IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Appellant, vs. 180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY; AND FORE STARS, LTD., A NEVADA LIMITED-LIABILITY COMPANY, Respondents.	No. 84345
180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY; AND FORE STARS, LTD., A NEVADA LIMITED-LIABILITY COMPANY, Appellants/Cross-Respondents, vs. CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Respondent/Cross-Appellant.	No. 84640

LANDOWNERS' REPLY BRIEF ON CROSS-APPEAL

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I. STANDARD OF REVIEW

The standard of review is important to how this Court must determine the issues in this appeal and cross-appeal. There is a vivid difference between the standard of review which governs the two. The City ignores and conflates the standard of review between the appeal and cross-appeal in this matter. The *substantial evidence* standard governs the appeal and favors upholding the judgment where, as here, substantial evidence supports it. Unlike the *substantial evidence* standard of review for the property interest and take in the appeal, the standard of review for the proper prejudgment interest rate in the cross-appeal is an *abuse of discretion* standard. Because the City ignores the difference between these two standards of review, the following addresses the two standards and how they should apply in this matter.

A. An "Abuse of Discretion" Standard is Applied in Reviewing the Determination of the Proper Interest Rate.

This Court has held it will review the district court's findings of fact and conclusions of law on the rate of interest under an "abuse of discretion" standard. *McCarran Int'l. Airport v. Sisolak*, 122 Nev. 645, 675, 137 P.3d 1110, 1130 (2006). This Court has held the rate of interest

used to calculate prejudgment interest is a "question of fact" that must be based on "competent evidence," and the district court does not abuse its discretion where "the evidence adduced on the subject [interest rate] substantially supported the district court's finding." *State ex rel. Dept. of Transp. v. Barsy,* 113 Nev. 712, 719, 941 P.2d 971, 977 (1977) (citing *State Emp. Sec. v. Hilton Hotels,* 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

Therefore, when reviewing the district court findings on the proper interest rate, this Court should determine whether the findings are supported by competent "evidence adduced" on the issue and, if not, it should find an abuse of discretion. As set forth in the Landowners' Opening Brief on Cross-Appeal and in this Reply Brief on Cross-Appeal, the district court's findings which adopt the prime plus two percent rate were based solely on arguments of counsel as the City offered *no evidence* in support of the prime plus two percent, only an affidavit of counsel. 119 JA 21753. *Cf. 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.") (citations omitted). The district court disregarded the only competent and empirical evidence on the proper rate of interest consisting of expert reports on the proper rate of interest submitted by

the Landowners. 112 pt. 3 JA 20157-112 pt. 6 JA -20357. Accordingly, it was an abuse of discretion to adopt the rate of prime plus two percent.

B. On the Other Hand, the "Substantial Evidence" Standard Is Applied In Reviewing the Property Interest and Take Findings on Appeal and Requires Deference to the Judgment Supported by Substantial Evidence.

The standard of review for the district court's property interest and take findings of fact and conclusions of law is different than the standard of review for the rate of interest. While this Court's review of the legal conclusions in inverse condemnation cases (the property interest and take) is "de novo," this Court has been clear that the underlying facts the district court adopts and uses to decide the property interest and take will not be disturbed if supported by "substantial evidence." *See City of Las Vegas v. Bustos*, 119 Nev. 360, 365, 75 P.3d 351, 354 (2003) (district court's findings of fact will not be disturbed on appeal if supported by substantial evidence); *see also* NRCP 52(a)(6) (findings of facts must not be set aside unless clearly erroneous). Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion. *See Barsy,* 113 Nev. at 719, 941 P.2d at 977 (citing *State Emp. Sec. v. Hilton Hotels,* 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)). This

Court has recognized that "[w]here there is conflicting evidence, this court is not free to weigh the evidence, and all inferences must be drawn in favor of the prevailing party." *Smith v. Timm*, 96 Nev. 197, 202, 606 P.2d 530, 532 (1980). Meaning, this Court is not the fact finder and will not re-try the factual disputes on the property interest and take; it will only review the record to determine whether there is substantial evidence to support the district court's findings of fact resolving the factual disputes. *See Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 365, 184 P.3d 378, 385 (2008) ("[I]t is not the role of this court to reweigh the evidence."); *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.") (citations omitted).

Therefore, when reviewing the district court's detailed findings of fact related to the Landowners' property interest and the City's take actions, this Court should review whether those underlying factual findings are supported by "substantial evidence." If supported by "substantial evidence," this Court should accept the district court's factual findings. This Court then reviews de novo whether the district

court properly applied those facts to define the Landowners' property rights and to decide whether the City's aggregate of actions resulted in a taking of that property under Nevada's taking standards.

The public policy for this rule is clear as demonstrated in this case. The district court allowed extensive briefing on the underlying facts related to the property interest and take, held five days of evidentiary hearings where these underlying facts were presented in detail, considered nearly 400 fact-intensive exhibits that amount to thousands of pages of documents prior to and during these evidentiary hearings, and then entered detailed findings of fact determining the property interest and taking. The district court was in the best position, as the trial judge, to consider all of the evidence and resolve the factual disputes and these factual findings should not be disturbed as they are supported by substantial evidence.

C. The City Fails to Consider These Standards of Review.

Not only does the City fail to acknowledge these different standards of review, but it fails to apply its arguments to these standards. For example, the City fails to argue why the factual findings by the district court on the property interest are or are not "substantial evidence" to

support the district court's findings. And, specific to the rate of interest issue addressed here, the City ignores the fact that there is no evidence whatsoever to support the prime plus two percent rate, which means the district court's adoption of this rate was an abuse of discretion. Simply stated, the City's briefings are an attempt at a re-trial before this Court, which is improper.

II. THE CITY FAILS TO ADDRESS SUPREME COURT PRECEDENT FOR THE DETERMINATION OF THE PROPER INTEREST RATE AND INSTEAD RELIES ON IRRELEVANT AND IMPROPER ARGUMENTS

The City's short five-page Answering Brief on Cross-Appeal fails to address the proper standard of review for the interest rate and the relevant facts and law related thereto.

A. The City Fails to Address its Lack of Evidence on the Interest Rate.

As stated, the determination of the interest rate is a "question of fact," and is reviewed for support by "competent evidence."

The City does not dispute that the Landowners presented the only competent evidence on the proper appreciation rate of return / rate of interest, which is the rate of return on properties similar to the 35 Acre Property for the relevant delay period - 23%. *See Landowners' Opening*

Brief on Cross-Appeal, pp. 135-138, 141-144 and City's Answering Brief on Cross-Appeal, pp. 85-90. Indeed, the City does not dispute that the district court expressly acknowledged the City failed to present any evidence at all on this important issue. *See* 126 pt. 1 JA 22888:19-23, 126 pt. 2 JA 22917:12-16. Therefore, because the only competent evidence before Judge Williams on the proper interest rate was the 23% rate, it was an abuse of discretion to order a rate of prime plus two percent (5.25%-7.00%) based solely on arguments of counsel. Stated another way, there is no evidence, much less competent evidence, supporting why the rate of prime plus two percent should be used to calculate interest. This was an abuse of discretion.

B. The City Does Not Dispute that Prime Plus Two Percent is an Arbitrary Rate that is Not Tied to Any Standard of Just Compensation.

In their Opening Brief on Cross-Appeal, the Landowners comprehensively detailed that interest is part of "just compensation" and set forth this Court's standards for deciding interest, including: 1) it must "compensate the landowner for the delay in the monetary payment that occurred after the property had been taken;" 2) it must put the Landowners "in as good position pecuniarily as [they] would have been if

[their] property had not been taken;" 3) it must provide a rate an owner can earn had he "invested his money in land similar to that condemned;" and, 4) it must be consistent with the rule, "what has the owner lost, not what has the taker gained." *See Landowners' Opening Brief on Cross-Appeal, pp. 147-149.* The Landowners then explained that the rate of prime plus two percent is an arbitrary rate that is not tied to any of these standards of "just compensation" and it is a "floor" rate that is only used if there is no other competent evidence presented. Not only does the City fail to dispute this argument, but it entirely ignores it, which the Court should consider a confession of error. *See, e.g., Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) ("We elect to treat the Chronisters' failure to respond to this argument in the three pages of argument in their answering brief as a confession of error."); NRAP 31(d)(2). This further shows that the prime plus two percent rate is not supported by any evidence, facts, or law and it was an abuse of discretion for the district court to order the prime plus two percent rate.

C. The City Misinterprets the *Barsy* Case.

Next, the City claims that this Court affirmed the higher interest rate in the *Barsy* case, because this was intended "to account for Barsy's

lost rental income during the eminent domain litigation" and there is no lost rental income in this case. *See City's Answering Brief on Cross-Appeal, p. 87.* This appears nowhere in the *Barsy* decision and there is no indication in *Barsy* that the higher interest rate was awarded to compensate for "lost rental income." In fact, *Barsy* considers a different category of damages (precondemnation damages) for the lost rental income, not a higher interest rate.

Instead, this Court held in *Barsy* that the higher interest rate was awarded to compensate Barsy for the lost use of the just compensation award during the delay period. *Barsy*, 113 Nev. at 718, 941 P.2d at 975 ("the purpose of awarding interest is to compensate the landowner for the delay in the monetary payment that occurred after the property had been taken."). And, this Court specifically held the higher interest rate was adopted, because it was based on what a landowner could have earned during the delay period had he "invested his money in land similar to that condemned." *Barsy,* 113 Nev. at 718, 941 P.2d at 976. The Landowners were aware of this Court's holding in *Barsy* and strictly followed it by presenting "competent evidence" to the district court of the rate the Landowners could have earned had they invested the

$34,135,000 sum in vacant land "similar" to the 35 Acre Property during the relevant period of delay. The same as people all across the Las Vegas Valley did, during this same time period and what the Landowners testified they would have done. Therefore, it was an abuse of discretion for the district court to disregard this competent empirical evidence.

D. The City's Argument that Prime Plus Two Percent Makes the Landowners Whole Misses the Point of the Rule and is Based on False Purchase Price Evidence that has Been Repeatedly Rejected.

1. The City's "Made Whole" Argument Misses the Point.

The City claims the Landowners are made "whole" with prime plus two percent, because according to the City, the Landowners allegedly paid only $4.5 million for the entire 250 Acres ($630,000 for the 35 Acre Property) and prime plus two percent provides compensation much higher. *City's Answering Brief on Cross-Appeal, pp. 87-88.* First, this Court's "made whole" standard requires that the Landowners be put "in as good position pecuniarily as [they] would have been if [their] property had not been taken." *Barsy,* 113 Nev. at 718, 941 P.2d at 977. Putting the Landowners in the same position pecuniarily as they would have been required payment of just compensation based on what the property is

worth as of the relevant date of valuation, not what it was worth 17 years ago when the 2005 purchase price was agreed upon.

Here, the City did not contest the 35 Acre Property was worth $34,135,000 as of the relevant August 1, 2017, date of valuation. 110 JA 19852-19874. The City also did not contest that had the Landowners been paid this $34,135,000 on the relevant August 1, 2017, date of valuation, they could have invested the money in similar land and earned 23% from August 1, 2017, forward. Because the City did not contest any of this valuation and interest rate data, this is the rate of interest this Court mandates in *Barsy* to put the Landowners "in as good position pecuniarily as [they] would have been if [their] property had not been taken." *Barsy*, 113 Nev. at 718, 941 P.2d at 975. People all across the Las Vegas Valley realized a gain of 23% on their money by investing in land during this same time period. The law simply cannot hold that these Landowners may not do the same because of the City's taking. If they are treated differently because of the City's taking, they will not be justly compensated nor made whole.

2. The City's 2005 Purchase Price Argument is Without Merit.

The City's entire argument related to making the Landowners "whole" is based on the false premise the Landowners only paid $4.5 million in 2015 for the entire 250 Acres or $630,000 for the 35 Acre Property at issue in this appeal. *City's Answering Brief on Cross-Appeal, p. 88.* To be clear, this alleged $4.5 million is based on an affidavit prepared by the City's private attorney, who has no personal knowledge of the 2005 transaction.

The district court, as the fact finder, reviewed all the evidence on the City's allegation the Landowners only paid $4.5 million for the entire 250 Acres in 2015 and rejected the argument as entirely baseless. 110 JA 19830-19833. *See also Landowners' Answering Brief on Appeal, pp. 125-128.* Summarily, the following are the district court's holdings on this issue: 1) the district court held there is no competent evidence supporting the City's alleged $4.5 million purchase price in 2015; 2) the purchase price / transaction began in 2005, which is too remote, because the date of valuation was September 14, 2017; 3) the 2005 purchase price / transaction arose out of a series of "complicated transactions" that began in 2005 and continued until 2015 through additional agreements with "a

lot of hair" on them involving several other properties; 4) the 2005 purchase price / transaction included "elements of compulsion;" and, 5) the City's own tax assessor did not use the 2005 purchase price / transaction when deciding the value of the 35 Acre Property for tax purposes. *See Landowners' Answering Brief on Appeal, pp. 124-128;* 110 JA 19830-19832. This was the conclusion of the district court in the 17 Acre Case as well. *See Case # A-18-773268-C, Doc# 409, Order Regarding Plaintiffs' Motion in Limine No. 1, 2 and 3.*[1]

Contrary to the City's self-serving affidavit from its legal counsel, there was substantial evidence before the district court to support the court's findings. First, the Landowners presented uncontested evidence of the complicated transaction and the elements of compulsion, including the following:

- When Peccole could not meet its obligation under a partnership agreement with the Landowners to construct the QR Towers, the

[1] The Landowners request the Court take judicial notice of this publicly available document contained in Records of the Eighth Judicial District Court. NRS 47.130, 47.150(2) ("A judge or court shall take judicial notice if requested by a party and supplied with the necessary information."); *see also Caballero v. Seventh Judicial Dist. Ct.*, 123 Nev. 316, 167 P.3d 415 (2007).

Landowners obtained another investor (IDB) that paid $90 million to become a partner in the QR Towers;

- Peccole transferred all of its ownership interest in the QR Towers to the Landowners and IDB;
- Peccole transferred all of its ownership interest in Tivoli Village, a large commercial complex at the northeast corner of Alta Dr. and Rampart Blvd., to the Landowners;
- Peccole transferred all of its ownership interest in Hualapai Commons, a large commercial shopping center at the northeast corner of Sahara and Hualapai, to the Landowners;
- Peccole granted the Landowners an option to purchase the 250 Acres;
- Peccole received $10 million in condominium units in the QR Towers;
- Peccole received $90 million;
- Peccole paid $30 million from this complex transaction to American Golf to remove American Golf from the 250 Acres; and,
- At the time the Landowners exercised the option to purchase the 250 Acres, they will pay an additional $15 million.

110 JA 19830-19831; 80 JA 14001-14024; 81 JA 14148-14151, 14210-14216, 14218-14219, 14221-14226, 14159-14163, 14161, 14162, 14165, 14235, 14149, 14151.

The Landowners also submitted the following: 1) the transaction documents from 2005; 2) deposition testimony from the Landowner representative, who has personal knowledge of the 2005 transaction, that the consideration attributed to the 250 Acres back in 2005 was over $100 million – not the City's alleged $4.5 million; 3) deposition testimony of the person most knowledgeable from Peccole that the transaction began through an option back in 2005 / 2006 period – not 2015 as alleged by the City; 4) documentary evidence of the option to acquire the 250 Acres back in 2005 / 2006; 5) the opinion by the only retained expert appraiser that the 2005 purchase price / transaction "had no relationship to the subject site's September 14, 2017 [date of valuation] market value;" (87 JA 15299); and, 6) the 2015 closing documents that showed the extensive assets and obligations, in addition to the 250 Acres, that were involved in the 2005 purchase price / transaction, including fixtures, equipment, the name "Badlands," vendor lists, stock of goods, existing contracts, machinery and vehicle leases, a liquor license, and the post-closing

obligation to subdivide that portion of the 250 Acres where the QR Towers were built. 110 JA 19826-19842; 80 JA 14003-14010.

Clearly, the district court findings on the 2005 purchase price / transaction are supported by substantial evidence and the City's argument the Landowners are made "whole" based on an alleged $4.5 million purchase transaction is baseless and without competent evidence. This argument by the City is also constitutionally offensive, even if the City's $4.5 million figure was accurate, the City's argument would be the equivalent of paying $100,000 as "just compensation" for a $1 million property, because the $1 million property was purchased for $100,000 17 years ago and then stating the owner is made "whole," because they got out of the property what they put into it, 17 years ago. This violates basic notions of just compensation, and every principle of common sense, constitutional law, and the Nevada Revised Statutes, namely, NRS 37.120.

3. The City's Citation to Dictionaries is Baseless and Demonstrates the Futility of its Interest Rate Argument.

Unable to rebut the Landowners' factual and legal arguments supporting their rate of interest and unable to cite to any "competent

evidence" presented by the City, the City turns to dictionary definitions that discuss the difference between "profit" and "interest" and claims the Landowners are seeking to base interest on a "profit" from a "speculative real estate venture." *See City's Answering Brief on Cross-Appeal, p. 88.* These dictionary definitions are meaningless and cannot supersede this Court's standards to calculate interest, which must meet the mandate for "just compensation." Second, the Landowners' evidence supporting the 23% rate is not based on a "speculative real estate venture;" it is based on factual, historical empirical data showing the sale and resale of properties similar to the 35 Acre Property during the relevant delay period. This empirical data shows the Landowners would have invested the $34,135,000 in land similar to the 35 Acre Property during the relevant delay period and earned (the same as other owners in Las Vegas) an annual interest rate of 23%. *See Landowners' Opening Brief on Cross-Appeal, pp. 135-138, 142-144.* In other words, the 23% rate of interest is not speculative as claimed by the City, because it is supported by actual market data demonstrating land rate increases during the relevant period.

In this same connection, the City claims the Landowners "cite[] no authority" to support their 23% interest rate based on the sale and resale of properties. *See City's Answering Brief on Cross-Appeal, p. 88.* To the contrary, as stated above, this Court held the interest rate must be based on what a landowner could have earned during the delay period had he "invested his money in land similar to that condemned." *Barsy,* 113 Nev. at 717-718, 941 P.2d at 975-976. This is precisely what the Landowners submitted to the district court – an analysis by two well-seasoned experts that determined a 23% annual rate of return on land similar to the 35 Acre Property during the relevant delay period. *See Landowners' Opening Brief on Cross-Appeal, pp. 135-138, 142-144.*

Therefore, the City's citation to dictionary definitions is no counter to the empirical market data submitted by the Landowners. Accordingly, the lower court abused its discretion in its determination of the prime plus two percent rate of interest.

4. The 23% Interest Rate Gain is the Only Rate Supported by Evidence and Based on This Court's Precedent.

Finally, this Court has been clear that the rate of interest is a question of fact that must be supported by "competent evidence" such as

what a landowner could have earned during the delay period had he "invested his money in land similar to that condemned." *Barsy,* 113 Nev. at 717-718, 941 P.2d at 975-976. The City does not dispute that the Landowners presented the only competent and empirical evidence that meets this standard and this evidence provides a 23% annual interest rate. Accordingly, it was an abuse of discretion to use prime plus two percent (5.25%-7%), instead of the 23% rate.

III. CONCLUSION

The City cannot overcome the standard of review for interest, so it simply ignores the standard. The City has provided no factual or legal basis for the district court's prime plus two percent rate (5.25% - 7.00%). The only competent evidence before the district court supported the 23% annual rate the Landowners requested. Therefore, the City fails to rebut the necessary conclusion that it was an abuse of discretion for the district court to use the prime plus two percent rate. The Landowners therefore respectfully request that this Court reverse the district court's decision regarding the interest rate and order that interest – which commences on August 2, 2017 and compounds annually – be computed at a rate of 23%. Based on the calculations attached to the Landowners' motion to

determine interest, the accuracy of which was not challenged by the City, the Landowners should be awarded interest as follows:

1. From August 2, 2017 (date of take) – February 2, 2022 **$52,515,866.90** ($34,135,000 x 23% for 4.5 years, compounded annually)

2. At a daily rate thereafter as follows:
From February 2, 2022 – August 2, 2023
$54,601.92 per day ($19,929,699.57 interest / 365)
from August 2, 2023 – August 2, 2024
$67,160.36 per day ($24,513,530.51 interest / 365).
112 pt. 2 JA 20154.

This matter should be remanded so that the judgment can be amended accordingly.

Dated this 16th day of May 2023.

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CERTIFICATE OF COMPLIANCE

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 I prepared this brief in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

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

☒ Proportionally spaced, has a typeface of 14 points or more and contains 4,040 words; or

☐ Does not exceed _____ pages.

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 a reference to the page and volume number, if any, of the transcript or appendix to support every assertion in the brief regarding matters in the record.

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

Dated this 16th day of May 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **LANDOWNERS' REPLY BRIEF ON CROSS-APPEAL** with the Supreme Court of Nevada on the 16th day of May 2023. I will electronically serve the foregoing document in accordance with the Master Service List as follows:

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