition in an attempt to supplant the City experts. 5 AA 1233.

though substantial evidence may exist in the record against such a finding") (emphasis added).

The inquiry is whether evidence supported the City's approvals. "The substantial evidence test is particularly applicable where there is conflicting evidence and the credibility of the witnesses is in issue." *Savini Constr. Co. v. A & K Earthmovers, Inc.*, 88 Nev. 5, 7, 492 P.2d 125, 126 (1972). When evidence conflicts, the fact finder can best evaluate the credibility of parties offering different versions of the facts, which will not be disturbed on appeal. *Kleeman v. Zigtema*, 95 Nev. 285, 287, 593 P.2d 468, 469 (1979); *Beverly Enters. v. Globe Land Corp.*, 90 Nev. 363, 365, 526 P.2d 1179, 1180 (1974) ("not within the province of the appellate court to instruct the trier of fact that certain witnesses or testimony must be believed").

The Opposition's argument requires this Court to ignore the standard of review and reweigh the evidence, contrary to the law for appeals. By applying the proper standards of review this Court will find that substantial evidence supports the City's approvals.

1. A Major Modification Is Not Legally Required.

The Opponents' seminal argument is that a UDC 19.10.040 'major modification' to the Conceptual Plan was required to approve the rezoning applications, thereby converting the Conceptual Plan into a strict encumbrance

barring any rezoning of the Property. This argument fails since the Property is not zoned 'PD,' as UDC 19.16.090 governs rezoning.

Opponents also argue that a 'major modification' to the Conceptual Plan was required under the City of Las Vegas Land Use and Rural Preservation Element of the Las Vegas 2020 Master Plan ("CLV 2020 Plan"). Both Tom Perrigo, Planning Director (City employee for 25 years), and Brad Jerbic, City Attorney (for 26 years), advised the City Council that a 'major modification' under the CLV 2020 Plan was not required.

Tom Perrigo:

> The applications before you were originally submitted to be heard by the Planning Commission on January 12th, 2016. These items were held in abeyance as the, as staff requested the applicant do some additional applications to encompass the full 250 acres known as the Badlands Golf Course.
>
> As such, staff required the modification of the Peccole Ranch Master Plan and a development agreement as it significantly departed from the allowable number of units and overall density described, prescribed in that document. With the withdrawal of those applications, ***staff has evaluated the proposed project on its own merits, and per the land use element of the 2020 Master Plan a major modification is not required for these items.***

5 AA 1166–1167.

Brad Jerbic:

> Is your question, Your Honor, why is there not a major mod accompanying this particular application at this point in time?
>
> . . .

> [**T]he City of Las Vegas Land Use and Rural Neighborhood Preservation Element of the Las Vegas 2020 Master Plan,** adopted by the City Council on September 2nd, 2009, in Ordinance 6056, as revised on May 8th, 2012, Ordinance 6152, it says, quote, special plan, special area plan in which major modification is required to change a land use designation include the following: 1014 Grand Canyon Village, Lone Mountain West, Grand Teton Village, Las Vegas Medical District, 015 Cliff's Edge Providence, Kyle Canyon Gateway, Lone Mountain, Summerlin; and Town Center. **It does not include Peccole Ranch**."

71 AA 17348.

The City Council rightfully adopted the Planning Director's interpretation and followed the City Attorney's legal opinion. The City Council's interpretation of its own code relating to the applications, supported by the City Attorney, is not a "manifest abuse of discretion" and must be accepted by the Court as a city's interpretation of its own land use laws is cloaked with a presumption of validity and will not be disturbed absent a manifest abuse of discretion. *Boulder City v. Cinnamon Hills Associations*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1994).

The only place 'major modification' is found in the UDC is under the Planned Development District zoning subchapter (19.10.040(G)(2)), which actually mirrors part of the rezoning code. It is undisputed that Landowner complied with UDC 19.16.090. *See* 19.10.040(G)(2); 11 AA 2478–2520; 26 AA 6217–6218. Therefore, even if 19.10.040(G)(2) was applicable to the Property (which it is not), it is "moot" because, the "procedures and standards" for a major modification are identical to a rezoning. *Cashman Equip. Co. v. West Edna Assoc.*

Ltd., 380 P.3d 844, 853 (Nev. 2016) ("Generally, this court will not decide moot cases.").[8]

This Court must conclude that a 'major modification' of the Conceptual Plan was not a Title 19 requirement to approve the rezoning application, and that the Opponents' argument is moot since Landowner met and exceeded the requirements of UDC 19.10.040(G)(2) through compliance with 19.16.090 (Rezoning).

2. <u>The Argument Regarding the Conceptual Plan Being a Permanent Encumbrance Is Contrary to the Law, the Code, and the Plan Itself.</u>

Opponents argue that the Conceptual Plan not only restricts the Property from development notwithstanding its existing residential (R-PD7) zoning, but also prohibits the City from rezoning under its code. Their position is a distortion of the law that renders zoning meaningless, overturns basic property rights law,[9] and makes long-term City planning a city-wide "taking."

However, the Conceptual Plan is not a recorded encumbrance upon the Property, and as a City planning tool it was defunct long ago. In fact, not a single

[8] The Opponents' assertion that Landowner waived mootness has already been rejected by this Court: "[T]he issue of mootness goes to the controversy's justiciability and must be considered at all stages of the litigation." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 264 n.3, 71 P.3d 1258, 1260 n.3 (2003).

[9] *Diaz v. Ferne*, 120 Nev. 70, 75, 84 P.3d 664, 667 (2004) (landowners cannot be bound by "secret intentions" and documents not noticed).

"major modification" to the Conceptual Plan was filed in almost thirty years of City zoning actions. 1 AA 178; 1 ARA 33–34; 1 ARA 36.[10]

That is because, while the Property was originally within the boundaries of the Conceptual Plan, it required annexation into a master association aka the Peccole Ranch Master Association. 15 AA 3469. It is undisputed that ***neither the Property, nor Queensridge CIC was ever annexed into Peccole Ranch Master Association***. 70 AA 17071. 1 ARA 23–27; 1 ARA 203–205.

Opponents bank their entire argument claiming real property rights protections under the "Peccole Ranch" Conceptual Plan, despite the fact that Queensridge homeowners do not live in a sub-association under the Peccole Ranch Master Association.[11] 21 AA 5060–22 AA 5208. The Queensridge CIC is governed by the Queensridge CC&Rs[12] which specifically disclose that

[10] In fact, the principals of Landowner developed multiple properties within these "boundaries" of the Conceptual Plan area, including Tivoli Village and One Queensridge Place, and the Conceptual Plan was never mentioned let alone required to be modified. 42 AA 10105–10110; 1 ARA 34.

[11] This is a repackaging of Opponents' declaratory relief claims that were dismissed nearly 2 years ago by the Honorable Judge Nancy Allf, Clark County District Court Case A-15-729053-B that Peccole Ranch is a NRS 278A Planned Unit Development and that the Conceptual Plan is a "Plan" as defined in NRS 278A.060 that gives residents enforcement rights under NRS 278A.40.

[12] Nothing in the CC&Rs even mentions the Peccole Ranch or any other "master plan."

Landowner's Property is "NOT A PART" of the Queensridge CIC and that the Property **is subject to development**. 40 AA 9646; AOB 12. Opponents have dusted off a decades old defunct planning tool to use it as a forever encumbrance because they are unable to rely on basic principles of real property law, due to their purchase documents and recorded Queensridge CC&Rs stating that the Property is 'subject to development' and is NOT A PART of the Queensridge CIC. *Wilson v. Wilson*, 23 Nev. 267, 45 P. 1009, 1010 (1896) (unrecorded documents do not impart notice).

Opponents' argument that the nearly thirty-year-old Conceptual Plan is a strict real property encumbrance contrary to the undisputed facts that it was never recorded against Opponents' property, nor Landowner's Property. The Conceptual Plan has never been the subject of a 'major modification' application under Title 19, in almost 30 years of non-conforming development, zone changes, and land use applications to the subject area *is unsupported by real property law, Nevada Statutes, and the City of Las Vegas Unified Development Code (UDC or Title 19).* The City's decision to approve Landowner's applications must be upheld.

3. Land Use Designations (Such as PR-OS) Do Not Prohibit Development, as Zoning Is Superior to Any Inconsistent Designations.

Opponents put much weight on the land use designation elevating it above zoning and crafted the wording in the order[13] in such a way as to affect the entirety of the Residential Acreage. However, the law is clear that zoning is superior to land use designations.

PR-OS is a land use designation[14] that is *determined according to the zoning classification of land*. 69 AA 16823–16918, 16857. It is imperative for the Court to understand that **the Property was not designated as PR-OS by any *legal action* taken by Landowner or the City**. In fact, the City could not determine how the PR-OS designation came to be:

[13] Opponents state that the City has "accepted" the District Court's erroneous order by not participating in this appeal ignoring that the City argued against the 'major modification' requirement in the District Court. RAB 4. Furthermore, the City Attorney explained to the City Council that the District Court's decision was "legally improper." 1 ARA 35. However, this decision not to appeal was made political in an effort by Councilman Seroka (put in office by the Opponents) who took office with the sole intent of preventing development on this Property. 1 ARA 32, ll. 882–888.

[14] Land use designations, also known as general plan designations, are not the same as zoning. General Plan Amendments change land use designations. UDC 19.16.030. Landowner filed and received approval for its General Plan Amendment application changing the designation from PR-OS to ML (Medium Low residential density). 47 AA 11295–11296.

> "The zoning for this property, R-PD7 was in existence prior to the change in the General Plan [PR-OS]. The General Plan was a staff-initiated change….[I]t doesn't take away the rights that the applicant has to zoning." 1 ARA 30.

Regardless, the City was indifferent to the designation and explained that zoning takes precedence over the land use designation. *Id.*; 97 AA 23701.

> "If you do not grant the general plan amendment tonight, you will merely leave in place a general plan that's inconsistent with the zoning, and the zoning trumps it, in my opinion." 1 ARA 31.

The City confirmed that the PR-OS designation, albeit improper, was inconsequential because zoning takes precedence over land use designations. The Land Use & Neighborhood Preservation Element of the Las Vegas 2020 Master Plan, which is designed to provide a framework for the orderly planning of future land uses (as opposed to present uses) within the City, specifically establishes land use hierarchy. 69 AA 16845; 97 AA 23701. Not surprisingly, ***land use designations are subordinate to zoning***. *Id.*; https://files.lasvegasnevada.gov/planning/Land-Use-Rural-Neighborhoods-Preservation-Element.pdf.

* *Land Use & Rural Neighborhoods Preservation Element pg. 19*

At the time zoning is granted, substantial factors are considered, including conformance with the City's 2020 Master Plan. UDC 19.16.090. As such, no matter what land use designation is placed on land, properly or improperly, ***existing zoning dictates permitted use***, not the land use designation aka the City's Master Plan. *Id.* Notwithstanding the land use hierarchy, the City approved Landowner's General Plan Amendment concurrent with its approval of Landowner's Rezoning application such that they were both consistent with each other when approved.

D. THE DISTRICT COURT RULING WAS TAINTED BY AN IMPROPER SCOPE OF REVIEW TO BE APPLIED TO JUDICIAL REVIEW.

Landowner does not need to challenge or disprove the District Court's erroneous ruling to prevail in this appeal. But, in its opening brief, to provide context, Landowner highlighted some of the District Court's most egregious rulings. AOB 50–53. For example, the District Court failed to give deference to the substantial evidence supporting the City's approvals. *Id.* The District Court ignored the City Council approvals of Landowner's applications. AOB 20–26. The District Court made findings beyond the scope of the record and beyond its expressed ruling that it didn't reach the "weight of the evidence." AOB 52–53; NRS 233B.135(1)(b) ("Judicial review of a final decision of an agency must be…[c]onfined to the record."). The overreaching order highlights the dangers of a court signing an order with "findings" that were never at issue let alone argued, and in fact silenced at the hearing by the District Court. Opponents' self-crafted, rubber stamped-order is being used in tangential proceedings to prevent all development on the Residential Acreage, thereby giving rise to the judicial taking claim discussed below.

Accordingly, this Court should reverse the District Court's judicial review order to correct the overreach and misuse of judicial review. *Nev. Employment Sec. Dep't v. Weber*, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (1984) ("It is not the

district court's function to choose among the various decisions made during an administrative proceeding.").

E. OPPONENTS DO NOT MEANINGFULLY OPPOSE LANDOWNER'S REQUEST FOR ITS JUDICIAL TAKING CLAIM TO BE LITIGATED IN DISTRICT COURT CASE NO. A773268.

Opponents tacitly agree that venue for Landowner's judicial taking claim should be in the pending District Court Case No. A773268, not this appeal. The principal reason venue is not proper in this appeal is because it involves a judicial review proceeding which cannot be an avenue to bring original claims, such as the judicial taking claim. *Nationstar Mortg. v. Rodriguez*, 375 P.3d 1027 (Nev. 2016). And, Opponents provide additional practical reasons why venue is appropriate in the pending District Court case.

First, Opponents are defending the judicial taking, but ***they have no standing to defend this claim***. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206 (2011) (real party in interest is one who possesses right to enforce claim and has significant interest in the litigation). The pending District Court proceeding that is referenced by Opponents on page 48 of its Answering Brief, Case No. A773268, includes all parties that have standing, including the State of Nevada, which is defending the Eighth Judicial District Court in that matter.

Second, Opponents allege that it is not clear in this appeal whether there is a taking challenged under the U.S. or Nevada Constitutions. To be clear, the

Landowners' taking claims are based in United States Constitution, the Nevada State Constitution, and the Nevada Revised Statutes. This is made clear in the Landowners' complaint in inverse condemnation filed in the District Court Case No. A773268, which case is referenced and discussed by Opponents at page 48 of their Answering Brief.

The District Court Case No. A773268, discussed by Opponents, has been stayed pending a decision by this Court on the venue issue. Therefore, if this Court determines that venue is proper in District Court Case No. A773268, Landowner's judicial taking claim will proceed in the proper course with the proper parties through the pending district court case. Accordingly, venue for Landowner's judicial taking claim is proper in the currently pending District Court Case No. A773268.

1. Opponents' Challenges to the Judicial Taking Claim Are Without Merit.

Although they have no standing to address the judicial taking claim, Opponents, nevertheless, respond to Landowner's arguments on its judicial taking claim. Contrary to Opponents' assertions, four Justices of the U.S. Supreme Court expressly recognized a judicial taking claim in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 715 (2010). Two other Justices recognized the claim by implication in *Stop the Beach* (*id.* at 733), and federal courts and other courts have agreed that the U.S. Supreme Court has

"recognized that a takings claim can be based on the action of a court." AOB 61–62. And, the two other U.S. Supreme Court cases (*PruneYard Shopping Ctr.* and *Webb's Fabulous Pharmacies*)[15] that Opponents assert "the Developer points to" to support the judicial taking claim were actually "pointed to" by Justices Scalia, Roberts, Thomas, and Alito in the *Stop the Beach* case, as U.S. Supreme Court precedent to support the rule that "the Takings Clause bars *the State* from taking private property without paying for it, **no matter which branch is the instrument of the taking**." *Stop the Beach*, 560 U.S. at 715 (italics in original).

Opponents cite to only one case on point to support its position that the U.S. Supreme Court has not recognized a judicial taking: *Petro-Hunt LLC v. United States*, 126 Fed. Cl. 367 (2016). The *Petro-Hunt* case never arrives at the ultimate opinion of whether the United States Supreme Court has recognized a judicial taking claim, instead, determining that "it is not necessary to determine if plaintiff's judicial takings claim is cognizable in federal court because, even if it is, the United States Court of Federal Claims lacks jurisdiction to determine if a judicial taking occurred in these cases." *Id*. at 380. In fact, the *Petro-Hunt* case simply provides a historical background of the judicial taking doctrine, even

[15] *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035 (1980); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446 (1980).

recognizing that "[s]ome courts, including the U.S. Court of Appeals for the Federal Circuit, have determined that judicial takings can exist...." *Id.* at 379; *Smith v. United States*, 709 F.3d 1114, 1116 (Fed. Cir. 2013) ("In that case [*Stop the Beach*] the Court recognized that a takings claim can be based on the action of a court.").

Finally, the three U.S. Supreme Court decisions cited by Opponents for the proposition that "other opinions from the U.S. Supreme Court have rejected a judicial taking theory," are not even remotely on point. RAB 54. Not one of these three cases directly or indirectly addresses the judicial taking doctrine.

2. Opponents' Challenges to the Merits of Landowner's Judicial Taking Claim Are Baseless.

Although Opponents concede that venue is properly in the pending District Court Case No. 773268, not this appeal, they still challenge the factual basis for Landowner's judicial taking claim. As an initial matter, Opponents have no interest at all in the judicial taking claim and, therefore, have no standing to challenge the judicial taking. *Secretary of State v. Nevada State Legislature*, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) ("Standing is the legal right to set judicial machinery in motion."). This is why a determination of venue in District Court Case No. A773268 is appropriate, as it will allow the judicial taking issues to be fully litigated in the normal course before the proper parties, not summarily discussed on appeal without the benefit of full litigation.

Opponents first argue that Landowner does not even have a valid property interest in the 17.49-acre Property to support a taking. RAB 55. This argument is without merit for four reasons: First, this Court expressly held twice that in an inverse condemnation proceeding, such as this, every Nevada landowner has a valid property interest. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006); *Schwartz v. State*, 111 Nev. 998, 1003, 900 P.2d 939, 942 (1995). In *Sisolak*, this Court rejected the same arguments Opponents make in this case and held that, in the context of an inverse condemnation case, every single property owner in the State of Nevada has the vested right to use his property. 122 Nev. at 659, 137 P.3d at 1119–1120.

Second, in Case Nos. 72410 and 72455, this Court affirmed findings of fact and conclusions of law entered by Judge Douglas Smith, which held that Landowner has hard R-PD7 residential zoning, including the "right to develop" a larger 250-acre parcel of property, which includes the 17.49-acre Property in this case. 70 AA 17077, ¶81–¶82; 1 ARA 23–27.

Third, the City itself has maintained Landowner has the right to develop the 17.49-acre Property. ("25 years ago or more when the hard zoning went into place, it covered the entire golf course, the 250 [acres]….As a result, the developer has a right to come in [to] ask for some development there."). 96 AA 23550.

Fourth, a residential use of the 17.49-acre Property is so widely accepted that the Clark County Tax Assessor has assessed the 17.49-acre Property for a residential value. 1 ARA 28–29, 37–39.

Opponents also suggest that there is no taking because the District Court "merely noted the obvious"—that the City Master Plan long ago designated the 17.49-acre Property as PR-OS. RAB 55. Even if the PR-OS designation were proper, which it is not, the District Court's order eliminated the long-standing hard R-PD7 zoning and "right to develop" the 17.49-acre property residentially by elevating the PR-OS designation above the hard zoning and holding that there "are no residential units permitted." 97 AA 23837, ¶13. There could not be a clearer judicial taking, as this case meets the specific standard adopted by the U.S. Supreme Court: "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Stop the Beach*, 560 U.S. at 715 (italics in original).

Also, the Opponents' argument that the District Court's order only requires Landowner to follow the law by applying for a 'major modification' equally supports Landowner's judicial taking claim. As outlined, Landowner met, and exceeded, any alleged 'major modification' procedures and standards (UDC 19.10.040(G)(2)), yet the District Court's order still concluded that the

PR-OS designation prevailed, meaning that there "are no residential units permitted." 97 AA 23837, ¶13. In other words, even though Landowner otherwise satisfied the conditions outlined in the District Court's order, Landowner is still denied the use of the 17.49-acres for residential use. This situation is the proverbial taking by "declaring that what was once an established right of private property no longer exists," even if the owner follows the proper zoning procedures. In essence, the District Court's order targets Landowner by mandating a 'major modification,' even though the requirements were already satisfied, which makes Landowner's inverse condemnation claim "much more formidable."[16] Therefore, this Court should determine that District Court Case No. A773268 is the proper venue for Landowner's judicial taking claim.

[16] For takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy. *A.A. Profiles, Inc. v. Ft. Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981); *Trustees Under Will of Pomeroy v. Westlake*, 357 So.2d 1299, 1304 (La. App. 1978); *Burrows v. Keene*, 121 N.H. 590, 596, 432 A.2d 15, 21 (1981); *Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320, 324–325 (Mo. App. 1976); *Huttig v. Richmond Heights*, 372 S.W.2d 833, 842–843 (Mo. 1963). As one court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be ***much more formidable***." *Commonwealth v. Alger*, 61 Mass. 53, 102 (1851) (emphasis added). *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1074, 112 S.Ct. 2886, 2924 (1992) (law cited in Justice Stevens' dissent).

III. CONCLUSION

This Court should reverse the District Court's judicial review order, reinstate the City's approvals, and extend Landowner's entitlements to develop the Property for two years given: (1) the very limited standards of review favor Landowner as the prevailing party in the City proceedings; (2) the City properly applied the UDC to approve Landowner's applications; (3) the substantial evidence presented supports the City's approvals of Landowner's applications; and (4) the District Court improperly exceeded the scope of its review. Additionally, this Court should conclude that the venue for Landowner's judicial taking claim should be in District Court Case No. A773268, due to the special nature of judicial review proceedings.

Dated this 1st day of May, 2019.

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CERTIFICATE OF COMPLIANCE

1. 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 Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 6,754 words; or

☐ does not exceed _____ pages.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S AMENDED REPLY BRIEF**, were filed electronically with the Nevada Supreme Court on the 1st day of May, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Todd Bice
Dustun Holmes

/s/ Leah Dell
Leah Dell, an employee of
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DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD; SEVENTY ACRES LLC, a Nevada liability company; et al., Plaintiffs, vs. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; et al., Defendants	Case No.: A-18-773268-C Dept. No.: 29 **Hearing Date: September 14, 2022** **Hearing Time: 9:00 a.m.** **ORAL ARGUMENT REQUESTED**

PLAINTIFF LANDOWNERS REPLY RE:
PLAINTIFF LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE THIRD AND FIFTH CLAIMS FOR RELIEF

I. INTRODUCTION

Regardless of the City's colorful narration, it remains uncontested that the City engaged in the following six actions (after the initial approvals on the 17 Acre Property) that directly target and impact the 17 Acre Property: **1)** the City imposed the new MDA application process to develop the entire 250

Acres (include the 17 Acre Property) and then denied the MDA; **2)** the City denied an access application and put in writing that it was requiring a new process for "any development" on the 17 Acre Property; **3)** the City denied a fence application and re-stated the new process for "any development" on the 17 Acre Property; **4)** the City adopted two new Ordinances that target only the 250 Acres, make it impossible to develop, and require "ongoing public access" onto the 17 Acre Property; **5)** the City refused to remove the improper PR-OS from the City maps; and, **6)** the City required drainage remediation for the entire 250 Acres and prohibited that drainage thereby precluding development on any part of the 17 Acre Property, despite the initial 17 Acre approvals.

The Landowners' motion for summary judgment demonstrates how the "aggregate" of these six taking actions rise to the level of a taking under Nevada's per se categorical taking standard, because they "completely deprived [the Landowners] all economical beneficial use of [their] property"[1] and Nevada's per se regulatory taking standard, because they "authorize" the public to physically enter onto and use the Landowners' private property and "preserves" that private property for use by the public. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Sisolak*, at 662, 666-668; *Hsu*, at 634-635.

MAI appraiser Tio DiFederico, the only expert in this case that analyzed the impact of the City's actions on the 17 Acre Property from a real estate market perspective, concluded as follows:

> Opinion #1:
>
> Based on these facts, it appears that the City is treating this landowner differently than it has treated all other units in the area and all other landowners in the area for the purpose of denying the landowner's property rights **so that the subject property will remain in a vacant condition** to be used by the surrounding neighbors as recreation, open space and a viewshed. Exhibit 207, p. 6553. Emphasis added.
>
> Opinion #2:
>
> Due to the effect of the government's actions, I concluded **there is no market to sell this property** with public use and these development restrictions along with high annual expenses. You would

[1] The City claims the Landowners have argued "incoherent and vague" taking tests. City Opp., p. 7:10. The tests the Landowners provide in their moving papers are quotes from Nevada law.

be paying for a property with no economic benefit that has annual expenses in excess of $65,000 for real estate taxes, in addition to insurance for a property used by the public in an uncontrolled way. Id. Emphasis added.

Mr. DiFederico concludes that, "[b]ased on my analysis of the property in the after condition, the City's actions result in **catastrophic damages** to this property" and "[d]ue to the government actions, it is my opinion that there would have been **no interest for the subject property in the after condition**." Id., 6553, 6554. Emphasis added.

The City offers no valid rebuttal for its taking actions and fails to produce an expert rebuttal to these opinions by appraiser DiFederico. Instead, the City asks this Court to ignore the plain language in the documented evidence and the unrebutted opinions of appraiser DiFederico and simply accept the arguments of the City's private attorneys as to their opinion of the impact of the City's actions, which is neither evidence nor accurate. *See Nevada Ass'n Servs., Inc. v. Eighth Judicial Dist. Court,* 130 Nev. 949, 957 (2014) (arguments of counsel "are not evidence and do not establish the facts of the case"). These unsupported accounts of the facts and proffered opinions of counsel fail to meet any evidentiary standard and should be rejected by this Court.

II. THE CITY'S ATTEMPT TO RE-WRITE THE FACTS IS UNAVAILING

A. The City Ignores the Underlying Factual Reason the City Revoked the 17 Acre Approvals and Took Aggressive Actions to Prevent all Development and Preserve the 17 Acre Property for Use by the Surrounding Neighbors

The City does not dispute that it reversed its position on the 17 Acre initial approvals once Steve Seroka (Seroka) took office; it just ignores this fact.

On February 15, 2017, the City Council approved 435 multi-family residential units on the 17 Acre Property by a 4-3 vote with three City Council Members strongly opposed. Exhibit 218, pp. 6938-6943. Just four months later, on June 13, 2017, Seroka defeated and replaced Councilman Bob Beers (Beers) for Ward 2 of the City Council where the 17 Acre Property is located. This is important, because Beers favored development consistent with the Las Vegas Municipal Code ("LVMC" or "the Code"), but Seroka

was a **zealot** opponent of any development (being supported by the surrounding neighbors in his campaign). Seroka publicly announced his position at City Hall *on the 17 Acre entitlements* stating "over my dead body" will development occur on the 250 Acres. Exhibit 124, p. 4236. And Seroka appeared at the February 15, 2017, City Council hearing *on the 17 Acre entitlements* to state, "I am against this project". . "I stand with the neighbors." Exhibit 131; pp 04327: ln 1626-1627. Thereafter, upon taking office, Seroka took specific direction from these "neighbors"[2] to revoke the 17 Acre entitlements and prevent development.

Once Seroka took office on June 13, 2017, as Ward 2 Councilman (the area encompassing the 17 Acre Property) the vote shifted from 4-3 in favor of development to 4-3 against development. Since June 13, 2017, with Seroka at the helm, the City brazenly put in writing its intent to deny all uses for the entire 250 Acres, including the 17 Acre Property, and engaged in the six taking actions in furtherance of this intent. Thus, while entitlements were initially approved on the 17 Acre Property, once Seroka took charge of Ward 2, those approvals were revoked.

B. Rebuttal of All City Arguments in Regard to Taking Fact #1 – the MDA

In regard to the 2017 Master Development Agreement (2017 MDA), the City claims there is not enough evidence to prove that **after** the initial approvals and once Seroka took office, the City demanded a new application to develop and would consider *only* this one type of application – the 2017 MDA to develop the entire 250 Acres (including the 17 Acre Property) - and it claims any demands for the 2017 MDA were not in public hearings. City Opp., pp. 15-17. This City argument is refuted by conclusive evidence.

First, the following statements were made by ***City Council members*** at a June 21, 2017, public hearing rejecting the application to develop the 35 Acre Property as a stand-alone parcel and demanding the new

[2] These are the neighbors that demanded the Landowners "hand over" 180 acres and when that failed, they enlisted the City to aid in the prevention of all development. Exhibits 94, 35.

2017 MDA for the entire 250 Acres: 1) "I have to oppose this, because it's piecemeal approach (Councilman Coffin);" 2) "I don't like this piecemeal stuff. I don't think it works (Councilwoman Tarkanian); and, 3) "***I made a commitment that I didn't want piecemeal,***" there is a need to move forward, "but not on a piecemeal level. ***I said that from the onset***," "Out of total respect, I did say that I did not want to move forward piecemeal." (Mayor Goodman). Exhibit 53, 6.21.17 City Council Meeting, pp. 001287:2618; 001293:2781-2782; 001307:3161; 001238:1304-1305; 001281:2460-2461. Additionally, veteran land use attorney Christopher Kaempfer, who was retained to obtain approvals for the 17 Acre Property, testified that he had no less than 17 meetings with the City Planning Department in regard to the 2017 MDA and the City advised him that "[the Landowners] either get an approved [MDA] for the entirety of the Badlands or we get nothing." Exhibit 48, pp. 001161-1162, paras. 11-13. Stephanie Allen, the attorney that worked with Mr. Kaempfer, also testified that she attended more than 25 meetings and "it was made clear by the City of Las Vegas employees, councilpersons, and the Mayor that the City would accept only one type of application to develop the 250 acre property – an MDA" and that the City "did not want and would not approve individual applications." Exhibit 195, paras 8-9. Finally, Landowner representative Mr. Lowie confirmed in his testimony that during the 2017 MDA process, "the City continued to make it clear to [the Landowners] that it would not allow development of individual parcels, but demanded that development only occur by way of the [2017] MDA." Exhibit 34, p. 000538, para. 19, p. 000539, para. 24:25-27. The City fails to rebut this conclusive evidence.

The City further claims that, despite demanding the 2017 MDA as the only option for development of the entire 250 Acres, the 17 Acre Property was exempted from the 2017 MDA based on the past approvals. City Opp., p. 15:11-20. This is directly contrary to the above uncontested evidence that the entire 250 Acres, including the 17 Acre Property, must be included in the MDA. Moreover, the uncontested evidence shows the 2017 MDA required the 17 Acre developed as part of the 2017 MDA and includes specific details for how the 17 Acre Property was to be developed. The 2017 MDA provides

"Development Area 1 [the 17 Acre Property]" "**shall** be developed as the market demands, **in accordance with this Development Agreement."** Exhibit 79, specifically p. 2703. The City Staff Report for the 2017 MDA states: 1) the area governed by the MDA is "250.92-acre" that includes the 17 Acre Property; 2) the MDA "includes this area [17 Acre Property] *for consistency with proposed development and the Master Studies*;[3]" 3) "New development within Development Areas 1 through 3 [the 17 Acre Property is Area 1] will require a Site Development Plan Review;" and, 4) the specifics to exactly how the 17 Acre Property will be developed under the MDA. Exhibit 77, pp. 2653, 2654, 2658, 2661. Additionally, the 2017 MDA states: 1) the property governed by the MDA, "contains four (4) development areas [development area 1 is the 17 Acre Property], totaling two hundred fifty and ninety-two hundredths (250.92) acres;" 2) the "Property" governed by the MDA is defined as "250.92 gross acres," which includes the 17 Acre Property; 3) the "maximum number" of residential units for the MDA includes the 17 Acre Property units; 4) the landscaping, parks, and recreation areas are interconnected throughout development areas 1, 2, and 3; and, 5) there will be additional dedication for roadways from the 17 Acre Property that will be constructed by the Landowners. Exhibit 81, pp. 2710, 2718, 2721-2723, 2726-2727, 2742. Importantly, the 2017 MDA specifically excludes 2.13 acres owned by the Landowners - "This area [covered by the MDA] does not include the 2.13 acres of PD (Planned Development) zoned property." Exhibit 77, p. 2656. No such exclusionary language exists for the 17 Acre Property. Instead, all of the above inclusionary language exists. Finally, the minutes from the August 2, 2017 City Council hearing, when the 2017 MDA was denied, denies development on "250.92" acres, which includes the 17 Acre Property. Exhibit 78. Therefore, the 17 Acre Property was NOT exempted from the 2017 MDA.

[3] "Master Studies" refers to Master Drainage Study, Master Sanitary Sewer Study and Master Traffic Study. "Each study is to be approved by the Director of Public Works *prior to the issuance of any permits except grub and clear permits . . . and/or demolition permits.* Exhibit 79, pg. 2655. This is important because denial of the MDA and the refusal to allow drainage on any "unentitled" land, was utilized to revoke the 17 Acre entitlements. Exhibit 117.

The City also claims that it lacked the power to revoke the 17 Acre Approvals. City Opp., p. 15:9-10. Yet, by forcing the 17 Acre Property into the 2017 MDA, then denying the MDA, illustrates that this is exactly what the City did. That the City's claims it lacked the power to take the actions that it took, does not prove that it did not do so. To the contrary, it illustrates the extreme measures to which the City went to contravene its own code, policies and procedures.

Therefore, the City's claim there is not enough evidence to prove the City mandated the 2017 MDA to include the 17 Acre Property is false. City Opp., pp. 16:24-17:6. The above uncontested evidence includes statements by City Council members at public hearings, the testimony by Mr. Kaempfer, Ms. Allen, and Mr. Lowie, the 2017 MDA itself, the City Staff Report for the 2017 MDA, and the denial minutes for the 2017 MDA.

C. Rebuttal of All City Arguments in Regard to Taking Fact #2 – the Access Denial

In regard to the access denial, the City claims the Landowners completely "misrepresent the facts" and the City never denied access and, even if it did, this could not have revoked the initial 17 Acre Property approvals. City Opp., pp. 17-18; 29-30. The evidence proves otherwise.

On June 28, 2017, four months after the initial approval and *after Seroka took office*, the Landowners requested access to the 17 Acre parcel, the 35 Acre parcel and the 133 Acres along with a perimeter fence for the 250 Acres (the fence is discussed in the next section). Exhibits 88 and 91. The access application included detailed architectural drawings and informed that the 17 Acre parcel was entitled. Exhibit 88 and City Exhibit DDDD-4. This is important because, as the City admits, once property is entitled, the City is without discretion to deny ministerial applications such as access and fencing. *See* City Exhibit IIIII, Declaration of McOsker ("The Building Department will approve any fencing for any purpose that meets the construction code adopted by the City"). Nevertheless, once Seroka took office, the City circumvented its own code and placed the access and fencing applications in the

hands of Seroka.[4] An August 21, 2017, City calendar note revealed that Seroka had meetings "over the weekend" regarding the access and fence permits - "Followup with CM Seroka regarding the Badlands fence permit. Want to take action on the Monday after find out cm's conversations went over the weekend regarding the permit." Exhibit 217, p. 6929. Three days after Seroka's "meetings over the weekend" and nearly three months after the request, on August 24, 2017, the City "denied" the access (and fencing) applications. Exhibits 89 and 92.

The City claims the "denial" was just intended to get the Landowners to file the "appropriate application" - a "major review" application. City Opp. 18:5-12. This is a meritless argument. First, the access denial letter specifically states the access application "is denied." Exhibit 89, p. 2816. Second, access applications are a routine over-the-counter *ministerial* request and are *specifically excluded from the "major review" process.* Exhibit 90, LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii). And, the "major review" application is substantial; it requires a pre-application conference, plan submittal, circulation to City departments for comments, recommendation, requirements, and publicly noticed Planning and City Council hearings. Exhibit 90. The City's invitation to challenge the denial of access after this long process through an even longer Petition for Judicial Review process is telling. This would impose a 2-3 year process for a constitutionally guaranteed access, which is an unreasonable barrier and the equivalent of denying this access property right. As the Landowners had already been through a protracted Major Review for the initial 17 Acre entitlements to begin with, forcing the Landowners through another Major Review process for access and fencing was the method used to prevent *any development*.

[4] Indeed, the City flagged the 250 Acres for irregular treatment. An interoffice email dated June 27, 2017 (immediately after Seroka took office) reveals that City of Las Vegas *Senior Permit Technician of Building & Safety* (Storla) directed the staff "if anyone sees a permit . . . at ***Badlands*** . . . Do Not Permit . . ." without talking to them. See Exhibit 130, pg. 4267.

It is also very telling that the City brazenly stated in the access and fence denial letters that, "any developments on this site has the potential to have significant impact on the surrounding properties . . . [a]s such, the (Building Permit Level Review) is denied . . . " Exhibits 89 and 92. It is difficult to see how this access could have a "significant impact" on anyone as the access to the 17 Acre Property off Rampart was already approved with the initial approvals and the access is far from any other properties.

The City then claims as a defense that the initial approvals on February 15, 2017 approved access from Rampart Blvd. to the 17 Acre Property. City Opp., p. 17:11-19. This is not a defense. The initial approvals on February 15, 2017 (prior to Seroka taking office) did approve access to Rampart Blvd. at the exact location the City denied access on August 24, 2017 (after Seroka took office). Exhibit 88, pp. 2810-2811. This demonstrates the City's changed position to revoke all uses of the 17 Acre Property.

The City then claims the Landowners had other access to the 17 Acre Property, therefore, there was no harm in the access denial. City Opp. pp. 17-18. This is plainly false, because the only abutting roadway for access to the 17 Acre Property (a separate and distinct parcel) is Rampart Blvd. and that is the very access point the City denied on August 24, 2017. Exhibit 88, p. 2811.

The City then makes the untenable argument that the requested access was just for "service operations" on the property, therefore, there was no harm in denying the access. City Mot., p. 17. This is a remarkable argument, because common sense dictates that if the City will not even allow access for "service operations," on already entitled land, it was surely not going to allow access to develop. More importantly, the Landowners had the property right of access under Nevada law (*Schwartz,* supra) and the City denied this access as part of its series of actions, i.e., "salvo," to deny all use of the property and preserve it for use by the surrounding neighbors.

D. Rebuttal of All City Arguments in Regard to Taking Fact #3 – the Fence Denial

The City does not contest that the Landowners submitted an application to fence the 17 Acre Property for safety and liability reasons and to exclude the surrounding neighbors from entering and, on

August 24, 2017 (after Seroka took office), the City denied the application. Instead, it provides baseless excuses for the denial. City Opp. 18-20, 28-29.

The City's first excuse is the 17 Acre Property already had some perimeter walls, therefore, it was no harm to deny this fence application. City Opp. 18-19. First, this is a made up excuse as this was not the reason provided for the denial. Exhibit 92. Second, the fencing the Landowners were requesting (which would exclude the public) was very different from the periodic perimeter walls (that were not excluding the public). Exhibit 150. Moreover, most of the perimeter walls are not controlled and maintained by the Landowners, they are controlled by the surrounding properties. Clearly, the periodic walls in the area were not keeping the surrounding neighbors (and the public) out of the property which is evidenced in Exhibit 150. Therefore, when the City "denied" the fence application it denied the Landowners the right to exclude others from their property and left it open for the public to use.

The City's second excuse is it was just trying to get the Landowners to file the "appropriate application" for a fence – a "major review" application. City Opp. 19:16-25. The City Code, however, expressly states a fence application is similar to a building permit review that is granted *over-the-counter*, is not subject to the "major review" process and is *excluded* from City Council review. Exhibit 90, LVMC 19.16.100(F)(2)(a) and 19.16.100(F)(2)(a)(iii). And, the "major review" application that the City now alleges was the "appropriate application" for a simple fence construction is substantial, as explained above. Exhibit 90. Also, the City's invitation to challenge the fence denial after this long process through an even longer Petition for Judicial Review process is outrageous. This imposes a 2-3-year process just to fence the property. Placing this unreasonable process on the constitutional right to exclude is a denial of this property right.

Finally, there are two important facts related to the fence denial the City ignores in its opposition. First, like the access denial, the fence denial occurred after Seroka took office and only three days after Seroka's "meetings over the weekend regarding the [fence] permit." Exhibit 217, p. 6929; Exhibits 89

and 92. Second, the City's fence denial letter states as the only reason for the denial, that the fence "has the potential to have a significant impact on the surrounding properties." Exhibit 92. This is an unbelievable statement as it is impossible to see how a fence protecting private property could have a "significant impact" on surrounding properties.

E. Rebuttal of All City Arguments in Regard to Taking Fact #4 – the Ordinances

The City claims the Landowners Motion for Summary Judgment has "distorted the facts" related to Ordinances 6617 and 6650 (even though the motion quotes directly from Ordinances 6617 and 6650) and then presents meritless defenses to the Ordinances. City Opp. 20:18.

The City first claims that Ordinance 6650 cannot be a taking because it merely requires "certain studies of the impact of the conversion and to engage the community in discussion of their proposals." City Opp. 20:20-23. The Landowners detail on pages 16-17 of their Motion for Summary Judgment just some of the impossible to meet development requirements in Ordinance 6650. It is patently misleading to claim these are just "certain studies." And, the City does not even attempt to excuse the fact that these impossible requirements apply only to the Landowners 250 Acres and no one else in the City. *See Landowners Motion for Summary Judgment, pp. 15-16.* Moreover, the City's own councilwoman referred to Ordinance 6650 as "the latest shot in a ***salvo against one developer [the Landowners].***" Exhibit 115, p. 3868; Exhibit 116, p. 3879:149-151. Emphasis added. This evidence rebuts the mere argument of the City's retained counsel.

Without any basis or evidence whatsoever, the City then claims Ordinance 6650 only applies to a "proposal" to use land and the Landowners never submitted a "proposal" to use during the effective period of the Ordinance. City Opp. 21:1-6. This argument is easily dispensed as the Landowners repeatedly worked with the City from 2015 through 2022 to develop the 17 Acre Property, including continually seeking the approval of the "Master" utility and drainage for the 17, 65 and 133 Acre Properties (further

discussed below), which would have allowed development on the 17 Acre Property. The Landowners never ceased these efforts.

The City also claims Ordinance 6650 does not require the Landowners to allow the public to physically enter on the 17 Acre Property and then asks this Court to accept the City's self-serving interpretation of the forced access language in Ordinance 6650. City Opp. 20-22. This proffered construction of Ordinance 6650 goes beyond its plain meaning, and it is well settled that Courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean v. U.S.*, 556 U.S. 568, 572 (2009); *See also DeStefano v. Berkus,* 121 Nev. 627, 629 (2005) (courts are not permitted to look beyond the statute for a different or expansive meaning or construction). The language in Ordinance 6650 (which applies to only the Landowners) is clear on its face; the Landowners "must, at a minimum and with respect to the property [250 Acres] … Provide documentation regarding ***ongoing public access***… and ***plans to ensure that such access is maintained.***" Id., pp. 3211:24-3212:9. Moreover, Seroka sponsored Ordinance 6650 immediately upon taking office with the stated goal of granting the surrounding neighbors the right to enter onto the 250 Acres and use it for recreation and open space. *See page 15 of Landowners Motion for Summary Judgment.* Importantly, the City made clear that the section where this ongoing access language appears was retroactive and applied. Exhibits 118, pp. 3957: 22; 3968:3, 4087:8-15; Exhibit 119, p 4163:255-261. Also, Judge Williams considered these exact City arguments in the 35 Acre Case, rejected them, and concluded Ordinance 6650 "preserved the **250 Acres** for use by the public and authorized the public **to use the 250 Acres**." Exhibit 201, p. 6314:19-20. Emphasis supplied. As explained, this 250 Acres includes the 17 Acre Property.

The City attempts to escape this forced access language in Ordinance 6650 by claiming the City would need to provide written notice that it was enforcing the access provision before there can be a taking. City Opp. 22:2-3; 27:18-19. This precise defense was specifically rejected by the United States Supreme Court in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) and *Knick v. Township of*

Pennsylvania, 139 S.Ct. 2162 (2019). In *Cedar Point*, the Court held a California statute amounted to a per se regulatory taking where the statute authorized labor unions to occasionally enter onto a farmer's property *upon written notice*. *Id.* at 2069. In *Cedar Point* one of the landowners was never given written notice and did not allow entry, yet the United States Supreme Court still held the California statute was a per se regulatory taking of his property, because "the regulation appropriates **a right to physically invade** the growers' property" **whether that right was exercised or not**. *Id.,* at 2074. Emphasis added. In *Knick,* the Court held **the adoption of an ordinance** that authorized the public to enter onto Ms. Knick's property during daylight hours amounted to a taking, **even though there was no evidence the public entered onto the property** and the Township of Pennsylvania immediately rescinded the ordinance the day after Ms. Knick filed her inverse condemnation claim. *Id.* It is beyond dispute that Ordinance 6650 appropriates a right to physically invade the Landowners' Property whether the City sent the Landowners *written notice* or not.

The City next claims all the Landowners had to do was file for a building permit and this forced access would automatically end. First, there is nothing in Ordinance 6650 that states the forced access ends with the issuance of a building permit. Instead, Ordinance 6650 states that if the Landowners don't comply with the forced access provision, they are guilty of a misdemeanor and subject to a $1,000 a day fine and up to six months in prison. Exhibit 108, p. 3213:16-22. Second, as stated on pages 18 to 19 of the Landowners' Motion for Summary Judgment, Ordinance 6650 imposed impossible to meet barriers that had to be met before any applications could be submitted for entitlements *or building permits*, meaning even the City's manufactured claim that a building permit would end the forced access was impossible to achieve.

The City next claims that Ordinance 6650 only authorized the public to use the 250 Acres for about 14 months. This argument is also untenable as the City has not provided the definitive evidence that it repealed the authorization for the public to enter onto the 250 Acres and indeed argues *even now that the*

250 Acres is designated as PR-OS for the surrounding neighbors' use. Regardless, the sole issue before the Court is whether the City actions, **at any time**, rose to a taking and "no subsequent action by the government can relieve [the government] of the duty to provide compensation for the period during which the taking was effective." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012). In *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019), the offending ordinance was repealed *the day after the inverse condemnation action was filed* and the United States Supreme Court held the repeal was not a defense to the taking that already occurred, reasoning "[a] bank robber might give the loot back, but he still robbed the bank." *Knick,* at 2170, 2172. Therefore, any repeal of Ordinance 6650 does not negate the taking. Moreover, this alleged repeal was only of Ordinance 6650; it was not a repeal of all other City action against the Landowners' property.

The City's argument that there is no evidence that the public is using the 17 Acre Property at the direction of the City (City Opp. 28:1-4) is incorrect as the uncontested testimony of Don Richards, superintendent for the 250 Acres, confirms the ongoing public access and details encounters with the trespassers and the surrounding neighbors who stated, "it is our open space," which they heard at a Queensridge HOA meeting from Councilman Seroka, the zealot opponent of any and all development. Exhibit 150. In addition, the City's own attorney submitted a Declaration in the 35 Acre Case, stating the photos in Exhibit 150 showing entry onto the property "appear to have been taken on the 17-Acre Property." Exhibit 227, p. 7079:10-11. Thus, even the City's own attorney confirms the public's actual use of the 17 Acre Property.

Finally, the City claims there is no evidence of "damages" from Ordinance 6650. City Opp. 28:9-20. This is both irrelevant and incorrect. This argument is irrelevant because the *Sisolak* case recognizes a taking when a statute or ordinance "authorizes" the public entry onto private property and the *Knick* case

also recognizes a taking where an ordinance authorized a very short period of entry.[5] *Sisolak,* supra, *Knick,* supra. This City argument is also incorrect as Landowners' appraiser DiFederico considered City Ordinance 6650, along with the aggregate of other City actions, and concluded the City actions caused "catastrophic damages" rendering the 17 Acre Property valueless and useless. Exhibit 207, p. 6554. The City offers no expert rebuttal to this opinion. Also, as stated in the Landowners' Motion for Summary Judgment, pp. 18-19, Ordinance 6650 makes it impossible to develop any part of the 250 Acres, clearly resulting in damages.

Finally, the City ignores the undisputed fact that these Ordinances were adopted by the City to target only one property owner – the Landowners, which makes the Landowners' taking claims "much more formidable." *Lucas v. South Carolina Costal Council*, 505 U.S. 1003, 1074 (1992) (Stevens, J., dissenting) ('If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be **much more formidable**.' [citation omitted].").

The undisputed facts show Ordinance 6650 is a "salvo" against one owner. The argument by the City's retained counsel does not refute these facts.

F. Rebuttal of All City Arguments in Regard to Taking Fact #5 – the PR-OS

The City claims the Landowners argument in regard to the PR-OS issue is "preposterous," because the City "indisputably lifted the PR-OS designation" with the initial 17 Acre Approvals. City Opp. p. 24:11-14. The City misses the point. The Landowners demanded that the City remove the improper PR-OS on their property from all City maps *beginning in 2016*. Exhibit 180. The City acknowledged that the PR-OS was not properly adopted on the City maps. Exhibit 180. Even so, the City refused to remove the PR-OS and then forced the Landowners to submit an application (GPA) to remove the PR-OS, which the

[5] *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3176–77 (1982) ("constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

Landowners did "under protest." *See e.g.,* Exhibit 98, p. 2988, final para. It was this GPA application and the City's granting the application removing the PR-OS that was the catalyst for the surrounding neighbors challenging the initial 17 Acre approvals in the Petition for Judicial Review (PJR) lawsuit. Exhibit 22, p. 454:13-15.

Because the City acknowledged the PR-OS was not properly adopted from the get go, the City should have removed the improper PR-OS nunc pro tunc from all City maps thereby avoiding the protracted PJR litigation.[6] Fourteen court orders reject the PR-OS designation proving the City's refusal to remove it was nothing more than obstructive. Exhibit 206.

G. Rebuttal of All City Arguments in Regard to Taking Fact #6 – the Drainage

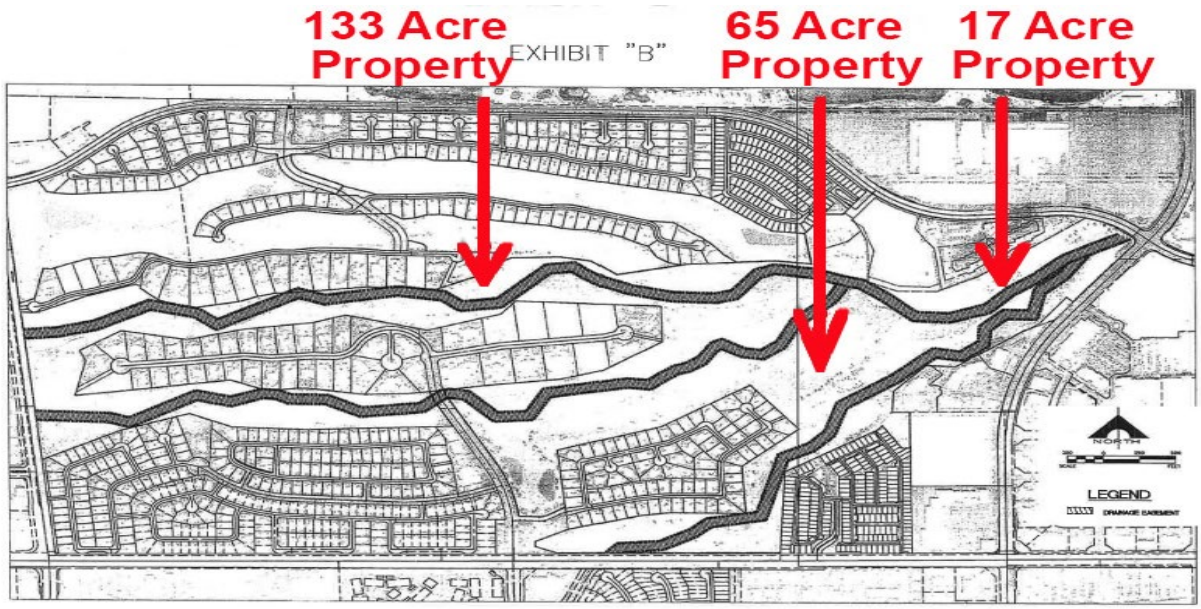
As explained in the Landowners' Motion for Summary Judgment, the utilities and drainage for the entire 250 Acres is intertwined among the 17, 65, and 133 Acre Properties (the 35 Acre Property has no drainage issues), meaning development on the 17 Acre Property cannot move forward without utility and drainage improvement approvals on the 65 and 133 Acre Properties. Therefore, in order to revoke the 17 Acre Property entitlements, the new City Council (with Seroka at the helm) only needed to prevent development on the 65 and 133 Acre Properties, which it did.

The City claims that this is "convoluted – and specious" and states "the 17-Acre Approvals were **in no way** conditioned upon the [Landowners] building drainage improvements on other segments of the Badlands." City Opp. 23:1-2. The City is wrong again.

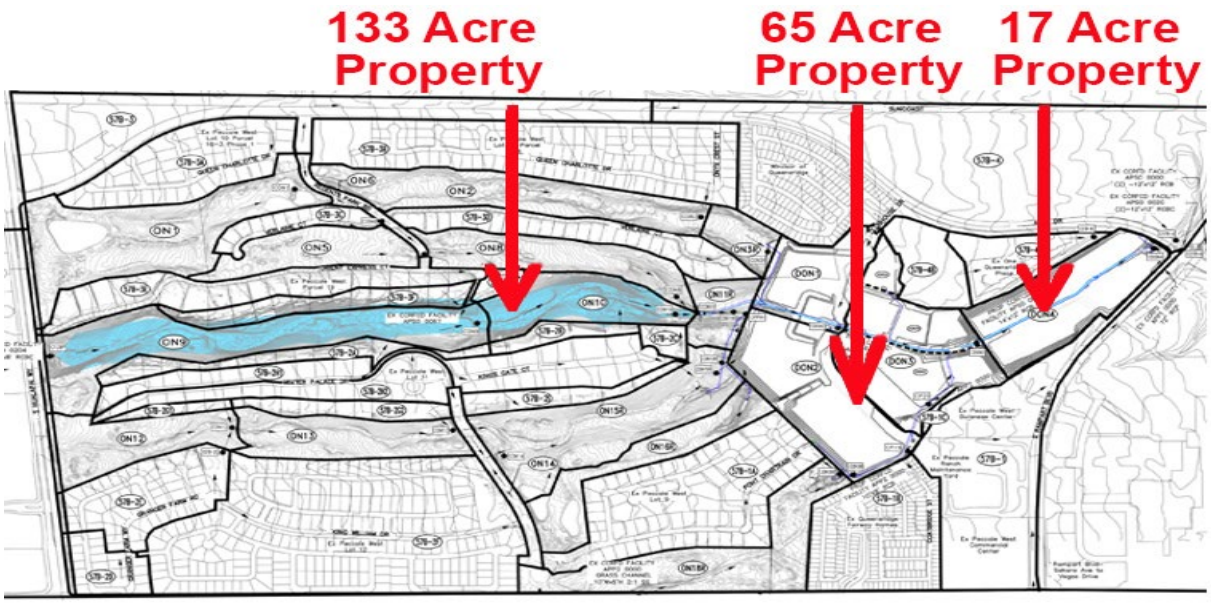
First, the Drainage Improvement Agreement between the City and the Landowners for the 250 Acres (which authorized the Landowners to make drainage improvements) shows the drainage flowing West to

[6] Instead, the City ran the Crockett Order adopting the PR-OS into these inverse condemnation cases asking for it to have issue preclusion effect on the entire 250 Acres.

East over the 65 and 133 Acre Properties and converges at the 17 Acre Property:



Second, the Technical Drainage Study (TDS) that was approved for the 17 Acre Property specifically required construction of drainage facilities on and through the 65 and 133 Acre Properties. Exhibit 228. The following is "Fig6A" from that TDS showing the required drainage infrastructure through the 65 and 13 Acre Properties with a narrow blue line:



See p. 7114 of Exhibit 228. "FIG7" from the TDS further identifies the "FLOOD PROTECTION FACILITIES" through the 65 and 133 Acre Properties with notations for locations 1-30, with the exact c.f.s. for the 100 year event and the exact type of box culvert for each location 1-30 on the 65 and 133 Acre Properties:

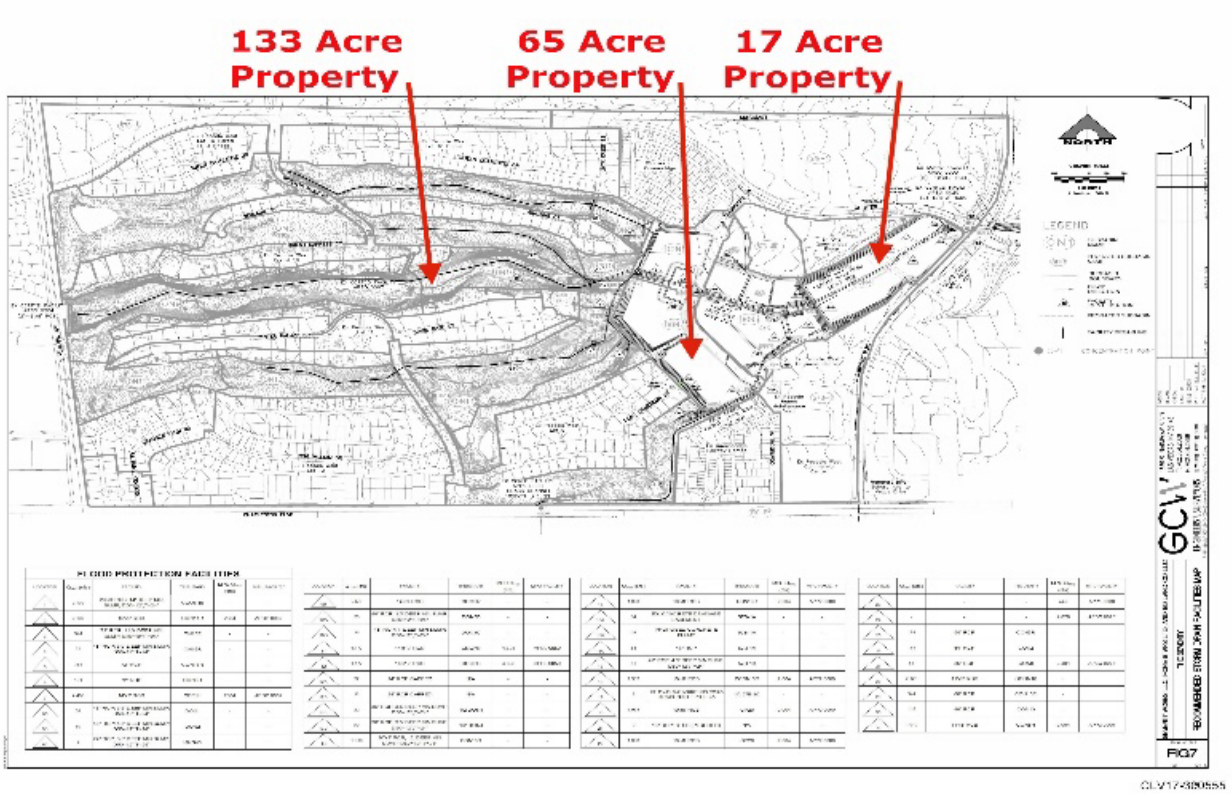


Exhibit 228, p. 7118. As this Court can see, FIG6A and FIG7 clearly show the drainage facilities through all of the 65 Acre Property and nearly all of the 133 Acre Property, with the drainage converging into a concrete box channel at the 17 Acre Property. Therefore, the City's argument that the 17 Acre entitlements were not conditioned on drainage through the 65 and 133 Acre Properties is refuted by its own document. Exhibit 228 (bearing the City bates numbers).

Third, as this Court knows well, the "technical" drainage study the City demanded for the 17 Acre Property initial approvals (Exhibit 228) is much more detailed than a mere "conceptual" drainage study.

The City demanded the "technical" drainage study to assure the drainage that converges on the 17 Acre Property was properly managed through the 65 and 133 Acre Properties.

Fourth, this drainage interconnectivity is seen in: 1) the 2017 MDA for the 250 Acres; 2) Ordinance 6650 (the City passed to target only the 250 Acres); and, 3) the minutes from the February 15, 2017, hearing on the 17 Acre Property applications, all of which mandated a global resolution of the utilities and drainage on the 250 Acres. The 2017 MDA incorporated the initial approvals for the 435 residential units on the 17 Acre Property and required a "Master Drainage Study" and "Master Utility Improvements" for the "Property," which is identified as the 250 Acres. Exhibit 81, pp. 2711, 2721; Exhibit 81, pp. 2716-2718. Critically, the 2017 MDA mandates that the Landowners "design and substantially complete" these drainage facilities "prior to the issuance of any permits." Exhibit 81, p. 2744. Ordinance 6650 adopted by the City in 2018 also required the Landowners to submit the "Master Drainage Study" for the entire 250 Acres as a whole. Exhibit 108, p. 3209:9-10, 3210:18-20. In the minutes from the February 15, 2017, hearing on the initial 17 Acre Property approvals, the City demanded "global" development of the entire 250 Acres, with the Mayor stating, "I have said oftentimes, and I'm going to repeat it, the best thing for the entire development for the security of the homeowners is to have a general development plan. That is the healthiest, safest, most honorable way to proceed." Exhibit 131, p. 4360:2584-2587. This City demand was repeated at length during the February 15, 2017, hearing with certain Councilmembers voting against entitlements because it was not the MDA. Exhibit 131 pp. 4388:3380-3381; 4374:2996-2998; 4294:656-657, 4295:687-688, 4296:716-717, 4361:2625-2626 4362:2629, 2640-2641, 2650-2651; 4374: 2959-2962, 2969-2971; 4299:803-808; 4300:816, 4370: 2861-2864; 4366:2744-2746. The Landowners understood this demand, with their counsel stating, "[o]ur work is not done," the 17 Acre Property will be part of a 250 Acre "master plan, a general development plan," and "[n]o matter what development plan comes up, that corner [17 Acre Property] is going to be developed as part of this plan." Exhibit 131, p. 4361:2604-2609; p. 4373:2985-2987.

Therefore, overwhelming evidence refutes the City's statement that the initial 17 Acre approvals were "in no way" conditioned upon building drainage improvements on the 65 and 133 Acre Properties. Indeed, the development of the 17 Acre Property was conditioned on drainage through the 65 and 133 Acre Properties, meaning the City could revoke the 17 Acre entitlements by precluding the drainage facilities on the 65 and 133 Acre Properties.

Contrary to what the City argues in Court now, once the new City Council that took office on June 13, 2017, it took this course of action. First, the City **denied** all use of the 65 Acre Property and the 133 Acre Property when it denied the 2017 MDA. *See pages 9-13 of the Landowners' Motion for Summary Judgment.* Second, it even **struck** the applications to develop the 133 Acre Property individually from the City Agenda for an improper reason; the City mandated a GPA application as part of the 133 Acre applications, the Landowners filed the GPA "under protest," and then the City Council members claimed at the hearing that the GPA application was procedurally improper and used that as a basis to strike the applications. Exhibits 97-106, specifically Exhibit 106, p. 3155:1029-1035; 3183:1851-3184:1867; 3192.

Then, when the Landowners still pursued the conditional approval of the drainage in order to move forward with development, the City unequivocally stated the City "Rules" provide that the drainage could not be approved, because entitlements were required on the 65 and 133 Acre Property prior to approval of drainage improvements and the entitlements had been denied. Exhibit 117, p. 3914. This directive came from the City Manager's Office. Id. The City does not even contest it denied the drainage on the 65 and 133 Acre Properties. City Opp., p. 23:27-28. Importantly, these City actions to preclude the drainage through the 65 and 133 Acre Properties occurred *after* the initial approvals and *after* the new City Council took office on June 13, 2017.

Finally, the City falsely claims the Landowners did not submit an application to develop the 65 Acre Property and, therefore, the City could not have denied entitlements and drainage on the 65 Acre Property. City Opp. 23:15. First, the 2017 MDA was the only application the City would accept to

develop the 65 Acre Property (with the entire 250 Acres), the 2017 MDA included development on the 65 Acre Property, including the drainage facilities, and the City denied the 2017 MDA. Exhibits 81 and 78. Second, this precise issue was presented to the District Court Judge in the 65 Acre Case and granted in favor of the Landowners. On July 22, 2022, the District Court Judge in the 65 Acre Case determined the City would only allow one application to develop the 65 Acre Case, the 2017 MDA, and then denied that 2017 MDA. That Court also granted the Landowners take motion (after it granted the property interest motion) finding the City engaged in actions that result in a taking of the 65 Acre Property. The Court set a trial to determine the sole issue of just compensation for the taking of the 65 Acre Property for July 31, 2023. *Scheduling Order, Case No. A-18-780184-C, filed August 24, 2022.*

Accordingly, the City has revoked the 17 Acre Property approvals by prohibiting the construction of the drainage facilities on the upstream 65 and 133 Acre properties.

H. Rebuttal of the City's Other Miscellaneous Factual Statements

The City presents additional baseless arguments of counsel, that are not evidence.

1. Rebuttal of the City's Argument the Landowners Don't Want To Build

The City claims the Landowners don't want to build on the 17 Acre Property and accuse the Landowners of creating an "alternative reality" (2:25) and presenting a "phony narrative of victimization by the City." City Opp. 2:25; 3:25-27. On August 25, 2022, the Landowners submitted an Opposition to the City's motion for summary judgment and "Countermotion to Approve Entitlements and End Take" to expose this colorful narrative. The Landowners' countermotion requests that an entitlement package (2022 MDA) to develop the entire 250 Acres that was approved by the City Planning Department and City Manager back in July, 2022, be submitted to the City Council for approval. This will allow development. The proposed 2022 MDA was to be presented to the City Council for approval on August 3, 2022, but at the eleventh hour, the City Council struck the 2022 MDA from the City Agenda. Exhibit 226. On September 12, 2022, the City's retained counsel filed a motion to strike the countermotion that

requires the City Council to consider the 2022 MDA, which would allow development. This clearly shows the City has never and will never allow development, fully supporting a take finding.

Furthermore, the City's claim that the Landowners do not want to develop and are trying to create a "phony narrative of victimization" is nonsensical. The Landowners are the most prolific developer in the area of the 250 Acres, having built Tivoli Village, the Queensridge Towers, 40% of the Queensridge Community custom homes, the Hualapai Commons shopping center, and other developments in the area. To believe the City's story, this Court must accept that this prolific developer, for the past 5 years, did not want to build 435 multi-family residential units **at a time Las Vegas was experiencing one of the greatest booms in multi-family real estate in its history.** The City's position is unbelievable, because it is untrue. Over the past 5 years, the Landowners worked tirelessly expending millions of dollars attempting to develop only to have the City take aggressive actions to deny preclude any and all development.

And, even with Seroka's departure, the current City Council continues the course, having stricken from its August 3, 2022, agenda the 2022 MDA entitlement package that would have allowed development. Exhibit 226, p. 7076. The City's retained private attorneys are even trying to shield the City Council from making a decision on the 2022 MDA by filing, on September 12, 2022, a motion to strike the Landowners' countermotion to present the 2022 MDA to the City Council. Clearly the City Council is still against development of any part of the 250 Acres and does not want any further evidence of this presented at public hearings.

2. Rebuttal of the City's "Letters" Defense

Each time there is an important motion before this Court, the City sends the Landowners a letter stating "the City will accept applications for any ministerial permits" and attaches the letter to its pleadings, claiming this shows the City wants the Landowners to build, but the Landowners refuse to build. The most recent letter was sent by the City on July 19, 2022, just 23 days before the date to file

dispositive motions in this case and the City references this letter at page 9 of its Opposition. The Landowners responded to the City's letter on August 10, 2022. Exhibit 223.

These City letters are pure gamesmanship. First, the City **knows** the Landowners cannot build now, because the City has precluded the drainage across the 65 and 133 Acre Properties, as set forth above. Second, as explained above, the City has already shown it is in fact denying "ministerial" permits as it denied the access and fencing for the 17 Acre Property – two important rights that are necessary for construction. Third, the Landowners accepted the City's most recent July 19, 2022, letter and agreed with the City staff on a 2022 MDA that would allow development on the 17 Acre Property. Astonishingly, the City Council struck that 2022 MDA from the City agenda on August 3, 2022, and its current private attorneys are trying to keep the 2022 MDA from being presented to the City Council (with the September 12, 2022, motion to strike the Landowners' countermotion) – all because the City Council does not want to be held accountable for denying any and all use of the 17 Acre Property. Exhibit 226. Therefore, the City waives its July 19, 2022, letter before this Court that invites the Landowners to apply to construct the approved 435 multi-family residential units, all the while the City is prohibiting the infrastructure that would allow that construction, denying the very ministerial permits it claims it will consider, and denying, as recent as August 3, 2022, a plan that would allow that development. This is pure gamesmanship.

3. Rebuttal of The City's Claim The Landowners are Presenting Inconsistent Arguments to the Courts

Next, the City claims that the Landowners arguments to support the taking in this case are "disingenuous" and "eviscerates the [Landowners] credibility," because during the time the City was engaging in actions to revoke the initial 17 Acre approvals and take the property, the Landowners submitted briefs to the Nevada Supreme Court to reverse the Crockett Order and reinstate the initial approvals. City Opp. pp. 8-12. This City argument provides a perverse interpretation of the events surrounding the Landowners continued attempt to develop and protect their property rights.

First, the City conflates Petitions for Judicial Review (PJR) with Inverse Condemnation. Obviously, the Landowners were fighting to protect their property rights in the PJR lawsuit and have never denied that the initial approval for the 17 Acre Property was valid, ie. the City did not abuse its' discretion in granting entitlements. However, once the City took action to revoke those initial approvals, this inverse condemnation lawsuit was necessary. There is no inconsistency in seeking to protect entitlements in a PJR lawsuit while seeking to protect the right to just compensation in an inverse condemnation case while the government is revoking those very entitlements. Instead, this shows how badly the Landowners wanted to build.

Additionally, the fact that the Landowners were fighting for their development rights at the Nevada Supreme Court level does not and cannot erase all of the egregious conduct the City engaged in to take the 17 Acre Property. The Nevada Supreme Court has been clear that the focus to determine a taking is on "government actions." *State v. Eighth Judicial Dist. Ct.,* supra, (there "nearly infinite variety of ways in which government **actions** or regulations can effect property interests." *Id.*, at 741). The City's attempt to re-direct this Court to the Landowners fight for development at the Nevada Supreme Court level is nothing more than a red herring to distract from its own egregious actions.

The Landowners had great expectations that the City would change its course once the Nevada Supreme Court entered its decision reversing the Crockett Order in the PJR lawsuit, but the City's actions to deny all use occurred prior to, during, and after the PJR lawsuit involving the Crockett Order. The Crockett Order on the PR-OS issue was filed on March 5, 2018 (Exhibit 22) and reversed by the Nevada Supreme Court on March 5, 2020 (Exhibit 23). The City denial of the 2017 MDA, which the City demanded to build on the 17 Acre Property, occurred on August 2, 2017, **before** the Crockett Order. The access and fence denial letters that denied access and fencing and imposed new requirements for "any development" were sent on August 24, 2017, **before** the Crockett Order. The City action that prohibited the "Master" drainage study and construction, set forth above, occurred **before** and **after** the Crockett

Order. The City's refusal to remove the invalid PR-OS from the 17 Acre Property occurred **before** and **after** the Crockett Order. The City's action to strike the new 2022 MDA from the City agenda occurred very recently on August 3, 2022, **after** reversal of the Crockett Order. The adoption of Ordinance 6650 occurred during the Crockett, order, but this does not help the City's argument.[7] If the City really thought the Crockett Order was valid, it would not have needed Ordinance 6650 to: 1) target only the 250 Acres; 2) make it impossible to build; and, 3) force ongoing public access to the 250 Acres. Finally, on pages 20-23 of the Landowners' Motion for Summary Judgment are the countless statements by City Councilpersons and the City Attorney's Office laying out in detail the City's plan to preserve the 17 Acre Property for use by the surrounding neighbors, how the decision to do this was "political," and that the City's actions were an abuse of power and unconstitutional. Almost all of these statements were **before** and **after** the Crockett Order. In fact, the current City Council zealous bias against any and all development, set forth on pages 20-23 of the Landowners' Motion for Summary Judgment, caused a UNLV ethics professor to exclaim, **"[t]his is a case of conflict of interest that is so obvious, my undergraduate students would think I was kidding were I to use it as an example in class of an actual case.**" Exhibit 210, p 6683. And, the current City Council, on August 3, 2022, struck from the City Agenda the 2022 MDA that would allow development on the 17 Acre Property, and the City just filed on September 12, 2022, a motion to strike the Landowners' countermotion to present the 2022 MDA to the current City Council. Exhibit 226. Therefore, despite the Landowners efforts with the Nevada Supreme Court to reverse the Crockett Order in the PJR lawsuit and reinstate the initial 17 Acre Approvals, the City continues its actions to revoke them.

[7] Critically, the City affirmatively used the Crockett Order to try to stop development on the 250 Acres by running it into every courtroom and claiming the validity of the holding. Moreover, when deciding whether to appeal the Crockett Order, veteran attorney Brad Jerbic explained the various options to the City Council that would make the matter mute, the City refused those options and voted NOT TO APPEAL this Order with Seroka exclaiming we may "win the battle and lose the war." Exhibit 221, p. 7037.

Finally, the City concedes that the denial of the entitlements for the 65 and 133 Acre Properties (by way of the 2017 MDA denial) prohibited any approvals for construction of drainage infrastructure on these properties. City Opp., p. 23:27-28. Therefore, the City knew that, despite any PJR arguments to the Nevada Supreme Court and despite what the Court ruled, it could simply deny entitlements for the 65 and 133 Acre Properties to prohibit the drainage infrastructure, which would, in turn, prohibit all development on the 17 Acre Property as the drainage is intertwined.

Therefore, the fact that the Landowners fought for their right to build in the PJR lawsuit and the fact that the City continued its egregious actions to stop that development (even after the reversal of the Crockett Order in the PJR lawsuit) further supports the Landowners' taking claims.

4. Rebuttal of the City's Illegal Actions Arguments

The final City defense is that it could not have revoked the Landowners' 17 Acre Approvals, because that would be illegal: 1) the approvals are "either invalid or not;" AND, 2) "only the City Council could do so." City Opp. 12:3, 12. This position does not assist the City. It is like a criminal stating he did not commit the crime, because to do so would be illegal. As the evidence shows, the City engaged in the very actions the City states are illegal.

III. THE CITY'S ATTEMPT TO RE-WRITE NEVADA TAKINGS JURISPRUDENCE IS WITHOUT MERIT

The City's legal arguments are also without merit.

A. This Court is Following the Proper Procedure in this Case

The City claims this Court erred by deciding the property interest first and now the take issue, because the Landowners tricked the Court with "pretend" motions with "made-up titles" and "fanciful names." City Opp., p. 5, fn. 1. Contrary to this City argument, this Court is taking the correct legal path in deciding this case. Not only does it make common sense that a landowner's property interest must be decided prior to deciding whether that property interest has been taken, this is mandatory Nevada law.

McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 658 (2006) (adopting the "two-step analysis" to resolve inverse condemnation cases).

B. This Court Should Consider all City Actions in the Aggregate When Deciding the Take Issue

The City next claims this Court is prohibited from considering all City actions in the aggregate and there is nothing in *State v. Eighth Judicial Dist. Ct.,* 1331 Nev. 411 (2015), that requires a consideration of all actions. The City then selects the action it wants this Court to consider (the February 15, 2017, initial approval) and requests that this Court ignore all other City actions. This is not the law. In *State v. Eighth Judicial Dist. Ct.,* the Court specifically states there is no "magic formula" in every case to determine a take and there "nearly infinite variety of ways in which government **actions** or regulations can effect property interests." Id., at 741. Emphasis added. Therefore, this Court should consider all City **actions** when deciding the taking in this case, not just the ones the City wants the Court to consider.

C. This Court Should Consider all City Statements When Deciding the Take Issue

The City also wants the Court to ignore all statements by the City Council members, even those made in public hearings, when considering the take issue. City Opp., pp. 7:10-13; 12, fn. 5. Interestingly, the City wants this Court to disregard the statements by its highest-ranking officials, but consider a "letter" written by Seth Floyd, the City's "Director of Community Development" and former attorney in this case. *See e.g.* City Opp., 9:9-13. Despite this inconsistency, the Nevada Supreme Court has already rejected this City defense. In *Sisolak*, the Court considered statements by Bill Keller, a principal planner, wherein "Sisolak claimed that Keller told him not to bother asking for a variance to build to more than 75 feet because the County would not approve it." *Sisolak*, supra, at 653-654. In *State v. Barsy,* 113 Nev. 712, 716, 720 (1992), the Nevada Supreme Court relied on statements by Garth Dull, the Director of NDOT, and another unnamed NDOT representative to resolve the eminent domain issues in that case. If statements by a "principal planner" and an unnamed NDOT representative are relevant, then statements by councilpersons, the highest-ranking City officials in their official capacity, are relevant.

D. This Court Should Reject the City's Unsupported Taking Law Argument

The City's final attempt to avoid liability is to claim the Landowners have provided an "incoherent and vague test for liability" and goes on for four pages stating what it thinks the test should be. City Opp. 7:10. The City claims there is an "extremely high bar" to find a taking and the purpose of this is to keep this Court (and all other courts) out of the City's business so the City can regulate properties however it wants within the City limits. City Opp. 5-6. The City

The City's claim that this Court cannot step in to protect Landowners in inverse condemnation proceedings is the exact opposite of Nevada law. The Nevada Supreme Court held in *Sisolak* that "our State enjoys a rich history of **protecting property owners against government takings**." *Sisolak,* supra, at 670. Emphasis added. And, in the seminal United States Supreme Court case of *Monongahela Nav. Co. v. U.S.,* 148 U.S. 312, 325, (1893), the Court held:

> "[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in the sound than in the substance. **It is the duty of courts to be watchful** for the constitutional rights of citizens, and against any stealthy encroachment thereon." Monongahela Nav. Co. at 325.

The City's four-page discussion of what it wants Nevada's taking standard to be is entirely irrelevant, because Nevada has adopted clear standards for a "per se regulatory" and "per se categorical" taking that are quoted in the Landowners' Motion for Summary Judgment. A per se regulatory taking (the Landowners' fifth claim), occurs when government action "authorizes" the public to use private property or "preserves" private property for public use. *See Sisolak,* supra, and *Cedar Point Nursery,* supra.*; Landowners Motion for Summary Judgment, p. 25:1-14.* A per se categorical taking occurs where government action "completely deprives an owner of all economical beneficial use of her property." *Sisolak*, supra, at 662; *Landowners Motion for Summary Judgment, p. 27:1-6.* The Nevada Supreme Court has been clear that an actual physical entry is not needed to meet either of these Nevada tests. *See Landowners Motion for Summary Judgment, p. 25:15-26:2.*

Therefore, there are two questions before this Court that are neither "incoherent" nor "vague." First, whether the aggregate of all City actions authorized the public to enter onto the 17 Acre Property or preserved the 17 Acre Property for use by the surrounding neighbors (or the public at large). Second, whether the aggregate of City actions completely deprived the Landowners of all economic beneficial use of the 17 Acre Property. Considering all City actions in the aggregate, both of these tests are clearly met here. *See Landowners Motion for Summary Judgment p. 26:3-21 and 27:7-20.*

E. The Court Should Not Disregard the Appraisal Evidence

Finally, the City asks this Court to disregard the only expert opinion that considered the impact of all City actions. City Opp. 25:13-28. This argument culminates the gamesmanship the City is playing with the Court. Landowner Appraiser DiFederico considered all city actions in the aggregate and concluded "the City's actions result in **catastrophic damages** to this [17 Acre] property" and "[d]ue to the government actions, it is my opinion that there would have been **no interest for the subject property in the after condition**." Exhibit 207, 6553, 6554. Emphasis added. As this Court will recall, the City asked for and obtained additional time to retain a rebuttal of Mr. DiFederico's opinion. The City, however, failed to produce an expert appraisal that considers all of the City's actions to opine what impact these actions have on the 17 Acre Property. Instead, it asks that the only relevant opinion be excluded. Clearly the City's attempt to exclude all evidence against it including relevant and necessary expert opinions is the only way the City believes it can shield itself from its egregious actions that prove the taking.

IV. CONCLUSION

The only issue now before the Court is whether, **at any time**, the aggregate of the City's actions set forth above meet Nevada's taking standard and they clearly do. The only expert retained in this case opines the City's actions resulted in "catastrophic damages," rendering the 17 Acre Property valueless and useless to the Landowners. This uncontested expert analysis and the conclusive evidence of the City

actions meet Nevada's invariable taking standards. Therefore, the Landowners respectfully request that this Court enter an order finding a taking.

DATED this 12th day of September, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 12th day of September, 2022, pursuant to NRCP (5)(b), a true and correct copy of the foregoing **PLAINTIFF LANDOWNERS' REPLY RE: PLAINTIFF LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE THIRD AND FIFTH CLAIMS FOR RELIEF** was served through the Eighth Judicial District Court's filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and addressed to each of the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FORE STARS, LTD, SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, DOE LIMITED LIABILITY COMPANIES I through X,

Plaintiffs,

CITY OF LAS VEGAS, political subdivision of the State of Nevada, THE EIGHTH JUDICIAL DISTRICT COURT, County of Clark, State of Nevada, DEPARTMENT 24 (the HONORABLE JIM CROCKETT, DISTRICT COURT JUDGE, IN HIS OFFICIAL CAPACITY), ROE government entities I through X, ROE Corporations I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendants.

Case No. A-18-773268-C
Dept. No. XXIX

SECOND SUPPLEMENTAL APPENDIX OF EXHIBITS IN SUPPORT OF CITY'S RENEWED MOTION FOR SUMMARY JUDGMENT AND MOTIONS IN LIMINE

VOLUME 32

The City of Las Vegas ("City") submits this Second Supplemental Appendix of Exhibits in support of its Renewed Motion for Summary Judgment and Motions in Limine.

Exhibit	Exhibit Description	Vol.	Bates No.
A	City records regarding William Peccole's Petition to Annex 2,246 acres to the City of Las Vegas	1	0001-0011

Exhibit	Exhibit Description	Vol.	Bates No.
B	City records regarding the Peccole Land Use Plan and the Z-34-81 rezoning application	1	0012-0030
C	City records regarding the Venetian Foothills Master Plan and the Z-30-86 rezoning application	1	0031-0050
D	Excerpts of the 1985 City of Las Vegas General Plan	1	0051-0061
E	City records regarding Peccole Ranch Master Plan and phase I rezoning application (Z-139-88)	1	0062-0106
F	City records regarding Z-40-89 rezoning application	1	0107-0113
G	Ordinance No. 3472 (establishing the Gaming Enterprise District) and related records	1	0114-0137
H	City records regarding the Amended Peccole Ranch Master Plan and phase II rezoning application (Z-17-90)	1	0138-0194
I	Excerpts of 1992 City of Las Vegas General Plan	2	0195-0248
J	City records related to Badlands Golf Course expansion	2	0249-0254
K	Excerpt of land use case files for GPA-24-98 and GPA-6199	2	0255-0257
L	Ordinance No. 5250 and Excerpts of Las Vegas 2020 Master Plan	2	0258-0273
M	Miscellaneous Southwest Sector Land Use Maps from 2002-2005	2	0274-0277
N	Ordinance No. 5787 and Excerpts of 2005 Land Use Element	2	0278-0291
O	Ordinance No. 6056 and Excerpts of 2009 Land Use & Rural Neighborhoods Preservation Element	2	0292-0301
P	Ordinance No. 6152 and Excerpts of 2012 Land Use & Rural Neighborhoods Preservation Element	2	0302-0317
Q	Ordinance No. 6622 and Excerpts of 2018 Land Use & Rural Neighborhoods Preservation Element	2	0318-0332
R	Ordinance No. 1582	2	0333-0339
S	Ordinance No. 4073 and Excerpt of the 1997 City of Las Vegas Zoning Code	2	0340-0341
T	Ordinance No. 5353	2	0342-0361
U	Ordinance No. 6135 and Excerpts of City of Las Vegas Unified Development Code adopted March 16, 2011	2	0362-0364
V	Deeds transferring ownership of the Badlands Golf Course	2	0365-0377
W	Third Revised Justification Letter regarding the Major Modification to the 1990 Conceptual Peccole Ranch Master Plan	2	0378-0381

Exhibit	Exhibit Description	Vol.	Bates No.
X	Parcel maps recorded by the Developer subdividing the Badlands Golf Course	3	0382-0410
Y	EHB Companies promotional materials	3	0411-0445
Z	General Plan Amendment (GPA-62387), Rezoning (ZON-62392) and Site Development Plan Review (SDR-62393) applications	3	0446-0466
AA	Staff Report regarding 17-Acre Applications	3	0467-0482
BB	Major Modification (MOD-63600), Rezoning (ZON-63601), General Plan Amendment (GPA-63599), and Development Agreement (DIR-63602) applications	3	0483-0582
CC	Letter requesting withdrawal of MOD-63600, GPA-63599, ZON-63601, DIR-63602 applications	4	0583
DD	Transcript of February 15, 2017 City Council meeting	4	0584-0597
EE	Judge Crockett's March 5, 2018 order granting Queensridge homeowners' petition for judicial review, Case No. A-17-752344-J	4	0598-0611
FF	Docket for NSC Case No. 75481	4	0612-0623
GG	Complaint filed by Fore Stars Ltd. and Seventy Acres LLC, Case No. A-18-773268-C	4	0624-0643
HH	General Plan Amendment (GPA-68385), Site Development Plan Review (SDR-68481), Tentative Map (TMP-68482), and Waiver (68480) applications	4	0644-0671
II	June 21, 2017 City Council meeting minutes and transcript excerpt regarding GPA-68385, SDR-68481, TMP-68482, and 68480.	4	0672-0679
JJ	Docket for Case No. A-17-758528-J	4	0680-0768
KK	Judge Williams' Findings of Fact and Conclusions of Law, Case No. A-17-758528-J	5	0769-0793
LL	Development Agreement (DIR-70539) application	5	0794-0879
MM	August 2, 2017 City Council minutes regarding DIR-70539	5	0880-0882
NN	Judge Sturman's February 15, 2019 minute order granting City's motion to dismiss, Case No. A-18-775804-J	5	0883
OO	Excerpts of August 2, 2017 City Council meeting transcript	5	0884-0932
PP	Final maps for Amended Peccole West and Peccole West Lot 10	5	0933-0941
QQ	Excerpt of the 1983 Edition of the Las Vegas Municipal Code	5	0942-0951

Exhibit	Exhibit Description	Vol.	Bates No.
RR	Ordinance No. 2185	5	0952-0956
SS	1990 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0957
TT	1996 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0958
UU	1998 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0959
VV	2015 aerial photograph identifying Phase I and Phase II boundaries, retail development, hotel/casino, and Developer projects, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0960
WW	2015 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0961
XX	2019 aerial photograph identifying Phase I and Phase II boundaries, and current assessor parcel numbers for the Badlands property, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0962
YY	2019 aerial photograph identifying Phase I and Phase II boundaries, and areas subject to inverse condemnation litigation, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0963
ZZ	2019 aerial photograph identifying areas subject to proposed development agreement (DIR-70539), produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0964
AAA	Membership Interest Purchase and Sale Agreement	6	0965-0981
BBB	Transcript of May 16, 2018 City Council meeting	6	0982-0998
CCC	City of Las Vegas' Amicus Curiae Brief, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481	6	0999-1009
DDD	Nevada Supreme Court March 5, 2020	6	1010-1016

Exhibit	Exhibit Description	Vol.	Bates No.
	Order of Reversal, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481		
EEE	Nevada Supreme Court August 24, 2020 Remittitur, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481	6	1017-1018
FFF	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlements on 17 Acres	6	1019-1020
GGG	September 1, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Final Entitlements for 435-Unit Housing Development Project in Badlands	6	1021-1026
HHH	Complaint Pursuant to 42 U.S.C. § 1983, *180 Land Co. LLC et al. v. City of Las Vegas, et al.*, 18-cv-00547 (2018)	6	1027-1122
III	9th Circuit Order in *180 Land Co. LLC; et al v. City of Las Vegas, et al.*, 18-cv-0547 (Oct. 19, 2020)	6	1123-1127
JJJ	Plaintiff Landowners' Second Supplement to Initial Disclosures Pursuant to NRCP 16.1 in 65-Acre case	6	1128-1137
LLL	Bill No. 2019-48: Ordinance No. 6720	7	1138-1142
MMM	Bill No. 2019-51: Ordinance No. 6722	7	1143-1150
NNN	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 65 Acres	7	1151-1152
OOO	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 133 Acres	7	1153-1155
PPP	April 15, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 35 Acres	7	1156-1157
QQQ	Valbridge Property Advisors, Lubawy & Associates Inc., Appraisal Report (Aug. 26, 2015)	7	1158-1247
RRR	Notice of Entry of Order Adopting the Order of the Nevada Supreme Court and Denying Petition for Judicial Review	7	1248-1281

Exhibit	Exhibit Description	Vol.	Bates No.
SSS	Letters from City of Las Vegas Approval Letters for 17-Acre Property (Feb. 16, 2017)	8	1282-1287
TTT	Reply Brief of Appellants 180 Land Co. LLC, Fore Stars, LTD,, Seventy Acres LLC, and Yohan Lowie in *180 Land Co LLC et al v. City of Las Vegas*, Court of Appeals for the Ninth Circuit Case No. 19-16114 (June 23, 2020)	8	1288-1294
UUU	Excerpt of Reporter's Transcript of Hearing on City of Las Vegas' Motion to Compel Discovery Responses, Documents and Damages Calculation and Related Documents on Order Shortening Time in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (Nov. 17, 2020)	8	1295-1306
VVV	Plaintiff Landowners' Sixteenth Supplement to Initial Disclosures in *180 Land Co., LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (Nov. 10, 2020)	8	1307-1321
WWW	Excerpt of Transcript of Las Vegas City Council Meeting (Aug. 2, 2017)	8	1322-1371
XXX	Notice of Entry of Findings of Facts and Conclusions of Law on Petition for Judicial Review in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-17-758528-J (Nov. 26, 2018)	8	1372-1399
YYY	Notice of Entry of Order *Nunc Pro Tunc* Regarding Findings of Fact and Conclusion of Law Entered November 21, 2019 in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-17-758528 (Feb. 6, 2019)	8	1400-1405
ZZZ	City of Las Vegas Agenda Memo – Planning, for City Council Meeting June 21, 2017, Re: GPA-68385, WVR-68480, SDR-68481, and TMP-68482 [PRJ-67184]	8	1406-1432
AAAA	Excerpts from the Land Use and Rural Neighborhoods Preservation Element of the City's 2020 Master Plan adopted by the City Council of the City on September 2, 2009	8	1433-1439
BBBB	Summons and Complaint for Declaratory Relief and Injunctive Relief, and Verified Claims in Inverse Condemnation in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-18-780184-C	8	1440-1477

Exhibit	Exhibit Description	Vol.	Bates No.
CCCC	Notice of Entry of Findings of Fact and Conclusions of Law Granting City of Las Vegas' Motion for Summary Judgment in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-18-780184-C (Dec. 30, 2020)	8	1478-1515
DDDD	Peter Lowenstein Declaration	9	1516-1522
DDDD-1	Exhibit 1 to Peter Lowenstein Declaration: Diagram of Existing Access Points	9	1523-1526
DDDD-2	Exhibit 2 to Peter Lowenstein Declaration: July 5, 2017 Email from Mark Colloton	9	1527-1531
DDDD-3	Exhibit 3 to Peter Lowenstein Declaration: June 28, 2017 Permit application	9	1532-1533
DDDD-4	Exhibit 4 to Peter Lowenstein Declaration: June 29, 2017 Email from Mark Colloton re Rampart and Hualapai	9	1534-1536
DDDD-5	Exhibit 5 to Peter Lowenstein Declaration: August 24, 2017 Letter from City Department of Planning	9	1537
DDDD-6	Exhibit 6 to Peter Lowenstein Declaration: July 26, 2017 Email from Peter Lowenstein re Wall Fence	9	1538
DDDD-7	Exhibit 7 to Peter Lowenstein Declaration: August 10, 2017 Application for Walls, Fences, or Retaining Walls; related materials	9	1539-1546
DDDD-8	Exhibit 8 to Peter Lowenstein Declaration: August 24, 2017 Email from Steve Gebeke	9	1547-1553
DDDD-9	Exhibit 9 to Peter Lowenstein Declaration: Bill No. 2018-24	9	1554-1569
DDDD-10	Exhibit 10 to Peter Lowenstein Declaration: Las Vegas City Council Ordinance No. 6056 and excerpts from Land Use & Rural Neighborhoods Preservation Element	9	1570-1577
DDDD-11	Exhibit 11 to Peter Lowenstein Declaration: documents submitted to Las Vegas Planning Commission by Jim Jimmerson at February 14, 2017 Planning Commission meeting	9	1578-1587
EEEE	GPA-72220 application form	9	1588-1590
FFFF	Chris Molina Declaration	9	1591-1605
FFFF-1	Fully Executed Copy of Membership Interest Purchase and Sale Agreement for Fore Stars Ltd.	9	1606-1622

Exhibit	Exhibit Description	Vol.	Bates No.
FFFF-2	Summary of Communications between Developer and Peccole family regarding acquisition of Badlands Property	9	1623-1629
FFFF-3	Reference map of properties involved in transactions between Developer and Peccole family	9	1630
FFFF-4	Excerpt of appraisal for One Queensridge place dated October 13, 2005	9	1631-1632
FFFF-5	Site Plan Approval for One Queensridge Place (SDR-4206)	9	1633-1636
FFFF-6	Securities Redemption Agreement dated September 14, 2005	9	1637-1654
FFFF-7	Securities Purchase Agreement dated September 14, 2005	9	1655-1692
FFFF-8	Badlands Golf Course Clubhouse Improvement Agreement dated September 6, 2005	9	1693-1730
FFFF-9	Settlement Agreement and Mutual Release dated June 28, 2013	10	1731-1782
FFFF-10	June 12, 2014 emails and Letter of Intent regarding the Badlands Golf Course	10	1783-1786
FFFF-11	July 25, 2014 email and initial draft of Golf Course Purchase Agreement	10	1787-1813
FFFF-12	August 26, 2014 email from Todd Davis and revised purchase agreement	10	1814-1843
FFFF-13	August 27, 2014 email from Billy Bayne regarding purchase agreement	10	1844-1846
FFFF-14	September 15, 2014 email and draft letter to BGC Holdings LLC regarding right of first refusal	10	1847-1848
FFFF-15	November 3, 2014 email regarding BGC Holdings LLC	10	1849-1851
FFFF-16	November 26, 2014 email and initial draft of stock purchase and sale agreement	10	1852-1870
FFFF-17	December 1, 2015 emails regarding stock purchase agreement	10	1871-1872

Exhibit	Exhibit Description	Vol.	Bates No.
FFFF-18	December 1, 2015 email and fully executed signature page for stock purchase agreement	10	1873-1874
FFFF-19	December 23, 2014 emails regarding separation of Fore Stars Ltd. and WRL LLC acquisitions into separate agreements	10	1875-1876
FFFF-20	February 19, 2015 emails regarding notes and clarifications to purchase agreement	10	1877-1879
FFFF-21	February 26, 2015 email regarding revised purchase agreements for Fore Stars Ltd. and WRL LLC	10	1880
FFFF-22	February 27, 2015 emails regarding revised purchase agreements for Fore Stars Ltd. and WRL LLC	10	1881-1882
FFFF-23	Fully executed Membership Interest Purchase Agreement for WRL LLC	10	1883-1890
FFFF-24	June 12, 2015 email regarding clubhouse parcel and recorded parcel map	10	1891-1895
FFFF-25	Quitclaim deed for Clubhouse Parcel from Queensridge Towers LLC to Fore Stars Ltd.	10	1896-1900
FFFF-26	Record of Survey for Hualapai Commons Ltd.	10	1901
FFFF-27	Deed from Hualapai Commons Ltd. to EHC Hualapai LLC	10	1902-1914
FFFF-28	Purchase Agreement between Hualapai Commons Ltd. and EHC Hualapai LLC	10	1915-1931
FFFF-29	City of Las Vegas' First Set of Interrogatories to Plaintiff	10	1932-1945
FFFF-30	Plaintiff 180 Land Company LLC's Responses to City of Las Vegas' First Set of Interrogatories to Plaintiff, 3rd Supplement	10	1946-1973
FFFF-31	City of Las Vegas' Second Set of Requests for Production of Documents to Plaintiff	11	1974-1981
FFFF-32	Plaintiff 180 Land Company LLC's Response to Defendant City of Las Vegas' Second Set of Requests for Production of Documents to Plaintiff	11	1982-1989
FFFF-33	September 14, 2020 Letter to Plaintiff regarding Response to Second Set of Requests for Production of Documents	11	1990-1994
FFFF-34	First Supplement to Plaintiff Landowners Response to Defendant City of Las Vegas' Second Set of Requests for Production of Documents to Plaintiff	11	1995-2002

Exhibit	Exhibit Description	Vol.	Bates No.
FFFF-35	Motion to Compel Discovery Responses, Documents and Damages Calculation, and Related Documents on Order Shortening Time	11	2003-2032
FFFF-36	Transcript of November 17, 2020 hearing regarding City's Motion to Compel Discovery Responses, Documents and Damages Calculation, and Related Documents on Order Shortening Time	11	2033-2109
FFFF-37	February 24, 2021 Order Granting in Part and denying in part City's Motion to Compel Discovery Responses, Documents and Damages Calculation, and Related Documents on Order Shortening Time	11	2110-2118
FFFF-38	April 1, 2021 Letter to Plaintiff regarding February 24, 2021 Order	11	2119-2120
FFFF-39	April 6, 2021 email from Elizabeth Ghanem Ham regarding letter dated April 1, 2021	11	2121-2123
FFFF-40	Hydrologic Criteria and Drainage Design Manual, Section 200	11	2124-2142
FFFF-41	Hydrologic Criteria and Drainage Design Manual, Standard Form 1	11	2143
FFFF-42	Hydrologic Criteria and Drainage Design Manual, Standard Form 2	11	2144-2148
FFFF-43	Email correspondence regarding minutes of August 13, 2018 meeting with GCW regarding Technical Drainage Study	11	2149-2152
FFFF-44	Excerpts from Peccole Ranch Master Plan Phase II regarding drainage and open space	11	2153-2159
FFFF-45	Aerial photos and demonstrative aids showing Badlands open space and drainage system	11	2160-2163
FFFF-46	August 16, 2016 letter from City Streets & Sanitation Manager regarding Badlands Golf Course Drainage Maintenance	11	2164-2166
FFFF-47	Excerpt from EHB Companies promotional materials regarding security concerns and drainage culverts	11	2167
GGGG	Landowners' Reply in Support of Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims Etc. in *180 Land Co., LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (March 21, 2019)	11	2168-2178
HHHH	June 28, 2016 Letter from Mark Colloton re: Reasons for Access Points Off Hualapai Way and Rampart Blvd.	12	2179-2184

Exhibit	Exhibit Description	Vol.	Bates No.
IIII	Transcript of City Council Meeting (May 16, 2018)	12	2185-2260
JJJJ	Excerpt of April 8, 2021 Transcript of Hearing re Plaintiffs' Motion for a New Trial and to Amend (March 11, 2021), Case No. A-18-780184-C	12	2261-2266
KKKK	Affidavit of Donald Richards and accompanying photographs submitted by the Developer on April 15, 2021 in Case No. A-18-780184-C	13	2267-2428
LLLL	Supplemental Declaration of Seth T. Floyd	14	2429-2432
LLLL-1	1981 Peccole Property Land Use Plan	14	2433-
LLLL-2	1985 Las Vegas General Plan	14	2434-2515
LLLL-3	1975 General Plan	14	2516-2611
LLLL-4	Planning Commission meeting records regarding 1985 General Plan	15	2612-2839
LLLL-5	1986 Venetian Foothills Master Plan	15	2840
LLLL-6	1989 Peccole Ranch Master Plan	15	2841
LLLL-7	1990 Master Development Plan Amendment	15	2842
LLLL-8	Citizen's Advisory Committee records regarding 1992 General Plan	15	2843-2860
LLLL-9	1992 Las Vegas General Plan	16-17	2861-3310
LLLL-10	1992 Southwest Sector Map	18	3311
LLLL-11	Ordinance No. 5250 (Adopting 2020 Master Plan)	18	3312-3319
LLLL-12	Las Vegas 2020 Master Plan	18	3320-3402
LLLL-13	Ordinance No. 5787 (Adopting 2005 Land Use Element)	18	3403-3469
LLLL-14	2005 Land Use Element	18	3470-3527
LLLL-15	Ordinance No. 6056 (Adopting 2009 Land Use and Rural Neighborhoods Preservation Element)	18	3528-3532
LLLL-16	2009 Land Use and Rural Neighborhoods Preservation Element	19	3533-3632

Exhibit	Exhibit Description	Vol.	Bates No.
LLLL-17	Ordinance No. 6152 (Adopting revisions to 2009 Land Use and Rural Neighborhoods Preservation Element)	19	3633-3642
LLLL-18	Ordinance No. 6622 (Adopting 2018 Land Use and Rural Neighborhoods Preservation Element)	19	3643-3653
LLLL-19	2018 Land Use & Rural Neighborhoods Preservation Element	19	3654-3753
MMMM	State of Nevada State Board of Equalization Notice of Decision, *In the Matter of Fore Star Ltd., et al.* (Nov. 30, 2017)	20	3754-3758
NNNN	Clark County Real Property Tax Values	20	3759-3774
OOOO	Clark County Tax Assessor's Property Account Inquiry - Summary Screen	20	3775-3776
PPPP	February 22, 2017 Clark County Assessor Letter to 180 Land Co. LLC, re Assessor's Golf Course Assessment	20	3777
QQQQ	Petitioner's Opening Brief, *In the matter of 180 Land Co. LLC* (Aug. 29, 2017), State Board of Equalization	20	3778-3815
RRRR	September 21, 2017 Clark County Assessor Stipulation for the State Board of Equalization	20	3816
SSSS	Excerpt of Reporter's Transcript of Hearing in *180 Land Co. v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (Feb. 16, 2021)	20	3817-3868
TTTT	June 28, 2016 Letter from Mark Colloton re: Reasons for Access Points Off Hualapai Way and Rampart Blvd.	20	3869-3874
UUUU	Transcript of City Council Meeting (May 16, 2018)	20	3875-3950
VVVV	Supplemental declaration of Seth Floyd	21	3951-3953
VVVV-1	Southwest Sector Land Use Map (1992)	21	3954
VVVV-2	10/10/1991 Planning Commission Minutes	21	3955-3957
VVVV-3	10/22/1991 Planning Commission Minutes	21	3958-3962

Exhibit	Exhibit Description	Vol.	Bates No.
VVVV-4	11/14/1991 Planning Commission Minutes	21	3963-3965
VVVV-5	11/26/1991 Planning Commission Minutes	21	3966-3968
VVVV-6	12/12/1991 Planning Commission Minutes	21	3969-3976
VVVV-7	12/12/1991 Planning Commission Resolution adopting 1992 General Plan	21	3977-3978
VVVV-8	2/5/1992 City Council Meeting Minutes	21	3979
VVVV-9	2/18/1992 Recommending Committee Meeting Minutes	21	3980-4000
VVVV-10	2/19/1992 City Council Meeting Minutes	21	4001-4002
VVVV-11	3/12/1992 Planning Commission Meeting Minutes	21	4003-4004
VVVV-12	3/16/1992 Recommending Committee Meeting Minute	21	4005
VVVV-13	4/1/1992 City Council Meeting Minutes	21	4006-4008
VVVV-14	Ordinance No. 3636 (adopting new general plan)	21	4009-4011
VVVV-15	2/13/1992 Citizens Advisory Committee Meeting Minutes	21	4012-4015
VVVV-16	3/27/1991 Citizens Advisory Committee Mailout	21	4016-4025
WWWW	Excerpts of NRCP 30(b)(6) Designee of Peccole Nevada Corporation – William Bayne	21	4026-4039

Exhibit	Exhibit Description	Vol.	Bates No.
XXXX	Findings of Facts, Conclusions of Law and Order Regarding Motion to Dismiss and Countermotion to Allow More Definite Statement if Necessary and Countermotion to Stay Litigation of Inverse Condemnation Claims Until Resolution of the Petition for Judicial Review and Countermotion for NRCP Rule 56(F) Continuance	21	4040-4051
YYYY	Declaration of Christopher Molina in Support of the City's Countermotion for Summary Judgment and Opposition to Motion to Determine Property Interest	21	4052-4053
ZZZZ	Declaration of Seth Floyd	21	4054-4055
ZZZZ -1	Master planned communities with R-PD zoning	21	4056-4061
ZZZZ -2	General Plan Maps for Master Planned Communities with R-PD zoning	21	4062-4067
AAAAA	Recorder's Amended Transcript of Pending Motions in *180 Land Company LLC, et al. vs. City of Las Vegas,* Eighth Judicial District Court Case No. A-18-775804 (September 17, 2021)	22	4068-4235
BBBBB	December 23, 2021 letter from Seth Floyd re Entitlements on 17-acre Property; Applications for development of other segments of former Badlands Golf Course	22	4236-4238
CCCCC	July 19, 2022 letter from Seth Floyd re Entitlements on 17-acre portion of Badlands	22	4239-4240
DDDDD	Appraisal of Real Property prepared by The DiFederico Group re the 17-Acre Property	23	4241-4394
EEEEE	Affidavit of Donald Richards (Ex. 50 to Plaintiff Landowners' Reply in Support of Countermotion for Discovery Pursuant to NRCP 56(d) filed 7/7/2021)	23	4395-4396
FFFFF	Bill No. 2018-5 (Ordinance No. 6617)	23	4397-4405
GGGGG	Appraisal Consulting Report prepared by Charles E. Jack of Integra Realty Resources	24	4406-4586
HHHHH	Supplemental Declaration Peter Lowenstein	24	4587-4600
HHHHH-1	Email from Steve Swanton re PMP – 58526 and PMP-58527 (Queensridge/Badlands Golf Course)	24	4601-4602

Exhibit	Exhibit Description	Vol.	Bates No.
HHHHH-2	June 8, 2015 letter to Angie Scott from Steve Swanton re PMP-59572	24	4603
HHHHH-3	Email from Stephanie Allen to Peter Lowenstein re Development Agreement	24	4604-4605
HHHHH-4	Email from Lucien Paet re New Badlands Parcel Map	24	4606
HHHHH-5	Approved Site Plan for SDR-62393	24	4607
IIIII	Declaration of Kevin McOsker	25	4608-4609
JJJJJ	Videotaped Deposition of Tio Stephan DiFederico, MAI	25	4610-4711
KKKKK	Appellant's Opening Brief filed 11/6/18 in Nevada Supreme Court Case No. 75481	26	4712-4791
LLLLL	Appellant's Amended Reply Brief filed 5/1/19 in Nevada Supreme Court Case No. 75481	26	4792-4829
MMMMM	City of Las Vegas's Motion for Summary Judgment filed 11/9/20 in the 65-Acre Case (No. A-18-780184-C)	26	4830-4862
NNNNN	Plaintiff Landowners' Opposition to the City's Motion for Summary Judgment Etc. filed 11/23/20 in the 65-Acre Case (No. A-18-780184-C)	26	4863-4950
OOOOO	City of Las Vegas' Motion to Remand 133-Acre Applications to the Las Vegas City Council filed 8/9/2021 in the 133-Acre Case (No. A-18-775804-J)	27	4951-4961
PPPPP	Notice of Entry of Findings of Fact, Conclusions of Law Regarding (1) Motion to Remand 133-Acre Applications to Las Vegas City Council and (2) Motion to Dismiss Civil Complaint Improperly Joined with Petition for Judicial Review	27	4962-4973
QQQQQ	Deposition Transcript of Charles E. Jack, June 16, 2022	28	4974-5168
RRRRR	Deposition Transcript of NRCP 30(b)(6) Designee of Peccole Nevada Corporation – William Bayne	29	5169-5411
SSSSS	Order Granting the City of Las Vegas' Motion to Compel and for an Order to Show Cause in the 35-Acre Case (No. A-17-758528-J)	30	5412-5416

Exhibit	Exhibit Description	Vol.	Bates No.
TTTTT	Order Granting the City of Las Vegas' Objection to the Discovery Commissioner's Report and Recommendation in the 35-Acre Case (No. A-17-758528-J)	30	5417-5422
UUUUU	Appraisal of Real Property prepared by The DiFederico Group re the 35-Acre Property	30	5423-5558
VVVVV	Excerpts of Deposition Transcript of Yohan Lowie	31	5559-5566
WWWWW	**Declaration of Philip R. Byrnes in Support of City's Reply in Support of City's Renewed Motion for Summary Judgment and City's Motion to Strike Developer's Countermotion for Approval of Entitlements and to End Take**	**32**	**5567-5568**
WWWWW-1	**Agenda Summary Page for Item 28 of the August 3, 2022 Las Vegas City Council meeting**	**32**	**5569-5570**
WWWWW-2	**Settlement Proposal**	**32**	**5571-5583**

Dated this 13th day of September, 2022.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
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Attorneys for City of Las Vegas

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 13th day of September, 2022, I caused a true and correct copy of the foregoing **SECOND SUPPLEMENTAL APPENDIX OF EXHIBITS IN SUPPORT OF CITY'S RENEWED MOTION FOR SUMMARY JUDGMENT AND MOTIONS IN LIMINE – VOLUME 32** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

EXHIBIT “WWWWW”

DECLARATION OF PHILIP R. BYRNES IN SUPPORT OF CITY'S REPLY IN SUPPORT OF CITY'S RENEWED MOTION FOR SUMMARY JUDGMENT AND CITY'S MOTION TO STRIKE DEVELOPER'S COUNTERMOTION FOR APPROVAL OF ENTITLEMENTS AND TO END TAKE

I, Philip R. Byrnes, declare under penalty of perjury as follows:

1. I am an attorney licensed to practice law in the State of Nevada. I am Senior Litigation Counsel in the Office of the City Attorney for Defendant City of Las Vegas (the "City") in Case No. A-18-773268-C. I am over the age of 18 years and a resident of Clark County, Nevada.

2. I make this declaration based upon personal knowledge, except where stated to be upon information and belief, and as to that information, I believe it to be true. If called upon to testify as to the contents of this declaration, I am legally competent to do so in a court of law.

3. I make this declaration in support of the City's Reply In Support Of the City's Renewed Motion for Summary Judgment and City's Motion to Strike Developer's Countermotion for Approval of Entitlements and to End Take.

4. One of my duties is to prepare the necessary documents for consideration of litigation matters at City Council meetings and to summarize the items in the form of agenda summary pages. On July 20, 2022, at the request of Councilmember Victoria Seaman, the Clerk of the City Council placed an item on the City Council agenda for its public meeting on August 3, 2022, listed as Item 28, entitled: "Discussion for possible action regarding settlement of the following litigation: 180 Land Company, LLC v. City of Las Vegas, 8JDC Case No. A-17-758528-J, NSC Case Nos. 84345, 84640; 180 Land Company, LLC, et al. v. City of Las Vegas, 8JDC Case No. A-18-780184-C; Fore Stars, Ltd., et al. v. City of Las Vegas, et al., 8JDC Case No. A-18-773268-C; and 180 Land Company, LLC v. City of Las Vegas, 8JDC Case No. A-18-775804-J ($64,000,000 - Various Funds)."

5. The title for this agenda item 28 was followed by the Agenda Summary Page I prepared. My summary of Agenda Item 28 was based on a document that Councilwoman Seaman provided in connection with this agenda item entitled "Global Settlement and Release" ("Settlement Proposal"). A true and correct copy of the Agenda Summary Page for Item 28 of the August 3, 2022 Las Vegas City Council meeting is attached as Ex. WWWWW-1. A true and correct copy of the Settlement Proposal is attached as Ex. WWWWW-2.

McDONALD CARANO
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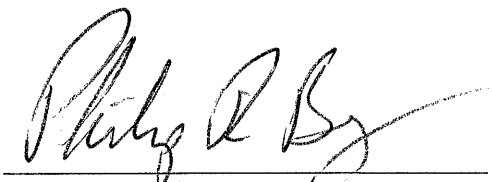
6. On information and belief, the Settlement Proposal was prepared by the Plaintiffs in the four Badlands actions against the City. City staff proposed changes to the Agreement at the direction of Councilwoman Seaman. The City Attorney did not propose the Settlement Proposal to the City Council and made no recommendation on Item 28. The Settlement Proposal was presented solely at the request of Councilwoman Seaman.

7. On August 3, 2022, Item 28 was stricken from the agenda at the request of Councilwoman Seaman.

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

Executed this 13th day of September 2022.



Philip R. Byrnes

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PHONE 702.873.4100 • FAX 702.873.9966

EXHIBIT “WWWWW-1”

City Council Agenda

Council Chambers · 495 South Main Street · Phone 702-229-6011
City of Las Vegas Internet Address: www.lasvegasnevada.gov

August 3, 2022
9:00 AM

28. Discussion for possible action regarding settlement of the following litigation: 180 Land Company, LLC v. City of Las Vegas, 8JDC Case No. A-17-758528-J, NSC Case Nos. 84345, 84640; 180 Land Company, LLC, et al. v. City of Las Vegas, 8JDC Case No. A-18-780184-C; Fore Stars, Ltd., et al. v. City of Las Vegas, et al., 8JDC Case No. A-18-773268-C; and 180 Land Company, LLC v. City of Las Vegas, 8JDC Case No. A-18-775804-J ($64,000,000 - Various Funds)

    Motion made by Stavros Anthony to Strike Items 28, 31, 32, 33 and 39 and Hold in Abeyance Item 29 to 8/17/2022

    Passed For: 7; Against: 0; Abstain: 0; Did Not Vote: 0; Excused: 0

    For-Victoria Seaman, Cedric Crear, Stavros Anthony, Carolyn Goodman, Michele Fiore, Brian Knudsen, Olivia Diaz;

AGENDA SUMMARY PAGE

City Council
Meeting of: August 3, 2022

Agenda Item No.:
28

DEPARTMENT: City Manager **DISCUSSION**
DIRECTOR: Jorge Cervantes

SUBJECT:
ADMINISTRATIVE:

Discussion for possible action regarding settlement of the following litigation: 180 Land Company, LLC v. City of Las Vegas, 8JDC Case No. A-17-758528-J, NSC Case Nos. 84345, 84640; 180 Land Company, LLC, et al. v. City of Las Vegas, 8JDC Case No. A-18-780184-C; Fore Stars, Ltd., et al. v. City of Las Vegas, et al., 8JDC Case No. A-18-773268-C; and 180 Land Company, LLC v. City of Las Vegas, 8JDC Case No. A-18-775804-J ($64,000,000 - Various Funds)

FISCAL IMPACT:
Budget Funds Available
Amount: $64,000,000
Funding Source: Various
Dept./Division: City Manager

PURPOSE/BACKGROUND:
This item is brought at the request of Councilwoman Victoria Seaman. For the past several years, the City of Las Vegas has been involved in several matters involving the former Badlands Golf Course. There are presently four active cases each dealing with a separate portion of the larger parcel. In one matter, a judgment in the amount of approximately $49,000,000 has been entered in favor of the landowner. This matter is currently on appeal to the Nevada Supreme Court. The remaining three matters are currently pending in the Eighth Judicial District Court. Councilwoman Seaman has engaged in discussions with representatives of the landowners and has a potential resolution to present to the Council. The landowners are willing to accept payment of $49,000,000, and construction of drainage facilities on the property at a cost not to exceed $15,000,000 to resolve the litigation. The settlement is contingent on the City Council's consideration and approval of certain land use entitlements for the property. Upon payment of the settlement funds and approval of the land use entitlements, the pending cases will be dismissed with prejudice and the City will receive a full release of liability.

RECOMMENDATION:
None

BACKUP DOCUMENTATION:
None

EXHIBIT “WWWWW-2”

GLOBAL SETTLEMENT AGREEMENT AND RELEASE

This Global Settlement Agreement and Release ("Agreement") is made and entered into effective upon complete execution by all parties to this Agreement (the "Effective Date"). This Agreement is entered into by and among 180 Land Co LLC, a Nevada limited liability company, Seventy Acres LLC, a Nevada limited liability company, and Fore Stars, Ltd, a Nevada limited liability company (collectively "Plaintiffs"); and Defendant of Las Vegas, a political subdivision of the State of Nevada ("Defendant" or "Defendant") (all parties hereinafter collectively referred to as "Parties"); for the purpose of resolving by compromise and settlement, all claims, liabilities and disputes between the Parties with prejudice as identified in the Recitals below

I. RECITALS

A. A dispute has arisen between Plaintiffs and Defendant as identified in the following cases filed in the Eighth Judicial District Court for the State of Nevada (collectively "Litigation"): Case No. A-17-758528-J; Case No. A-18-773268-C; Case A-18-775804-J; and Case A-18-780184-C.

B. In Case A-17-758528-J, the Court issued a Final Judgment in Inverse Condemnation in favor of Plaintiffs 180 Land Co LLC and Fore Stars, Ltd. dated April 18, 2022. A Notice of Appeal to the Supreme Court of Nevada has been filed by both the Defendant and the Plaintiffs in that case (collectively "Appeals"). The Appeals are pending and a briefing schedule has been set.

C. The Parties wish to fully and finally compromise and settle any and all disputes, issues, allegations, claims, defenses, rights, and obligations which have been asserted or which could have been asserted in the Litigation and Appeals, or which arise out of or are in any way

connected to the conduct alleged in, related to, or giving rise to the Litigation and Appeals on the terms and conditions expressed in this Agreement.

II. AGREEMENT

NOW, THEREFORE, in consideration of the following terms, covenants, and conditions set forth herein, the Parties hereby agree as follows:

1. **Recitals**.

The foregoing Recitals are true and correct and are incorporated herein as if fully stated herein.

2. **Mutual Release**.

The purpose of this Agreement is to fully and finally resolve the dispute and any and all related issues among the Parties in the Litigation and Appeals. Accordingly, upon satisfaction or resolution of the items set forth in Section 4 below, each Party, for good and valuable consideration, the adequacy of which is hereby acknowledged, does hereby forever release, acquit, and discharge every other Party, and that Party's principals, partners, officers, managers, directors, members, shareholders, investors, trusts, trustees, agents, employees, attorneys, successors, predecessors, affiliates, subsidiaries, insurers, assigns, executors and executrixes, administrators, creditors, related entities, and any other legal representatives from any and all claims, actions, causes of action, demands, counterclaims, costs, losses, suits, rights, damages, attorney fees, and expenses of any kind whatsoever, whether known or unknown, fixed or contingent, accrued or not yet accrued, matured or not yet matured, anticipated or unanticipated, asserted or unasserted, which that Party may have against any other Party, arising from or relating directly or indirectly to the Litigation and Appeals, and any and all claims which have been asserted or could have been asserted in the Litigation and Appeals, and those relating to or arising from the allegations set forth

in the Litigation and Appeals. Each Party expressly waives all rights afforded by laws regarding a waiver of unknown claims. Each Party shall bear its own attorneys' fees and costs incurred in connection with the Litigation and/or the preparation and execution of this Agreement. However, in the event any dispute arises between any of the Parties arising out of or in connection with this Agreement such as the breach or enforcement of this Agreement, the prevailing party in said action shall be entitled to an award of reasonable attorney's fees, costs of suit and necessary disbursements in addition to whatever other relief such prevailing party may be awarded in connection with such dispute Each Party makes this above release on its own behalf and on behalf of its respective constituents, including every other person or entity holding any interest in the Party, its predecessors, or its successors.

3. **Mutual Warranties**.

Except as otherwise identified in this Agreement, the Parties warrant and represent that they have not assigned or transferred any part or portion of the subject matter released in this Agreement to any person or entity. Each Party shall indemnify and hold harmless every other Party from and against any claims, including attorney's fees and costs, based on, in connection with, or arising out of any such assignment or transfer. Each Party also warrants that the individual executing this Agreement on behalf of the entity is fully authorized to bind that entity including its general partners, limited partners, investors, and every other person or entity holding any interest in the Party by executing this Agreement.

4. **Settlement Items and Dismissals**.

In exchange for a dismissal of the Litigation, inclusive of the Appeals, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties have agreed to the following Settlement Items:

a. Settlement Funds: Payment of settlement funds by Defendant in the amount of Forty Nine Million Dollars ($49,000,000) to the Plaintiffs within ten (10) days after the Effective Date. Plaintiff will designate a single entity as the payee of the settlement funds and Plaintiffs will resolve among themselves the allocation of the funds pursuant to their respective interests.

b. Drainage Infrastructure: Defendant to design, subject to Plaintiffs' approval, and construct the culvert drainage infrastructure, from both Charleston and Hualapai to Rampart/Alta connection, including the FEMA CLOMR and LOMR process. Defendant's out of pocket cost for the actual construction in doing so shall not exceed Fifteen Million Dollars ($15,000,000). Unless otherwise agreed to by the parties in writing, ~~D~~defendant shall timely and diligently pursue the drainage infrastructure project by: (i) filing the CLOMR application within nine (9) months of the Effective date or as soon as drainage calculations, analysis and design are complete, whichever comes first ~~not to exceed six (6) months from effective date~~ and (ii) causing the completion of the culvert drainage infrastructure and obtaining a LOMR immediately after drainage improvements are completed~~,~~ and no later than 18~~24~~ months from completion of drainage calculations, analysis and design are complete~~.~~

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c. Sewer Connections: Defendant will approve connections to the sewers under private roads located within the Queensridge common interest community, subject to Plaintiffs' reasonable approval regarding location and design.

d. LVVWD Right of Way: Defendant to obtain, ~~design and construct right of way,~~ at Defendant's cost ~~and subject to Plaintiffs'~~ approval, from LVVWD to allow

for ingress/egress to/from Rampart to the Properties, no less in width than as specified in the previously approved Traffic Study.

e. Entitlements: Within ninety (90) days of the Effective Date, Defendant shall place on a duly noted Planning Commission meeting agenda and then the next permissible City Council agenda for consideration ~~approveal~~ the following zoning entitlements, with the corresponding land use designations, on the respective parcels (collectively the "Properties") such that to develop any property for the approved use Plaintiffs shall only be required to seek approval of a Site Development Review (SDR) and/or Tentative Map (TMP)/Final Map (FMP) and/or Design Guidelines, as applicable, in order:

i. PARCEL A (35 Acres) - APN 138-31-201-005

- Re-zone property R-1 with a General Plan designation of L.
- Approved density up to 153 single family units.

ii. PARCEL B (133 Acres) - APNs 138-31-601-008, 138-31-702-003, 138-31-702-004

- Re-zone property R-1 with a General Plan designation of L.
- Approved density of up to 357 single family units, with allowable density increase by shifting from Parcels C, D, and/or E to Parcel B, so long as the added lots are comparable to the adjacent Queensridge CIC lot sizes.

iii. PARCEL C (16.72 Acres) - APNs 138-31-801-002, 138-31-801-003

- Re-zone property R-2 with a General Plan designation of MLA.

- Approved density of up to 120 single family attached or detached units to mirror adjacent Fairway Point density along Charleston and/or to mirror the adjacent Queensridge CIC density.

iv. PARCEL D (47.59 Acres) - APN 138-32-301-007

- Re-zone property P-D with General Plan designations of MF3, SC, GC, O, NC, CC, for the following uses:
- Approved density up to 2,280 multi-family (MF) units (condominium and/or apartments);
- Approved for accessory commercial uses; assisted living; 150 room non-gaming hotel with accompanying commercial (subject to relocation to Parcel E or Parcel F, with comparable exchange in density).
- Parcel D structure height no taller than previously approved One Queensridge Place tower three.

v. PARCEL E (17.49 Acres) - APN 138-32-301-005

- Re-zone property R-4 with conforming a General Plan designation of H.
- Change currently approved 435 multi-family condominiums to allow up to 720 multi-family condominium and/or apartments.

vi. PARCEL F (4.5 Acres) - APN 138-32-301-005

- Re-zone property P-D with conforming a General Plan designation of H.

- Approved density up to 220 multi-family (MF) units (condominium and/or apartments
- Parcel F structure height no taller than previously approved One Queensridge Place tower three.

f. PRMP No Effect: Defendant acknowledges and agrees that the Peccole Ranch Master Plan has no application nor effect whatsoever to the Properties.

The City shall have a duty to act in good faith to timely allow development pursuant to the City Code as it exists on the date of this Agreement and as contemplated in section 4(e) of this Agreement and, within 180 days after ~~After~~ payment of the settlement amount in 4(a), and approval of the entitlements in 4(e), Plaintiff shall dismiss the pending lawsuits. Judge Williams shall retain jurisdiction to enforce the provisions of this Agreement. ~~. . .~~ . ~~the Parties shall file joint stipulations to stay the Litigation and Appeals and in each of the stipulations the parties will include provision(s) to stay in writing the two-year and five-year rules and any other provision(s) necessary to further the purpose of preserving jurisdiction of the Litigation and Appeals pending completion of this Agreement. The failure of Defendant to make the settlement payment by the due date shall cause this Agreement to terminate automatically, with no further action required by either Party. Upon Defendant's timely satisfaction of settlement items 4(db) and 4(ge), the Litigation and Appeals will be dismissed by Plaintiff. The failure of Defendant to satisfy the foregoing by their respective due dates shall result in a lifting of the stay of the Litigation and Appeals such that the matters can proceed without further delay, with all district court cases that are part of the Litigation being consolidated into case number A-18-773268-C A-17-758528-J. Upon the lifting of the stay, as set forth herein, the Defendant consents to a taking by inverse condemnation in the consolidated~~

~~Litigation (which shall include the case on appeal); the Defendant's pending appeal shall be dismissed; Plaintiffs' appeal shall be proceed; the sole issue for determination in the Litigation shall be the just compensation to which Plaintiff is entitled for the taking of the property; with the fair market value and highest and best use of all property based on the zoning designations set forth in this Agreement, with Plaintiff, at their sole discretion, choosing as the date of valuation the date of service of summons or the date of trial to determine fair market value. After the determination of fair market value for the property taken, Plaintiffs shall be entitled to and the district court judge shall determine all other elements of just compensation, which shall include, but are not limited to, an award to Plaintiffs of cost, attorney fees, interest, and reimbursement of taxes in all four of the consolidated cases (the Litigation).~~

~~Defendant agrees that, in the event of any breach of any provision of Section 4, Plaintiffs' will not have an adequate remedy in money or damages. In such event, Plaintiff shall be entitled to obtain injunctive relief against Defendant for such breach in any court of competent jurisdiction, without the necessity of posting a bond even if otherwise normally required and may elect to lift the stay of the Litigation and Appeals such that the matters can proceed without further delay. Such injunctive relief will in no way limit Plaintiffs' right to obtain other remedies available under applicable law and as set forth herein.~~

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5. **Fees and Costs**.

Each Party will bear its own fees and costs related to this Agreement and the Litigation.

6. **Entire Agreement**.

This Agreement, including exhibits, memorializes the entire Agreement and understanding among the Parties in connection with the resolution of their dispute and the related Litigation. This

Agreement may be altered only by a written instrument executed by all Parties after the date of this Agreement.

7. **No Release of Third Parties**.

This Agreement shall not affect claims against any other third parties.

8. **Construction**.

This Agreement is jointly drafted, and negotiated, and shall be construed as a whole. Any rule or construction that ambiguities are to be resolved against the drafting Party shall not apply to the Settlement Documents.

9. **Additional Acts**.

Each of the Parties shall execute any and all documents or take other such action necessary and proper to effectuate the provisions and intent of this Agreement. The Defendant Attorney's Office is authorized by the Defendant Council to proceed with the stipulations in the Litigation and Appeals to effectuate the provisions and intent of this Agreement.

10. **Execution in Counterparts**.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, with the same effect as if each Party had executed all counterparts. Moreover, this Agreement may be executed by facsimile or electronic signatures, which shall be deemed as effective and binding as original signatures.

11. **Notices**.

The following contact information shall be used for the service of notices under this Agreement:

To Plaintiff: James J. Leavitt, Esq. (NSB 6032)
LAW OFFICES OF KERMITT L. WATERS

704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
jim@kermittwaters.com

Elizabeth Ghanem, Esq. (NSB ####)
EHB COMPANIES LLC
1215 South Fort Apache Ste 120
Las Vegas, Nevada 89117
Telephone: (702) 940-6930
Facsimile: (702) 940-6931
EHam@EHBcompanies.com

To Defendant: Bryan K. Scott, Esq. (NSB 6032)
LAS VEGAS DEFENDANT ATTORNEY'S OFFICE
495 South Main Street, Sixth Floor
Las Vegas, Nevada 89101
Telephone: (702) 229-6629
Facsimile: (702) 386-1749
bscott@lasvegasnevada.gov

Each Party shall give the other Parties prompt notice of any change in the identity or contact information for the above designees. Notices shall be effective and be deemed to have been given upon sending the notice by email or facsimile, with copy by regular mail, or upon the date of receipt if delivered by courier that provides delivery confirmation receipt.

12. **Independent Understanding**.

The Parties acknowledge that they have been fully advised and represented by legal counsel of their selection in the negotiation and execution of this Agreement, and that they understand the meaning and significance of its various terms. In executing this Agreement, the Parties are relying solely upon their own independent judgment and not on any representation, statement, or action by any of the other Parties released under this Agreement.

13. **Jurisdiction, Venue, and Law**.

This Agreement is intended to be performed in the State of Nevada and the laws of the State of Nevada shall govern its interpretation and effect. Any lawsuit to interpret or enforce the terms of this Agreement shall be brought in Clark County, Nevada, in district court case number A-17-758528-J.

14. **Prevailing Party**.

Each Party shall bear its own attorneys' fees and costs incurred in connection with the Litigation and/or the preparation and execution of this Agreement. However, in the event any dispute arises between any of the Parties arising out of or in connection with this Agreement such as the breach or enforcement of this Agreement, the prevailing party in said action shall be entitled to an award of reasonable attorney's fees, costs of suit and necessary disbursements in addition to whatever other relief such prevailing party may be awarded in connection with such dispute.

15. **Participation and Defense**.

In the event that any challenge or appeal is filed with regard to the Defendant's approval of this Agreement, or any action of the Defendant in it's compliance with this Agreement, then the Defendant will actively participate in the defense and opposition to such challenge or appeal.

THE SIGNATURES BELOW ACKNOWLEDGE THAT EACH EXECUTING PARTY HAS READ AND UNDERSTANDS THE FOREGOING PROVISIONS AND THAT SUCH PROVISIONS ARE REASONABLE AND ENFORCEABLE. EACH SIGNATURE BELOW ALSO ACKNOWLEDGES THAT THE RESPECTIVE PARTY HAS SIGNED THIS AGREEMENT AS HER/HIS/ITS OWN FREE AND VOLUNTARY ACT. EACH PARTY FURTHER ACKNOWLEDGES THAT THIS IS AN IMPORTANT AND BINDING LEGAL

CONTRACT, AND THAT EACH PARTY HAS HAD AN OPPORTUNITY TO REVIEW THIS AGREEMENT WITH HER/HIS/ITS LEGAL COUNSEL

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Parties hereto, intending to be legally bound, execute this Agreement as of the date first written above.

180 LAND CO LLC

By: _____
Name:
As Manager of EHB Companies LLC, Its Manager

DATED this ____ day of July, 2022

SEVENTY ACRES LLC

By: _____
Name:
As Manager of EHB Companies LLC, Its Manager

DATED this ____ day of July, 2022

FORE STARS, LTD.

By: _____
Name:
As Manager of EHB Companies LLC, Its Manager

DATED this ____ day of July, 2022

DEFENDANT OF LAS VEGAS

By: _____
Name:

DATED this ____ day of July, 2022

[END OF SIGNATURES]