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

JOINT APPENDIX, VOLUME NO. 2

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DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, Ltd, SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **PLAINTIFF LANDOWNERS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS** Hearing date: _____ Hearing time: _____

COMES NOW Plaintiffs, 180 LAND COMPANY, LLC, a Nevada Limited Liability Company, FORE STAR, Ltd, and SEVENTY ACRES, LLC, a Nevada Limited Liability Company (hereinafter the "Landowners") by and through their attorney of record, the Law Offices of Kermitt L. Waters, and hereby files Plaintiff Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation Claims. This Motion is based upon the Memorandum of Points and Authorities included herein, the exhibits attached hereto, the pleadings and papers on file in this matter, and such oral arguments as may be heard by the Court at the time of the hearing in this matter.

DATED this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
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Attorney for Plaintiff Landowners

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVE that the undersigned will bring the above and foregoing Plaintiff Landowners' Motion for Summary Judgment on Liability for the Landowners' Inverse Condemnation Claims on for hearing before the above-entitled Court, on the 6 day of Feb, 20 19, at the hour of 9:30am a.m./p.m. or as soon thereafter as counsel may be heard in the Regional Justice Center, Department No. XVI, Courtroom 12D, 200 Lewis Avenue, Las Vegas, Nevada, 89101

DATED this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
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MEMORANDUM OF POINTS AND AUTHORITIES

This is a Fifth Amendment Constitutional proceeding filed by the Plaintiff Landowners (hereinafter "the Landowners") against the Defendant, the City of Las Vegas (hereinafter "the City" or "the Government") for the taking by inverse condemnation of their approximately 35 Acre Property. This pleading requests summary judgment on liability for the taking of the 35 Acre Property and exceeds the 30 page limit for several reasons. First, liability in this inverse condemnation action is based on the "aggregate" of City actions impacting the Landowners' property, therefore, these City actions must be set forth in detail.[1] Second, this is an immensely important case for the Landowners, as the City has entirely prevented them from using their 35 Acre Property into which they have invested significant time, resources and money. Finally, this case involves the Landowners' important constitutional right to payment of just compensation under the United States and Nevada Constitutions and, therefore, should be fully and fairly presented to the Court.[2]

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[1] State v. Eighth Jud. Dist. Ct., 351 P.3d 736 (Nev. 2015) (*citing* Arkansas Game & Fish Comm's v. United States, 568 U.S. --- (2012)) (there is no "magic formula" in every case for determining whether particular government interference constitutes a taking under the U.S. Constitution; there are "nearly infinite variety of ways in which government actions or regulations can effect property interests." Id., at 741); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (inverse condemnation action is an "ad hoc" proceeding that requires "complex factual assessments." Id., at 720.); Lehigh-Northampton Airport Auth. v. WBF Assoc., L.P., 728 A.2d 981 (Comm. Ct. Penn. 1999) ("There is no bright line test to determine when government action shall be deemed a de facto taking; instead, each case must be examined and decided on its own facts." Id., at 985-86).

[2] McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006) ("The first right established in the Nevada Constitution's declaration of rights is the protection of a landowner's inalienable rights to acquire, possess and protect private property. . . . The drafters of our Constitution imposed a requirement that just compensation be secured prior to a taking, and our State enjoys a rich history of protecting private property owners against Government takings. Id., at 1126-27. (emphasis supplied)).

STATEMENT OF FACTS[3]

A. FACTUAL BACKGROUND RELATED TO THE LANDOWNERS' PROPERTY

This part of the factual background will set forth: 1) a general description of the 35 Acre Property; 2) an explanation of who the Landowners are; 3) the constitutionally vested right to develop the 35 Acre Property; and, 4) the Landowners' investment backed expectations in developing the 35 Acre Property.

1. The Property - The 35 Acre Property is Located Within the Physical Boundary of the Queensridge Community

The Landowners own 10 separate parcels generally located south of Alta Drive, east of Hualapai Way and north of Charleston Boulevard within the physical boundary of the Queensridge Community. For purposes of this pleading these 10 parcels will be referred to in segments as the 65 Acre Property, the 17 Acre Property, the 35 Acre Property, and the 133 Acre Property and jointly as the 250 Acre Residential Zoned Land. *See Exhibit 1: 1 App LO 00000001.*

2. The Landowners - the Landowners are Skillful Developers that Have a Compelling Interest in Seeing the 35 Acre Property Professionally Developed Consistent With Their Other Developments in the Area

The Landowners are accomplished and professional developers.[4] Over the past 20 years, they have assembled properties for, designed, and constructed over 3 million square feet of retail and residential development in the immediate vicinity of the 35 Acre Property, consisting of: 1) 40% of the custom homes within the Queensridge Community; 2) One Queensridge Place, which includes two world renowned 20-floor luxury residential high rises; 3) Tivoli Village, which includes 18 unique, old world designed buildings used for retail, restaurant, and office space; and, 4) Fort

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[3] These facts and documents will also put the City on further notice of the Landowners' factual basis for their claims pursuant to Liston v. Las Vegas Metropolitan Police Dep't, 111 Nev. 1575 (1995) (referring to an amended complaint, deposition testimony, interrogatory responses and pretrial statement demand as a basis to provide notice of facts that support a claim).

[4] Yohan Lowie, one of the Landowners' principles, has been described as the best architect in the Las Vegas valley, even having designed and constructed the Nevada Supreme Court building. *Exhibit 5: 2 App LO00000418-419.*

Apache Commons, which includes 65,000 square feet of development. More importantly, the Landowners' principals live in the Queensridge Community and One Queensridge Place, where the 35 Acre Property is located, and are the single largest owners of property within both developments. This means that no other person or entity has a higher stake in seeing the 35 Acre Property competently developed compatible and consistent with the surrounding properties.

3. The Vested Right to Develop the 35 Acre Property

a. The 250 Acre Residential Zoned Land Has Been Hard Zoned For a Residential Use Since 1986 and Reaffirmed in 1996, 2001, and 2015

On numerous occasions over the past 32 years (1986,[5] 1996,[6] 2001,[7] 2014,[8] 2016,[9] and 2018[10]), the City has confirmed the R-PD7 hard zoning on the 35 Acre Property. This residential zoning is so widely accepted that the Clark County tax Assessor has assessed the property as

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[5] *Exhibit 85.*

[6] *Id.*

[7] *Exhibit 2.* On August 15, 2001, the City Council approved Ordinance 5353 in a 7-0 vote, which had two purposes: 1) to include the 250 Acre Residential Zoned Land hard R-PD7 zoning on the City Zoning Atlas (which includes the 35 Acre Property); and, 2) to include this R-PD7 hard zoning on the City's land use plan. *Exhibit 2: 1App LO 00000002-83*. The City "repealed" any prior City actions that could possibly conflict with this R-PD7 hard zoning: "SECTION 4: All ordinances ***or*** parts of ordinances ***or*** sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Las Vegas, Nevada, 1983 Edition, in conflict herewith are ***hereby repealed.*** *Exhibit 2: 1 App LO 00000003. (emphasis supplied)."*

[8] *Exhibit 3.* Two "zoning verification Letters" which state "the subject properties are zoned R-PD7 (Residential Planned Development District – 7 units per acre)…. The density allowed in the R-PD District shall be reflected by a numerical designation for that district. (Example, R-PD4 allows up to four units per gross acre.)." *Exhibit 3: 1 App LO 00000084.*

[9] *Exhibit 4.* At a November 16, 2016, City Council hearing, Tom Perrigo, the City Planning Director, confirmed "[t]he land is zoned R-PD7, which we've discussed, which allows up to 7.49 units per acre. *Exhibit 4: 2 App LO 00000341 lines7473-7481.*

[10] *Exhibit 6.* City Attorney Brad Jerbic stated "they [City Planning Staff] gave him [the Landowner] a letter saying it's R-PD7. I have seen no evidence that they are wrong in what they gave him." *Exhibit 6: 3 App LO 00000523 lines 1160-1161*. City Staff concurred and stated on the record that "in all of our review of the zoning atlas, the zoning for the subject sites that are on the agenda today is R-PD7." *Id. at lines 1165-1166.*

residential for a value of approximately $88 Million. *Exhibit 36: 8 App LO 00001923-1938*. As will be explained below, the City has also readily approved residential development on at least 50 properties in the immediate vicinity of the 35 Acre Property that had similar R-PD7 hard zoning.

b. The Nevada Supreme Court Upheld the Landowners' Vested "Right To Develop" Residentially

Moreover, the pointed issue of whether the 35 Acre Property is R-PD7 hard zoned which grants the Landowners a "right to develop" has been fully litigated before the Honorable Judge Douglas E. Smith and affirmed by the Nevada Supreme Court. *Exhibit 83: 13 App., LO 2977-3001, Findings of Fact and Conclusions of Law and Judgment, filed November 30, 2016; Exhibit 7, 3 App., LO 00000557, Findings of Fact and Conclusions of Law, Final Order and Judgment, filed January 1, 2017; Exhibit 84, 13 App., LO 00003003; see also Exhibit 98: 16 App., LO 3830-3832, Supreme Court Order Denying Rehearing.* Following significant and lengthy briefing and oral argument, Judge Smith entered the following findings, concluding the Landowners have had hard zoning of R-PD7 since 1986 and this hard zoning of R-PD7 controls over any other conflicting land use plans, thereby granting the Landowners the "right to develop" the 35 Acre Property with a residential use:

- On March 26, 1986, a letter was submitted to the City Planning Commission requesting permission to use the 250 Acre Residential Zoned Land for a "golf course," however, the zoning that was sought was R-PD "as it allows the developer flexibility and the City design control." "Thus, ***keeping the golf course [250 Acre Residential Zoned Land, which includes the 133 Acre Property at issue in this case] for potential future development as residential was an intentional part of the plan***." *Exhibit 83: 13 App., at LO 00002990, finding #59.* (emphasis supplied).

- Even though there is a 1986 map that shows a golf course around the location of the Landowners' 250 Acre Residential Zoned Land, "the current Badlands Golf Course [250 Acre Residential Zoned Land] is not the same as what is depicted on the map" (*Exhibit 83: 13 App., at LO 00002990, finding #61)* and the Landowners "have the ***right to close the golf course*** and not water it" (*Exhibit 7: 3 App., LO 00000568, finding #26*). (emphasis supplied).

- The Zoning Bill No. Z-2001, Ordinance 5353, "demonstrates that the R-PD7 Zoning was codified and incorporated into the Amended Atlas in 2001." *Exhibit 83, 13 App., LO 00002989-00002990, finding #58.*

- "[T]wo letters from the City of Las Vegas to Frank Pankratz dated December 20, 2014, ***confirm the R-PD7 zoning on all parcels held by Fore Stars, Ltd.*** [the 250 Acre Residential Zoned Land]." *Exhibit 83: 13 App., LO 00002990, finding #60.*

- "The Court finds that the GC Land [250 Acre Residential Zoned Land] owned by the Developer Defendants [Landowners] has ***'hard zoning' of R-PD7. This allows up to 7.49***

units per acre subject to City of Las Vegas requirements." *Exhibit 83: 13 App, LO 00002994, finding #82; Exhibit 7: 3 App., LO 00000592, finding #130.* (emphasis supplied).

- "Notwithstanding any alleged 'open space' land use designation, the zoning on the GC Land [250 Acre Residential Zoned Land], as supported by the evidence, is R-PD7." The Court then rejected the argument that "suggests the land is 'zoned' as 'open space' and that they [Queensridge homeowners] have some right to prevent any modification of that alleged designation under NRS 278A." *Exhibit 7: 3 App., LO 0000576 - 577, finding #64, LO 00000593, finding #132.*

- The language from NRS 278.349(3)(e) supports the Landowners' position that the hard residential zoning trumps any other land use designation that may have been applied at any time to the Landowners 250 Acre Residential Zoned Land. *Exhibit 7: 3 App., LO 00000577, finding # 66.*

- "The court finds that the Developer Defendants [Landowners] have ***the right to develop*** the GC Land [250 Acre Residential Zoned Land]***."*** *Exhibit 83: 13 App., LO 00002994, finding #81.* (emphasis supplied). This finding was repeated in the subsequent order twice as follows: "The zoning on the GC Land [250 Acre Residential Zoned Land] dictates its use and ***Defendants rights to develop their land***" *(Exhibit 7: 3 App., LO 00000576, finding # 61,. (emphasis supplied))* and the Landowner has the ***"right to develop their land."*** (*Exhibit 7: 3 App., LO 00000592, finding # 130. (emphasis supplied)).*

- Judge Smith even held that the initial steps to develop, parceling the 250 Acre Residential Zoned Land, had proceeded properly: "The Developer Defendants [Landowners] properly followed procedures for approval of a parcel map over Defendants' property [250 Acre Residential Zoned Land] pursuant to NRS 278.461(1)(a) because the division involved four or fewer lots. The Developer Defendants [Landowners] parcel map is a legal merger and re-subdividing of land within their own boundaries." *Exhibit 83: 13 App., LO 00002986, finding #41.*

Judge Smith then held the Queensridge CC&Rs do not apply to the 35 Acre Property and the Queensridge Community could not restrain the Landowners "right to develop their land:"

- The 250 Acre Residential Zoned Land is not a part of the Queensridge Community and, therefore, is not subject to the Queensridge CC&Rs and "cannot be enforced against the GC Land [250 Acre Residential Zoned Land]."[11] *Exhibit 83: 13 App., LO 00002998, finding #51, LO 00002989, findings #53-57, LO 0002990-2993, findings 62-79; Exhibit 7: 3 App., LO 00000563-564, findings 5-7, LO 00000565, findings 15-16, LO 00000567, finding #24, LO 00000568-569, finding #29, 31, LO 00000571, findings 38-40, LO 00000576-577, findings # 64-65, LO 00000577-578, findings #68-70, LO 00000583, finding # 88, LO 00000586, finding #102, LO 00000589-590, findings # 120-124, LO 00000594, finding # 135.*

[11] The CC&Rs for the Queensridge Community plainly state "[t]he existing 18-hole golf course commonly known as the 'Badlands Golf Course' [250 acre property] **is not a part** of the Property or Annexable Property" governed by the Queensridge CC&R's. *Exhibit 66: 11 App LO 00002552-2704.* Also, the "Master Plan" for Queensridge shows that the 250 acre property is "NOT A PART" of the Queensridge Community. *Id.*

- The Queensridge Community, the geographic area where the 250 Acre Residential Land is located "may, but is not required to, include ... a golf course." *Exhibit 83: 13 App., LO 00002992, finding #70.*

- The Queensridge Homeowners transfer documents "evidence that no such guarantee [that the 250 Acre Residential Zoned Land would remain a golf course] was made and that Plaintiffs were advised ***that future development to the adjoining property [250 Acre Residential Zoned Land] could occur, and could impair their views or lot advantages."***[12] *Exhibit 7: 3 App., LO 00000565, finding # 13, LO 00000571, finding # 38, LO 00000574, finding #53.*

The Landowners' vested right to develop residentially is so irrefutable that Judge Smith found any challenge to this vested right (as the City is doing in this proceeding) is "frivolous" and "baseless," warranting an award of attorney fees. *Exhibit 7, 3 App. LO 00000584-585, finding #95, p. 27, LO 00000586, finding #102.*

The Nevada Supreme Court affirmed Judge Smith. *Exhibit 84, 13 App., LO 00003002.* The Court held "[b]ecause the record supports the district court's determination that the golf course [250 Acre Residential Zoned Land] was not part of the Queensridge community under the original CC&Rs and public map and records, regardless of the amendment, we conclude the district court did not abuse its discretion in denying appellants' motion for NRCP 60(b) relief." *Exhibit 84, 13 App., LO 00003003; see also Exhibit 98: 16 App., LO 3830-3832, Supreme Court Order Denying Rehearing.* The Court continued, "[a]ppellants filed a complaint alleging the golf course land [250 Acre Residential Zoned Land] was subject to the CC&Rs when the CC&Rs and public maps of the property demonstrated that the golf course land [250 Acre Residential Zoned Land] was not." *Id., p. 4.* The Supreme Court also upheld the award of attorney fees, confirming it is frivolous to challenge the Landowners' vested right to develop. *Id.*

Accordingly, it is settled Nevada law that the Landowners have the vested "right to develop" this specific 35 Acre Property with a residential use.

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[12] Every purchaser of property within the Queensridge Community was required to accept, as part of their purchase agreement, that there were no representations on how the 250 acre property would be developed: "Purchaser is not relying upon any warranties, promises, guarantees, advertisements or representations made by Seller or anyone…." and "….Seller has made no representations or warranties concerning zoning or the future development of phases of the Planned Community or the surrounding area or nearby property." *Exhibit 69, 11 App., LO 00002733-34*.

c. The Nevada Supreme Court Affirmance of the Judge Smith Orders Nullifies the Crockett Order

The City has relied heavily on the Crockett Order in these proceedings to assert that the Landowners need to submit a "major modification" to ripen their taking claims. The Nevada Supreme Court affirmance of the Judge Smith Orders, however, entirely nullifies the Crockett Order rendering it meaningless in this case (hereinafter "Crockett Order").

I. What the Crockett Order Holds

To understand how the Nevada Supreme Court nullified the Crockett Order, it is first important to analyze what the Crockett Order holds. According to the City, the Crockett Order holds that a "major modification" application is necessary to develop and the Landowners never submitted this application to the City. This City argument (applying the Crockett Order) is that an individual named William Peccole drafted a "conceptual" plan showing certain land use designations in 1986 and that this "conceptual" plan shows an open space / golf course designation on the 250 Acre Residential Zoned Land, which includes the 35 Acre Property. The City then asserts (applying the Crockett Order) that, if the Landowners want to use the 250 Acre Residential Zoned Land for a residential use, the Landowners need to request a "major modification" to change the designation from open space / golf course to a residential use on Mr. Peccole's conceptual plan. And, since the Landowners never filed for a "major modification" their claims are not ripe. This City argument (applying the Crockett Order) focuses entirely and solely on Mr. Peccole's "conceptual" plan and entirely ignores the hard R-PD7 zoning that has existed on the property since 1986. In other words, the Crockett Order holds that Mr. Peccole's "conceptual" plan on how he envisioned the area to develop trumps the R-PD7 hard zoning that was adopted by City ordinance.

ii. How The Nevada Supreme Court Nullifies the Crockett Order

This City argument, adopted in the Crockett Order, however, has been rejected in the two Judge Smith orders, which were affirmed by the Nevada Supreme Court. The Judge Smith orders rely entirely on the hard R-PD7 residential zoning that was on the 250 Acre Residential Zoned Land since 1986 instead of the "conceptual" land use plan drafted by Mr. Peccole. As detailed above, according to the Judge Smith orders and the Supreme Court affirmance, it is settled law that: 1) the

Landowners have the vested "right to develop" the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) with a residential use; 2) the 250 Acre Residential Zoned Land was never part of the Queensridge Community or subject to any Queensridge CC&Rs; 3) the Queensridge homeowners have no rights whatsoever to the 250 Acre Residential Zoned Land; 4) no Queensridge CC&Rs or other City plan may be invoked to prevent this development; and, 5) the Landowners properly proceeded with the residential development by filing the appropriate parcel maps. *Exhibits 7, 83, 84, 85, 89 and 98.* Accordingly, per Nevada law no "major modification" application is necessary - the property is zoned residential, its intended use, and the Landowners' have the "right to develop" the property for this use.

Moreover, it is important to understand the sole process for how Mr. Peccole's "concept" plan can even be applied to grasp how the Supreme Court Affirmance of the Judge Smith orders nullifies the Crockett Order. Mr. Peccole's conceptual plan itself states unequivocally that: 1) the plan is only Mr. Peccole's "concept"[13] - it is not a City master land use plan; and, 2) the sole and only way the "concept" plan can even be applied to any properties is through the adoption of Covenants Conditions and Restrictions ("CC&Rs"). *Exhibit 60: App LO 00002369 and 2383*. The Queensridge CCR's unequivocally state that the "'Badlands Golf Course' (which includes the 35 Acre Property) **is not a part**" of the Queensridge development under the Peccole 1990 Conceptual Plan. *Exhibit 66: 11 App LO 00002572*. The "Master Plan" for the Queensridge development that was recorded with the County Recorder, entitled the "Final Map For Peccole West," unequivocally shows the 35 Acre Property was "NOT A PART" of the Queensridge development, meaning it could not be reserved for open space use for the Queensridge development. *Exhibit 66: 11 App LO 00002685-90*. Additionally, the 35 Acre Property has always remained private land and there was not any condition by the City in 1990 as part of the approval of the Queensridge development that the 35 Acre Property be dedicated for public use, such as a park. The Nevada Supreme Court understood this well,

[13] The Peccole1990 Conceptual Plan was designed to be flexible: "as the City of Las Vegas General Plan is designed as a set of guidelines to help direct future growth of the City, so is the proposed Peccole Ranch Master Plan designed with an inherent flexibility to meet changing market demands at the time of actual development." *Exhibit 60: 10 App LO 00002384*.

specifically holding that the 35 Acre Property is not a part of any CC&Rs and, therefore, the CC&Rs "cannot be enforced against the [35 Acre Property]."[14]

Therefore, Mr. Peccole's concept plan does not even apply to the 35 Acre Property. If Mr. Peccole's concept plan does not apply to the 35 Acre Property, then it goes without saying that Mr. Peccole's open space designation does not apply and there is no need to "modify" Mr. Peccole's concept plan to develop the 35 Acre Property.

It is impossible to reconcile the Crockett Order with the Judge Smith orders and Supreme Court Affirmance. The Judge Smith orders focus on the R-PD7 hard zoning (approved by the City) and affirm the "right to develop" the property residentially.[15] The Crockett Order, on the other hand, ignores the R-PD7 zoning and, instead, focuses on Mr. Peccole's "concept" plan designation of open space and hold no residential units are allowed in the open space.[16]

This Court should follow the Judge Smith orders as they have been affirmed by the Nevada Supreme Court. *Exhibits 7 84, 89 and 98.* Moreover, Nevada's executive,[17] legislative,[18] and judicial branches[19] have all determined Judge Smith is correct - hard zoning trumps the land use plan,[20] especially a "concept" plan by Mr. Peccole that is not even a city master land use plan.

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[14] *See page 4, above.* The CC&Rs for the Queensridge Community plainly state "[t]he existing 18-hole golf course commonly known as the 'Badlands Golf Course' [250 acre property] **is not a part** of the Property or Annexable Property" governed by the Queensridge CC&R's. *Exhibit 66: 11 App LO 00002552-2704.* Also, the "Master Plan" for the Queensridge CC&Rs shows that the 250 acre property is "NOT A PART" of the Queensridge Community. *Id.*

[15] *Exhibits 7, 83, 84, 85, 89 and 98*.

[16] *Exhibit 72, 12 App., LO 00002821, see specifically LO 00002825, finding #13.*

[17] 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.")

[18] See NRS 278.349(3)(e).

[19] *See Exhibits 7, 84, 89 and 98.*

[20] The City, itself, has admitted that zoning trumps the General Plan. The City filed a pleading in the petition for judicial review related to the 17 Acre Property arguing: "[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

d. Public Policy for the Nevada Supreme Court Affirmance of the Judge Smith Orders

The Nevada Supreme Court Affirmance of the Judge Smith Orders is well reasoned and based on strong public policy.

Reason / Public Policy #1 - First, as cited above the property has always been zoned residential, the intent was always to develop the property residentially, the City itself repeatedly affirmed this hard residential zoning, and hard zoning trumps any other conflicting land use plan designation.[21] In fact, any challenge to this vested "right to develop" is, as stated by Judge Smith, "frivolous."[22] This residential zoning is so widely accepted that the Clark County Tax Assessor has assessed the property as residential for a value of approximately $88 Million. *Exhibit 36: 8 App LO 00001923-1938.* Moreover, the ruling is consistent with the Nevada Supreme Court Sisolak and Schwartz cases, which hold that Nevada landowners have the vested right to develop their properties even if they have not put it to a beneficial use[23] and the government may only regulate that use with

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area, while zoning designations specifically define allowable uses and contain the design and development guidelines for those intended uses." Jack B. Binion, et al. v. City of Las Vegas, et al., Case No. A-17-752344-J, Respondent City of Las Vegas Answering Brief, 2:8-12. (emphasis supplied). The City's own attorney, Brad Jerbic, represented in a public hearing that "[i]f you do not grant the general plan amend[ment] tonight, you will leave in place a general plan that's inconsistent with the zoning, **and the zoning trumps it, in my opinion**." *Exhibit 71, 11-12 App., Transcript of Planning Commission meeting, Feb. 14, 2017, page 64 lines 1795-1797.* (emphasis supplied). Mr. Jerbic further stated, [b]ut the fact is, if you didn't even have a general plan amendment that synchronized the General Plan with the zoning, the zoning is still in place, and it doesn't change a thing." *Exhibit 21, Vol 4-5, Transcript of City Council Meeting of August, 2, 2017, page 95, lines 2652-2654.* Tom Perrigo, Planning Director for the City of Las Vegas, agreed with Mr. Jerbic and opined that zoning trumps the master plan. *Id., pp. 94-95.*

[21] *See Exhibit 7, 3 App., 00000557; Exhibit 83: 13 App., LO 00002977; Exhibit 84: 13 App., LO 00003002; Exhibit 89: 13 App., LO 00003093; Exhibit 98: 16 App., LO 3830-3832, Supreme Court Order Denying Rehearing.*

[22] *Exhibit 7, 3 App. LO 00000584-585, finding #95, p. 27, LO 00000586, finding #102.*

[23] McCarran Intl. Airport v. Sisolak, 122 Nev. 645 (2006) (landowner had a vested right to use the airspace above his property pursuant to NRS 493.040, even though he never used it and the County never approved the use. Schwartz v. State, 111 Nev. 998 (1995) (Nevada landowners have a vested right to access roadways adjacent to their property, even though the access has never been built).

"valid zoning and related regulations" that do not "give rise to a taking claim."[24] Otherwise, if the City had absolute discretion to grant or deny the use of property, then the Just Compensation Clause would be entirely eliminated. The City could deny all use of all properties in the City (under the City's alleged discretionary power) and never pay any compensation whatsoever for these denials. This despotic argument is not the law and never will be the law as it would bring all property transactions in the State of Nevada to an immediate and abrupt halt. No entity or person would ever purchase property in this State, because there would be no property rights. The only "thing" that would be purchased in a property transaction is dirt for which there are no rights, because the local entities, like the City, could tell the new owner that he cannot use the property at all under the City's absolute discretion argument.

Reason / Public Policy #2 - The City's own persons most knowledgeable have affirmed the vested right to develop and rejected the major modification argument. Brad Jerbic is perhaps the best person at the City who can offer an opinion on the major modification issue as he has been the City Attorney for nearly 30 years, has worked to draft the City Code, interprets the Code, and has advised the City Council on this Code for his entire career. Mr. Jerbic stated in a public hearing that the City's current "major modification" argument is nothing more than a "red herring."[25] Phil Byrnes has been an assistant City Attorney for over 20 years and, therefore, may be the next best person to provide an opinion on the City's "major modification" argument and he stated that a major modification is not required.[26] Tom Perrigo, the City's highest ranking planner, stated a major modification is not required to develop the 35 Acre Property.[27] Finally, further evidence that any

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[24] McCarran Intl. Ariport v. Sisolak, 122 Nev. 645, 660, fn. 25 (2006). This also further shows that the City's reliance on the Stratosphere is misplaced as that case applies to zoning issues, not inverse condemnation issues. And, all it holds is that the City has discretion to grant or deny certain uses. It does not say that the City has "absolute discretion" to deny all use of property without payment of just compensation.

[25] *See Exhibit 24, 5 App LO 00001071-1072.*

[26] *See Exhibit 38, 24:13-17; 26-27; 29; 30; 43:2-10, 8 App LO 0001964 - 9 App LO LO - 00002018.*

[27] *See Exhibit 5, 2App LO 0000400:1228-1233.*

"major modification" argument is a complete farce is the fact that the City has granted permission to develop fifty (50) other properties in the area of the 35 Acre Property that have R-PD7 zoning and were similarly in "open space" labeled areas on the Peccole 1990 Conceptual Plan and not once did the City reference a PR-OS or other "open space" designation or require a "Major Modification" from the Peccole 1990 Conceptual Plan for these 50 applications.[28]

Reason / Public Policy #3 - Judge Smith held that the 35 Acre Property has been hard zoned R-PD7 since 1986. The City's development code applicable to "R-PD" hard zoned property, like the Landowners' property, is LVMC 19.10.050 and this code provision does not require a major modification application as a precondition to develop. By comparison, the City's code to develop under the "PD" designation, LVMC 19.10.040, does require a major modification application to develop. Therefore, a major modification is not a barrier to exercise the vested right to develop.

Reason / Public Policy #4 - The Peccole 1990 Conceptual Plan was not recorded and did not dedicate anything to the City; it was only a "Conceptual Master Plan" that was the vision of a developer. *Exhibit 60: 10 App LO LO 00002369*. Unrecorded visions of a developer are not notice to or binding upon subsequent purchasers of land sufficient to trump the vested right to develop.

Reason / Public Policy #5 - This Court is required to consider the "practical reality"[29] facing landowners in inverse condemnation actions; the Court is not required to abandon all common sense and reason. Any argument that a major modification requirement is a barrier to exercising the vested right in this case requires this Court to do just this. Simply put, the City has represented to this Court

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[28] The City admitted that there have been six other development/entitlement actions done within the Peccole 1990 Conceptual Plan area, none of which were prohibited from developing due to an open space designation and none required a Major Modification from the open space designation. *Exhibit 5: 2 App LO 00000400:1228-1233 and Exhibit 61: 10 App LO 00002465:2314-2318*. The City also approved approximately 44 residential developments all zoned with R-PD7 with a similar open space designation on the Peccole 1990 Conceptual Plan without any delay or request for a Major Modification from the Peccole 1990 Conceptual Plan. *Exhibit 62: 10 App LO 00002471-2472*. 50-0 is not a mistake. This proves the 1990 Conceptual Plan is just that – a "plan" – that is only "conceptual" and what controls is the actual zoning of the property.

[29] City of Sparks v. Armstrong, 103 Nev. 619 (1987) (court upheld taking claim, explaining that the City of Sparks, in arguing that the taking did not occur earlier failed to recognize "the practical reality" the landowners faced as owner of the property).

during the petition for judicial review proceedings that if the Landowners had written the words "major modification" at the top of its applications to the City, then the City would not have engeaged in the following acts (these acts will be explained fully below): 1) the City's councilmen would not have called the Landowners' representative a "motherfucker," would not have stated "over my dead body" will development ever be allowed, and would not have stated he will "vote against the whole thing;" 2) the City would not have adopted the "Yohan Lowie Bills" and would not have strategically adopted the Bills to deny all applications to develop; 3) the City would not have denied the MDA (that included significantly more than any major modification requires); 4) the City would not have made it impossible to get a drainage study; 5) the City would not have denied the fence and access applications; 6) the City would not have denied the applications to develop for this 35 Acre Property and the 133 Acre Property; 7) the City would not have identified $15 million of City funds to take over the Landowners' property for a City "park;" 8) the City would not be vehemently trying to claw back the 17 Acre Property approvals; and 9) the Landowners' Property would be fully developed today. No reasonable person, considering the above cited facts, could possibly believe this argument.

Reason / Public Policy #6 - If this Court elects to follow the Crockett Order that entirely ignores the Landowners' hard zoning and vested right to develop, instead of the Judge Smith Orders and Nevada Supreme Court Affirmance, this will be a judicial taking of the 35 Acre Property. The United States Supreme Court has held that judicial action that "recharacterizes as public property what was previously private property is a judicial taking."[30] The Court explained that this is a proper taking claim, because the Taking Clause is concerned with the "act" that results in the taking and does not focus on the particular "government actor," meaning the judiciary also may engage in taking actions.[31] Acceptance of the Crockett Order in this case would amount to a judicial taking, because the order would be applied to recharacterize the Landowners' 35 Acre Property from a hard zoned residential property with the vested "rights to develop" to a public park / open space with zero developable units.

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[30] Stop the Beach Renourishment, Inc.v. Florida Dept. of Env. Protec., 130 S.Ct. 2592 (2010).

[31] Id., at 2601.

Therefore, there is strong public policy supporting the Landowners' vested right to develop.

4. The Landowners' Investment Backed Expectations to Develop the 35 Acre Property

In furtherance of their vested "right to develop" the 250 Acre Residential Zoned Land, the Landowners invested their time, money, expertise and resources. Based upon the Landowners' extensive investment and commitment to develop the 35 Acre Property, it is clear that development on the 35 Acre Property was not speculative or conjectural and would be a financial success. And, this process began in 2015, when the Las Vegas residential real estate market was booming. Therefore, the Landowners had significant investment backed expectations in the development of the 35 Acre Property.

B. FACTUAL BACKGROUND RELEVANT TO THE GOVERNMENT ACTION WHICH ELIMINATED ALL USE AND ENJOYMENT OF THE 35 ACRE PROPERTY, RENDERING THE PROPERTY USELESS AND VALUELESS

This part of the Landowners' Motion for Summary Judgment will set forth the systematic and aggressive actions by the City to prevent any and all development on the 35 Acre Property thereby rendering the property useless and valueless and establishing liability for a taking. It is important to consider all of these City actions and how the actions as a whole impact the 35 Acre Property, because "the form, intensity, and the deliberateness of the government actions toward the property must be examined … All actions by the [government], in the aggregate, must be analyzed."[32] These City actions demonstrate the basis for the Landowners' Inverse Condemnation claims.

1. City Action #1 - City Denial of the 35 Acre Property Applications

The Landowners submitted complete applications to develop the 35 Acre Property for a residential use consistent with the R-PD7 hard zoning. *Exhibit 22.* Again, it is settled law that the Landowners have the "right to develop" this property. *Exhibits 83, 84, 85, and 98*. The City Planning Staff thoroughly reviewed the applications, determined that the proposed residential development was consistent with the R-PD7 hard zoning, that it met all requirements in the Nevada Revised Statutes, and in the City's Unified Development Code (Title 19), and appropriately recommended approval. *Exhibit 22: 4 App LO 00000932-949 and Exhibit 23: 4 App LO 00000950-*

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[32] Merkur v. City of Detroit, 680 N.W.2d 485, 496 (Mich.Ct.App. 2004).

976. Tom Perrigo, the City Planning Director, stated at the hearing that the proposed development met all City requirements and should be approved. *Exhibit 5: 2 App LO 00000376 line 566 - 377 line 587.*

The City Council denied the 35 Acre Property applications,[33] stating as the sole basis for denial the City's alleged desire to see the entire 250 Acre Residential Zoned Land developed under one Master Development Agreement (MDA). *Exhibit 5: 2 App LO 00000363, 372, 376.* The City assured the Landowners that the MDA approval was "very, very close" and "we are going to get there." *Exhibit 5: 2 App LO 00000367 line 336; 370 line 408; Exhibit 5: 2 App LO 00000466 lines 2987-2989; LO 0000475 line 3251 to LO 0000476 line 3256.* The City Attorney even stated "There's no doubt about it [approval of the MDA]. If everybody thinks that this can't be resolved, I'm going to look like an idiot in a month and I deserve it. Okay?" *Exhibit 5: 2 app LO 00000467 lines 3020-3021.*

2. City Action #2 - Denial of the Master Development Agreement (MDA)

To comply with the City request to have one unified development, between July, 2015, and August 2, 2017, the Landowners worked with the City on an MDA that would allow development on the 35 Acre Property along with all other parcels that made up the 250 Acre Residential Zoned Land. *Exhibit 25: 5 App LO 00001132-1179.*[34] As stated above, the City mandated that

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[33] One councilman understood that denying the 35 Acre Property applications would clearly expose the City to liability: "So I think actually the fastest way for the property owner to exercise their property rights would probably be for us to deny this, because then they can go to court **and a court will immediately reverse us, because this is so far inside the existing lines** [the City's Code requirements]." *Exhibit 5: 2 App LO 00000451 lines 2588-2590.*

[34] Exhibit 25 is a combination of numerous documents related to the MDA as follows: *Badlands Development Agreement CLV Comments 11-5-15; Planning 11/05/15 DA Highlights; email from City Planning Section Manager, Peter Lowenstein to Landowners' land use attorneys, dated November 5, 2015, with attachment identified as "Badlands DA Comments; email correspondence between City Planning Section Manager, Peter Lowenstein, and Landowner representative Frank Pankratz, dated February 24, 2016; email correspondence between City Attorney Brad Jerbic and Landowners' land use attorney Stephanie Allen, dated May 22, 2017; Addendum to MDA to provide additional changes, dated 2016; The Two Fifty Development Agreement's Executive Summary; City requested concessions signed by a representative of the Landowners; Substantial Changes to the Development Agreement for the Two Fifth Based on Residential Feedback (July 27, 2017); Comments on Development Agreement for Two Fifty (Draft*

development of the 35 Acre Property be included in the MDA covering all 250 acres,[35] rather than one application for just the 35 Acre Property.

The amount of work that went in to the MDA was demanding and pervasive.[36] The Landowners complied with each and every City demand, making more concessions than any developer that has ever appeared before this City Council.[37] A non-exhaustive list of the Landowners' concessions, as part of the MDA, include: 1) donation of approximately 100 acres as landscape, park equestrian facility, and recreation areas (*Exhibit 29: 8 App LO 00001836; Exhibit 24: 4 App LO 00000998 lines 599-601; Exhibit 30: 8 App LO 00001837*); 2) building brand new

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of May 25, 207) Michael Buckley, Fenemore Craig, P.C. (Brad/City Jerbic Response in Bold) June 13, 2017.

[35] The Landowners explained that they were going through this MDA process at the request of the City: "[w]e've been working on this agreement [MDA] at length for two years, because the direction of this Council was that you prefer to have a holistic, universal plan, and we have done that." *Exhibit 24: 4 App LO 00000990 lines 375-377.*

[36] The City Attorney stated that he has met with and worked "very, very hard" with the neighbors and the Landowners on the MDA "on a regular basis" and the Mayor acknowledged that the City and the Landowners had "been working for two years" and "working so many hours" on the MDA (*Exhibit 5: 2 App LO 00000367 lines 333-335; 446 lines 2471-2472; 447 lines 2479-2480; 465 lines 2964-2965*) and that, at times, she was meeting with the City Attorney and the Director of Planning "on a weekly basis or more often" on the MDA. *Exhibit 24: 5 App LO 00001002 lines 691-692.* The Mayor indicated that City Staff had dedicated "an excess of hundreds of hours beyond the full day" working on the MDA with the various groups involved. *Id. at 1002 lines 697-701.* The City Attorney recognized the "frustration" of the Landowners due to the length of time negotiating the MDA. *Exhibit 5: 2 App LO 00000466 lines 2991-2992.*

[37] Councilwoman Tarkanian commented that she had never seen anybody give as many concessions as the Landowners: "I don't know if I've ever seen anybody who's done as much as far as, you know, filling in gullies and giving you football field lengths behind you and stuff like that . . . **I've never seen that much given before**." *Exhibit 5: 2 App LO 00000458 lines 2785-2787; 459 lines 2810-2811. (emphasis supplied).* The Mayor acknowledged that "you did bend so much. And I know you are a developer, and developers are not in it to donate property. And you have been donating and putting back, ... And it's costing you money every single day it delays." *Exhibit 5: 2 App LO 00000446 lines 2462-2465.* The Landowners conveyed that the changes were extensive and always at the request of the City: "[w]e have done that through many iterations, and those changes were not changes that were requested by the developer. They were changes requested by the City and/or through homeowners to the City." *Exhibit 24: 4 App LO 00000990 lines 378-380.*

driveways and security gates and gate houses for the existing security entry ways for the Queensridge development; (Id.); 3) building two new parks, one with a vineyard; (Id.) and, 4) reducing the number of units, increasing the minimum acreage lot size, and reduced the number and height of towers. *Exhibit 5: 2 App LO 00000431 lines 2060-2070; Exhibit 29: 8 App LO 00001836; and Exhibit 30: 8 App LO 00001837*. The City demanded changes to the MDA that ranged from simple definitions, to the type of light poles, to the number of units and open space required for the overall project.[38] In total the City required at least 16 new and revised versions of the MDA. *Exhibit 28*.[39] In the end, the Landowners were very diligent in meeting all the City's demands[40] and the MDA met all of the City mandates, the Nevada Revised Statutes and the City's own Code requirements.[41] *Exhibit 24: 5 App LO 00001071-1073 lines 2652-2655.* Even the City's own Planning Staff, who

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[38] As just one example of this, *see Exhibit 31: 8 App LO 00001838-1845.* Another example of the significant changes requested and made over time can be seen in a comparison of just two of the MDAs – the MDA dated July 12, 2016 and the MDA dated May 22, 2017. *Exhibit 32: 8 App LO 00001846-1900.* During just this eight-month period there were 544 total changes to the MDA. *Id.* These changes can also be seen in a comparison of the "Design Guidelines" that were part of the MDA. *Exhibit 33: 8 App LO 00001901-1913.* Another 157 changes were made to these Design Guidelines in just over one year from the April 20, 2016, to May 22, 2017, version. *Id. at LO 00001913.*

[39] *Exhibit 28* consists of 16 versions of the MDA generated from January, 2016 to July, 2017. *Exhibit 28: 5 App LO 00001188- 8 App L0 00001835.* Importantly, the Landowners expressed their concern that the time, resources, and effort it was taking to negotiate the MDA may cause them to lose the property. *Exhibit 5: 2 App LO 00000447-450.*

[40] For example, on February 24, 2016, the City made numerous additional changes to the MDA at 1:41 pm and the Landowners had responded to and made the changes to the MDA by 11:53 pm that evening (*Exhibit 26: 5 App LO 00001180-1182*) and on May 22, 2017, the Landowners submitted the SDR (Site Development Plan Review) language for the MDA at 1:12 pm and by 3:32 pm that same day had already had a phone conversation with the City Attorney and made the changes to the SDR the City required. *Exhibit 27: 5 App LO 00001183-1187*.

[41] The MDA included over 55 pages of specific development standards for the 250 Acre Residential Zoned Land. *Exhibit 28: 5 App LO 00001188- 8 App L0 00001835.*

participated at every step in preparing the MDA, recommended approval, stating the MDA "is in conformance with the requirements of the Nevada Revised Statutes 278" and "the goals, objectives, and policies of the Las Vegas 2020 Master Plan" and "[a]s such, staff [the City Planning Department] is in support of the development Agreement." *Exhibit 24: 4 App LO 00000985 line 236 – 00000986 line 245; LO 00001071-00001073; and Exhibit 40: 9 App LO 00002047-2072*.

Notwithstanding the Landowners' efforts and sweeping concessions and the City's own Planning Staff recommendation to pass the MDA, on August 2, 2017, the MDA was presented to the City Council and the City denied the entire MDA altogether. *Exhibit 24: 5 App LO 00001128-112.* As the 35 Acre Property is vacant, this meant that the property would remain vacant. And, this means the City assertion that it wanted to see the entire 250 Acre Residential Zoned Land developed as one unit was an utter farce. Regardless of whether the Landowners submit individual applications (35 acre applications) or one omnibus plan for the entire 250 Acre Residential Zoned Land (the MDA), the City unilaterally denied all uses. As will be shown below, it has been discovered that the 35 Acre Property and MDA denials are in furtherance of a City scheme to specifically target the Landowners' property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for $ 15 Million which is 1%[42] of its fair market value. Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.

3. City Action #3 - Adoption of the Yohan Lowie Bills

After denial of the MDA, the City then raced to adopt two Bills that solely target the 250 Acre Residential Zoned Land in order to create an even further barrier to development.

The first is Bill No. 2018-5, which Councilwomen Fiore acknowledged "**[t]his bill is for one development and one development only. The bill is only about Badlands Golf Course** [250 Acre Residential Zoned Land]. . . . "**I call it the Yohan Lowie [a principle with the Landowners] Bill**." *Exhibit 44: 9 App LO 00002079 lines 57-58; 17:487. Id. at 17:487.* The purpose of the Yohan Lowie Bill was to block any possibility of developing the 35 Acre Property by giving veto power to adjoining property owners before any land use application can even be submitted regardless

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[42] This is an estimate as in 2017 the Tax Assessor placed an assessment value of approximately $88 Million on the Subject Property and the Tax Assessed Value is universally understood to be below market value. *Exhibit 36: App LO 00001923-1938.*

of the existing hard zoning and whether the neighbors have any legal interest in the property or not. *Exhibit 45: 9 App LO 00002099 lines 6-8.*

The second Bill is Bill No. 2018-24, which is also clearly intended to target only the Landowners' 250 Acre Residential Zoned Land (which includes the 35 Acre Property) by making it nearly impossible to develop and then applying unique laws to jail the Landowners for seeking development of their property. On October 15, 2018, a recommending committee considered Bill 2018-24 and it was shown that this Bill targets solely the Landowners' Property. *Exhibit 92, 93, and 94, 13-15 App., see specifically, Exhibit 94, 15 App., pp. 00003571-3573.* And, Bill 2018-24 defines the "requirements pertaining to the Development Review and Approval Process, Development Standards, and the Closure Maintenance Plan" for re-purposing "certain" golf courses and open spaces. *Exhibit 46: 9 App LO 00002106-2118.* Bill 2018-24 requires costly and technical application procedures, including: approval of expensive and technical master drainage, traffic, and sewer studies before any applications are even submitted; ecological studies; 3D topographic development models; providing ongoing public access to the private land; and requiring the Landowner to hire security and monitoring details. Id. passim. Additionally, Bill 2018-24 seeks to make it a misdemeanor subject to a $1,000 a day fine or "imprisonment for a term of not more than six months" or any combination of the two for an owner of a discontinued golf course who fails to maintain the course to a level that existed on the date of discontinuance, regardless of whether the course can be profitably operated at such a level. *Id. at LO 00002114-2116.* According to Councilwoman Fiore at the September 4, 2018, Recommending Committee meeting, if adopted, this would be the only ordinance in the City development code which could enforce imprisonment on a landowner. At the September 4, 2018, meeting the City Staff confirmed that Bill 2018-24 could be applied retroactively. This makes an owner of any failing golf course an indentured servant to neighboring owners whether such neighbors have any legal interest to the property or not. On November 7, 2018, despite the Bill's sole intent to target the Landowners' Property and prevent its development, the City adopted the Bill. *Exhibits 90-97, see specifically, Exhibits 96 and 97, 15 and 16 App., LO 00003594-3829.*

This further shows the lengths to which the City has gone to prevent the development of the

250 Acre Residential Zoned Land – seeking unique laws to jail the Landowners for pursuing development of their own property for which they have the "right to develop." As will be shown below, the adoption of these two City Bills is in furtherance of a City scheme to specifically target the Landowners' property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1%[43] of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

4. City Action #4 - Denial of an Over the Counter, Routine Access Request

In August, 2017, the Landowners filed with the City a request for three access points to streets the 250 Acre Residential Zoned Land abuts – one on Rampart Blvd. and two on Hualapai Way. *Exhibit 58: 10 App LO 00002359-2364*. This was a routine over the counter request and is specifically excluded from City Council review.[44] Moreover, the Nevada Supreme Court has held that a landowner cannot be denied access to abutting roadways, because all property that abuts a public highway has a special right of easement to the public road for access purposes and this is a recognized property right in Nevada.[45] The Court held that this right exists "despite the fact that the Landowner had not yet developed access."[46] Contrary to this Nevada law, the City denied this access application citing as the sole basis for the denial, "the various public hearings and subsequent debates concerning the development on the subject site." *Exhibit 59: 10 App LO 00002365.* In violation of its own City Code, the City required that the matter be presented to the City Council through a "Major Review." *Exhibit 59: 10 App LO 00002365.* As will be shown below, this access denial is also in furtherance of a City scheme to have the Landowners' property remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

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[43] This is an estimate as in 2017 the Tax Assessor placed an assessment value of approximately $88 Million on the Subject Property and the Tax Assessed Value is universally understood to be below market value. *Exhibit 36: App LO 00001923-1938.*

[44] *See* LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii).

[45] Schwartz v. State, 111 Nev. 998 (1995).

[46] Id., at 1003.

5. City Action #5 - Denial of an Over the Counter, Routine Fence Request

In August, 2017, the Landowners filed with the City a routine request to install chain link fencing to enclose two water features/ponds that are located on the 250 Acre Residential Zoned Land, which, again, they have the "right to develop." *Exhibit 55: 10 App LO 00002345-2352.* The City Code expressly states that this application is similar to a building permit review that is granted over the counter and not subject to City Council review.[47] The City denied the application, citing as the sole basis for denial, "the various public hearings and subsequent debates concerning the development on the subject site." *Exhibit 56: 10 App LO 2343.* In violation of its own Code, the City then required that the matter be presented to the City Council through a "Major Review" pursuant to LVMC 19.16.100(G)(1)(b) which states that "the Director determines that the proposed development could significantly impact the land uses on the site or on surrounding properties." *Exhibit 57: 10 App LO 00002354-2358.* The Major Review Process contained in LVMC 19.16.100 is substantial. It requires a pre-application conference, plans submittal, circulation to interested City departments for comments/recommendation/requirements, both a publicly noticed Planning Commission and City Council hearings. The City has required this extraordinary standard from the Landowners to install a simple chain link fence to enclose and protect two water features/ponds on their property. As will be shown below, this fence denial is also in furtherance of a City scheme to specifically target the Landowners' property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

6. City Action #6 - Denial of a Drainage Study

In an attempt to clear the property, replace drainage facilities, etc., the Landowners submitted an application for a Technical Drainage Study, which should have been routine, because the City and the Landowners already executed an On-Site Drainage Improvements Maintenance Agreement that allows the Landowners to remove and replace the flood control facilities on their property that they have a "right to develop." *Exhibit 78: 12 App LO 00002936-2947.* It is worth noting that the City's Yohan Lowie Bill requires a technical drainage study in order to grant entitlements. The City,

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47 *See* LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii).

however, in furtherance of its scheme to keep the Landowners' property in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value,[48] is mandating an impossible scenario - that **there can be no drainage study without entitlements while requiring a drainage study in order to get entitlements**. This is a clear catch-22 intentionally designed by the City to prevent any use of the Landowners' property.

7. City Action #7 - City Refusal to Even Consider the 133 Acre Property Applications

As part of the numerous development applications filed by the Landowners over the past three years to develop all or portions of the 250 Acre Residential Zoned Land, in October and November 2017, the necessary applications were filed to develop residential units on the 133 Acre Property consistent with the R-PD7 hard zoning. *Exhibit 47: 9 App LO 00002119-10 App LO 2256.*[49] *Exhibit 49: 10 App LO 00002271-2273*. Again, as determined by Judge Smith and affirmed by the Nevada Supreme Court, the Landowners have the "right to develop" this property. The City Planning Staff thoroughly reviewed the applications, determined that the proposed residential development was consistent with the R-PD7 hard zoning, that it met all requirements in the Nevada Revised Statutes, the City Planning Department, and the Unified Development Code (Title 19), and appropriately recommended approval. *Exhibit 51: 10 App. LO 00002308-2321*. Instead of approving the development, the City Council delayed the hearing for several months until May 16, 2018 - the same day it was considering the Yohan Lowie Bill, referenced above. *Exhibit 50: 10 App LO 00002285-2287.* The City put the Yohan Lowie Bill on the morning agenda and the 133 Acre Property applications on the afternoon agenda. The City then approved the Yohan Lowie Bill in the morning session. Thereafter, Councilman Seroka asserted that the Yohan Lowie Bill applied to deny development on the 133 Acre Property and moved to strike all of the applications for the 133 Acre

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[48] *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

[49] Although not required by code, GPA 7220 was "submitted under protest" by the Landowners to satisfy a housekeeping request made by the City. City Attorney, Brad Jerbic, admitted that "The law does not require a General Plan Amendment when the zoning is already in place and you're not requesting a change in the zoning." *Exhibit 6: 3 App LO 00000522 lines* 1114-1115. The City Staff Report admits the GPA was filed "at the city's request." *Exhibit 48: 10 App LO 00002258*.

Property filed by the Landowners. *Exhibit 6: 2 App LO 00000490 lines 206-207.* The other Council members were taken back and surprised by this clearly unconstitutional attempt to deny even the opportunity to be heard on the applications:

> Scott Adams (City Manager): "I would say we are not aware of the action. … So we're not really in a position to respond technically on the merits of the motion, cause it, it's something that I was not aware of." *Exhibit 6: 2 App LO 00000498 lines 443-450.*
>
> Councilwoman Fiore: "none of us had any briefing on what just occurred." *Id. at. lines 454-455.*
>
> Councilman Anthony: 95 percent of what Councilman Seroka said was, I heard it for the first time. So I – don't know what it means. I don't understand it." *Exhibit 6: 3 App LO 00000511 lines 810-811.*

The City then refused to allow the Landowners to be heard on their applications for the 133 Acre Property and voted to strike the applications. *Exhibit 51: 10 App LO 00002308-2321 and Exhibit 53: 10 App LO 00002327-2336.* Although not directly applicable to the 35 Acre Property at issue in this case, the strategic adoption and application of the Yohan Lowie Bill to strike all of the 133 Acre Property development applications is further evidence of the City's systematic and aggressive actions to deny any and all development on any part of the 250 Acre Residential Zoned Land. And, as will be shown below, this City action is also in furtherance of a City scheme to specifically target the Landowners' property to have it remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

8. City Action #8 - The City Announces It Will Never Allow Development on the 35 Acre Property, Because the City Wants the Property for a City Park and Wants to Pay Pennies on the Dollar

It is clear that the purpose for the repeated City denials is the City wants the Landowners' Property for a City park. In documents obtained from the City pursuant to a Nevada Public Records Request, it was discovered that the City has already allocated $15 million to acquire the Landowners' private property - "$15 Million-Purchase Badlands and operate." *Exhibit 35: 8 App LO 00001922.* In this same connection, Councilman Seroka issued a statement during his campaign entitled "The Seroka Badlands Solution" which provides the intent to convert the Landowners' private property into a "fitness park." *Exhibit 34: 8 App LO 00001915.* In an interview with KNPR

Seroka stated that he would "turn [the Landowners' private property] over to the City." *Id. at LO 00001917.* Councilman Coffin agreed, stating his intent in an email as follows: "I think your third way is the only quick solution…Sell off the balance to be a golf course with water rights (key). Keep the bulk of Queensridge green." *Exhibit 54: 10 App LO 00002344.* Councilman Coffin and Seroka also exchanged emails wherein they state they will not compromise one inch and that they "need an approach to accomplish the desired outcome," which, as explained, is to take the Landowners' property for a City park. *Exhibit 54: 10 App LO 00002340.*

In furtherance of this taking, the City has announced that it will never allow any development on the 35 Acre Property or any other part of the 250 Acre Residential Zoned Land. Councilman Seroka testified at the Planning Commission (during his campaign) that it would be "**over his dead body**" before the Landowners could use their private property for which they have a vested right to develop. *Exhibit 21: 4 App LO 00000930-931.* In reference to development on the Landowners' Property, Councilman Coffin stated firmly "I am voting against the whole thing," (*Exhibit 54: 10 App LO 00002341*) calls the Landowners' representative a "motherfucker," and expresses his clear resolve to continue voting against any development:

> I agree with you Chuck. Now that I have answered you from my home totally using personally paid – for resources like my personal cell phone thru a non-governmental server I have to submit this email to the aforementioned developer's lawyer. I could have said your characterization as dishonest would be improper but that would be subject to discovery as interpreted by his lawyers since the **Asshole** is suing me and claiming I am anti-sematic.
> **If this motherfucker gets his way in federal court <u>I will not be able to vote anymore on Badlands</u> [the 250 Acre Residential Zoned Land].** The **sonofabitch** asks for everything with the term "Badlands" including personal text messages, email, social media posts and comments [sic], voice mail and written notes or letters, handwritten.or.not [sic].
> The guy seems to be in the grip of several mental disorders including but not limited to narcissism and much of the obsessive compulsive spectrum. Greed can be an uncontrollable manifestation of his needs caused by his disorders. There can be no dishonesty if you are mentally ill but his illness has.cost [sic] local government millions and innocent bystanders like you a horrible cost of security in your home and loss of values.
> Better hope he does.not [sic] win his harassment lawsuits against Seroka and me because we will be in the grip of dictatorial capitalism.
> Bob Coffin. *Exhibit 76: 12 App LO 00002852. (Emphasis added).*

It is important to again note: 1) as affirmed by the Nevada Supreme Court, the Landowners have the vested "right to develop" their property; 2) the Landowners' property is not for sale; and,

3) the Clark County Assessor has placed a residential value of approximately $88 Million on the property. *Exhibit 36: 8 App LO 00001923-1938*. As it is universally understood that tax assessed value is well below market value,[50] the City's scheme to "Purchase Badlands and operate" for "$15 Million," (which equates to less than 6% of the tax assessed value and likely less than 1% of the fair market value) **shocks the conscience**.[51]

9. City Action #9 - The City Shows an Unprecedented Level of Aggression To Deny All Use of the 250 Acre Residential Zoned Land

The City then went to unprecedented lengths to interfere with the use and enjoyment of the property. Councilman Coffin sought "intel" against one of the Landowner representatives so that the intel could, presumably, be used to deny any development on the 250 Acre Residential Zoned Land (including the 35 Acre Property). In a text message to an unknown recipient, Councilman Coffin stated:

> Any word on your PI enquiry about badlands guy?
> While you are waiting to hear **is there a fair amount of intel on the scum** behind [sic] the badlands takeover? **Dirt will be handy if I need to get rough.** *Exhibit 81: 12 App LO 00002969. (emphasis supplied).*

Knowing the unconstitutionality of their actions, instructions were then given on how to hide communications regarding the 250 Acre Residential Zoned Land from the Courts. Councilman Coffin, after being issued a documents subpoena, wrote:

> "Also, his team has filed an official request for all txt msg, email, anything at all on my personal phone and computer under an erroneous supreme court opinion…So everything is subject to being turned over so, for example, your letter to the c[i]ty email is now public and this response might become public (to Yohan). I am considering only using the phone but awaiting clarity from court. **Please pass word to all your neighbors. In any event tell them to NOT use the city email address**

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[50] Nichols' on Eminent Domain, at §22.1, 22.6 (Although the assessor is required to appraise the value of the property, it is an open secret that the assessment rarely approaches the true market value.)

[51] This shows an incentive to deny all use of the property so the City can purchase the property for pennies on the dollar, which is an unconstitutional act in itself. To the extent the Government argues that the stunning level of bias is only evidenced from two Council members it should be noted that 3 other Council members have been deferring to these two Council members. *Exhibit 14: 4 App LO 00000781 lines 2760-2765*. It should also be noted that the Landowners are unaware of any rebuke of the publicly made statements of bias and intent to turn the Landowners' property into a City Fitness Park from the other Council members.

> **but call or write to <u>our</u> personal addresses. For now…PS. Same crap applies to Steve [Seroka]** as he is also being individually sued i[n] Fed Court and also his personal stuff being sought. This is no secret so let all your neighbors know." *Exhibit 54: 10 App LO 00002343. (Emphasis added).*

Then, Councilman Coffin actually advises Queensridge residents on how to circumvent the legal process and the Nevada Public Records Act[52] by instructing them on how not to trigger any of the search terms being used in the subpoenas. "Also, please pass the word for everyone to not use **B…l..nds in title or text of comms. That is how search works**." *Id. (emphasis supplied)*. Finally, There are emails between a City Councilman and a local lobbyist who has been referred to as one of the Las Vegas Valley's go-to people whenever businesses or organizations need someone to deal with local governments for the" which suggests a concern that "letters from certain pe[o]ple in queensridge on badlands issue" will "tie a link" to the Councilman. The email chain reads as follows:

> "Terry, this is from Councilman Coffin, please contact him directly should you need to. Susan"
>
> "Thanks, Got it. Terry Murphy"
>
> "It does not mention me by name but there will be other messages **w[h]ich tie a link.** [from Coffin]"
>
> "I will see what I can find…[from Murphy]"
>
> "Just got word from c[i]ty attorney office that someone has asked for letters from certain pe[o]ple in queensridge on badlands issue. The names are not familiar as t[h]ey seem like ordinary objectors. Will share when I get it today or Friday.[from Coffin]" *Exhibit 54: 10 App LO 00002337. (emphasis supplied).*

10. City Action #10 - the City Reverses the Past Approval on the 17 Acre Property

The City may assert that it approved a use on the 17 Acre Property and this proves the City's willingness to approve other uses on the 250 Acre Residential Zoned Land, including the 35 Acre Property at issue in this case. This 17 Acre approval was in early 2017 with a drastically different City Council and <u>each and every one</u> of the City actions cited above occurred after the 17 Acre approval, including the Yohan Lowie Bills that seek imprisonment of the Landowners' principles for

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[52] *See NRS 239.001* (use of private entitled in the provision of public services must not deprive members of the public access to inspect and copy books and records relating to the provision of those services)

attempting to use their property for which they have a "right to develop." Moreover, the City has tried to claw back the 17 Acre Property approvals. Whereas in approving the 17 Acre Property applications the City agreed the Landowners had the vested right to develop without a major modification, now the City is arguing in other documents that: 1) the Landowners have no property rights; and, 2) the approval on the 17 Acre Property was erroneous, because no major modification was filed:

> "[T]he Developer must still apply for a major modification of the Master Plan before a takings claim can be considered…" *Exhibit 37: 8 App LO 00001943 lines 18-20*;
>
> "Moreover, because the Developer has not sought a major modification of the Master Plan, the Court cannot determine if or to what extent a taking has occurred." *Id. at LO 00001944 lines 4-5*;
>
> "According to the Council's decision, the Developer need only file an application for a major modification to the Peccole Ranch Master Development Plan …to have its Applications considered." *Exhibit 39: 9 App LO 00002028 lines 11-15*;
>
> "Here, the Council's action to strike the Applications as incomplete in the absence of a major modification application does not foreclose development on the Property or preclude the City from ultimately approving the Applications or other development applications that the Developer may subsequently submit. It simply held that the City would not consider the Applications without the Developer first submitting a major modification application." *Id. at LO 00002032 lines 18-22.*

The irrefutable reason the City changed its position is the City is seeking to deny the Landowners their constitutional property rights so the Landowners' property will remain in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922*.

C. THE LANDOWNERS FILED SEVERAL INVERSE CONDEMNATION CLAIMS AGAINST THE CITY FOR THE TAKING OF THEIR 35 ACRE PROPERTY

On February 28, 2018, the Landowners filed five inverse condemnation[53] claims against the City (pursuant to this Court's order to sever the claims from the petition for judicial review) alleging

[53] Inverse condemnation is *a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127,1130 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258, 100 S. Ct. 2138 (1980).

that the City took their 35 Acre Property by inverse condemnation which requires payment of just compensation:

- First Claim for Relief in Inverse Condemnation, Categorical Taking. Landowners' Complaint, filed February 28, 2018 ("Complaint"), p. 10.
- Second Claim for Relief in Inverse Condemnation, Penn Central Regulatory Taking. Complaint, p. 12.
- Third Claim for Relief in Inverse Condemnation, Regulatory Per Se Taking. Complaint, p. 14.
- Fourth Claim for Relief in Inverse Condemnation, Non-regulatory Taking. Complaint, p. 15.
- Temporary Taking. Complaint, p. 16.

LEGAL ARGUMENT

The Landowners are seeking summary judgment on each of these inverse condemnation claims with the exception of the Penn Central claim.

A. STANDARD OF REVIEW

1. Standard for Summary Judgment

NRCP 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Further, "summary judgment ... may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." NRCP 56(c). In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026 (2005), the Nevada Supreme Court eliminated the "slightest doubt standard," holding that "[w]hile the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to do more than simply show that there is some 'metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor" and that "[t]he nonmoving party " 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'"[54]

[54] Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002) (quoting Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 442 (1993) (quoting Collins

Summary judgment may be sought "at any time after the expiration of 20 days from the commencement of the action." NRCP Rule 56(a). Here, more than 20 days has expired from the commencement of this action and, therefore, summary judgment is appropriately sought.

2. This Court Decides, as a Matter of Law, the Issue of Liability in Inverse Condemnation Cases - Whether a Taking has Occurred

This Court decides, as a matter of law, whether a taking has occurred in this case. McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (2006) ("whether the Government has inversely condemned private property is a question of law that we review de novo." Id., at 1119).[55] The Nevada Supreme Court in the case of County of Clark v. Alper, 100 Nev. 382, 391 (1984), recognized that "[I]nverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." Therefore, all "eminent domain" liability rules and principles cited herein apply equally to this "inverse condemnation" action.

B. GENERAL INVERSE CONDEMNATION LAW - JUST COMPENSATION IS CONSTITUTIONALLY MANDATED WHERE THERE IS A TAKING OF PRIVATE PROPERTY

The Fifth Amendment to the United States Constitution and Article 1 Section 8 of the Nevada State Constitution both provide that private property shall not be taken without payment of just compensation.[56] These constitutional provisions prohibit '[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

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v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983))); Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992) (quoting Collins, 99 Nev. at 302, 662 P.2d at 621)).

[55] *See also* Moldon v. County of Clark, 124 Nev. 507, 511, 188 P.3d 76, 79 (2008) ("whether a taking has occurred is a question of law.."); Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007) (date of taking determined by court to be August 1, 1990); City of Sparks v. Armstrong, 103 Nev. 619 (1987) (date of taking determined by the court to be September 12, 1972).

[56] "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. Const., V Amend. "Private property shall not be taken for public use without just compensation having first been made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made." Nev. Const, Art 1, § 8.

whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554, 1561 (1960). As Justice Holmes noted, even a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326 (1922). Nevada has a "rich history of protecting private property owners against Government takings" as the very "first right established in the Nevada Constitution's declaration of rights is the protection of a landowner's inalienable rights to acquire, possess and protect private property." McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1126-27 (Nev. 2006). The Nevada Supreme Court has held that any financial burden the government may bear is entirely "irrelevant" to the inquiry under the United States and Nevada Constitutions as to whether a taking has occurred. Sisolak, at 1127, Fn. 88.[57] Accordingly, where there is a taking of private property, just compensation must constitutionally be paid for the taken property and any other "desire" by the government to improve a public condition or "desire" to not pay just compensation to save money cannot trump that constitutional right to payment of just compensation.

These rules have a special application where vacant land, like the 35 Acre Property, is involved, because when the government engages in actions that interfere with the use and enjoyment of vacant land the "investment value" and "development value" are "frozen" and the value of the vacant and unimproved land to the owner is "destroyed."[58]

C. SUMMARY JUDGMENT IS APPROPRIATE ON ALL CLAIMS

1. THERE HAS BEEN A CATEGORICAL TAKING - Landowners First Claim for Relief in Inverse Condemnation - Complaint, ¶ 44-55

"Categorical [taking] rules apply when a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all

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[57] *See also* Arkansas Game and Fish Com'n v. U.S., 568 U.S. 23 (2012) (rejecting the argument that recognizing just compensation in a flooding case would unduly impede the government's ability to act in the public interest).

[58] Manke v. Airport Authority, 101 Nev. 755, 757, 710 P.2d 80, 81 (1985).

economical use of her property."[59] And, it is unanimously held that government action that seeks to preserve property for a future public improvement project so the government can acquire the property at a later date for a cheaper value, is a categorical taking.[60] The United States Supreme Court case of Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), is instructive. In Lucas, Mr. Lucas purchased two vacant lots in Charleston County, South Carolina to develop them residentially. Id., at 1006-07. Thereafter, the Beachfront Management Act (Act) was adopted that prevented the development on the two residential lots. Id., at 1008-09. Mr. Lucas conceded the validity of the Act as it was intended to protect the South Carolina beaches that were eroding, but challenged the Act as an uncompensated taking of his property and, after a bench trial, was awarded approximately $1,200,000.00 for the taking. Id., at 1009-10. On appeal to the United States Supreme Court, it was asserted that there was no taking, because Mr. Lucas could still use his property to exclude others, picnic, swim, camp in a tent, or live on the property in a moveable trailer, thereby leaving the property with some value and that his claim was improper since he failed to challenge the underlying validity of the Act. Id, at 1044-46. The United States Supreme Court rejected these minimal uses, held Mr. Lucas was not required to challenge the underlying Act as a precondition to bringing his inverse condemnation claim, and held that there had been a deprivation of all economic use of the property, resulting in a "categorical taking."

As explained above, according to the Judge Smith Orders, affirmed by the Nevada Supreme Court, the Landowners "have the right to develop" the 35 Acre Property, but have been deprived of all economic use of the 35 Acre Property by the City so the City can preserve the property for a City park. The City denied both the 35 Acre Property applications to develop and that the Master

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[59] McCarran Intern. Airport v. Sisolak, 122 Nev. 645, 663, 137 P. 3d 1110, 1122 (2006).

[60] Mentzel v. City of Oshkosh, 146 Wis.2d 804, 812-813, 432 N.W.2d 609, 613 (1988) (taking occurred when the City of Oshkosh denied the landowner's established liquor license because the City of Oshkosh desired to acquire the landowner's property and it sought to reduce the value of its acquisition.); City of Houston v. Kolb, 982 S.W.2d 949 (1999) (taking found where the City of Houston denied a subdivision plat submitted by the Kolbs for the sole purpose of keeping the right- of-way for a planned highway clear to reduce the cost for the State in acquiring the properties for the highway.)

Development Agreement (MDA), both of which met every single City requirement. The City will not even allow the Landowners to put up a fence. And, even though the Nevada Supreme Court has recognized Nevada landowners have a special right to access their property by way of adjacent roadways, the City has denied the Landowners' access. The City has even adopted the "Yohan Lowie Bills," special legislation that targets only these Landowners, which not only makes it impossible to develop, but unconstitutionally threatens fines, including imprisonment, for noncompliance. The City has strategically adopted this Yohan Lowie Bill so that it can use it as an excuse to deny all development applications on any part of the 250 Acre Residential Zoned Land. The City has also denied applications to develop the 133 Acre Property, showing there is no possibility that any development will ever be allowed on any one of the parcels that make up the 250 Acre Residential Zoned Land. Moreover, the City has created an impossible development scenario by requiring a drainage study in order to get entitlements to build, but then mandating that there can be no drainage study without entitlements. Additionally, the City Councilman, in whose jurisdiction the Landowners' Property is located (Seroka), has unabashedly testified before the City Planning Commission that "over his dead body" will development ever be allowed and another Councilman stated that the Landowners' principle is a "motherfucker" and that he will vote "against the whole thing." Finally, perhaps the best evidence of a categorical taking is the fact that these specific Landowners are well seasoned developers who have worked tirelessly to develop the 35 Acre Property, submitting all of the requisite development applications to the City, and the property lies vacant and useless today as a result of the City's actions. And, the reason the City will never allow development on the 35 Acre Property is because the City has a scheme to preserve the Landowners' property in a vacant condition to be "turned over to the City" for a "fitness park" for 1% of its fair market value. *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922*.

There is no genuine issue as to any of these material facts proving the categorical taking; they are all evidenced by the City's own documents. Therefore, summary judgment should be entered that the City has categorically taken the Landowners' 35 Acre Property.

2. THERE HAS BEEN A REGULATORY PER SE TAKING - Third Claim for Relief in Inverse Condemnation - Complaint, ¶ 77-84.

The Nevada Supreme Court has recognized two types of regulatory per se takings, both of which apply in this case.

a. There has been a Regulatory Per Se Taking as a Result of the City "Preserving" The Use of the 35 Acre Property

The Nevada Supreme Court held in the Sisolak, supra, case that a Per Se Regulatory Taking occurs where government action "preserves" property for future use by the government. Sisolak, supra, at 731. The facts of the Sisolak case are instructive. In Sisolak, the County of Clark (hereinafter "the County") adopted height restriction ordinance 1221 (hereinafter "Ordinance 1221") to provide a clear landing path for a newly expanded runway at McCarran International Airport.[61] After many years of litigation, the Nevada Supreme Court held that Ordinance 1221 was a taking of the landowners' airspace,[62] "because the right to fly through the airspace **is preserved** by the Ordinances [Ordinance 1221] and expected to continue into the future." Id. Relevant to this case, the Court determined that any physical invasion was "inconsequential" to the liability determination; rather the Court focused on how Ordinance 1221 "preserved" the airspace undeveloped.[63]

Here, the impact to the 35 Acre Property as a result of the City's actions is significantly more than the impact to the property surrounding the Airport as result of Ordinance 1221. As explained

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[61] Sisolak, at 1114-15.

[62] Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006). Landowners' counsel is very familiar with these cases as they litigated the airspace taking cases for nearly 14 years.

[63] Johnson v. McCarran Int'l Airport, Supreme Court Case No. 53677, *Exhibit 87* The Landowner understands that the Johnson case is unpublished. The case, however, is not cited for any specific rule, but rather to clarify the ruling by the Nevada Supreme Court in the Sisolak case. Also, the three main cases relied upon by the Court to find a taking in the Sisolak case were all non-physical taking cases. "[S]everal state supreme courts have concluded that height restriction ordinances, ***almost identical*** to the County's resulted in unconstitutional takings of property for public uses." Sisolak, at 668-69. The three cases relied upon by the Court for this position at footnote 72 of the opinion are all non-physical taking cases. *See* Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641, 646–47 (1964); Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237, 242 (1963); Yara Eng'g Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945).

above, the City is not only "preserving" the vacant nature of the 35 Acre Property, but it has entirely excluded the Landowners from using the property for any purpose whatsoever so the 35 Acre Property may be used for the City's future park. Accordingly, there has been a regulatory per se taking of the Landowners' Property under this Nevada Supreme Court standard.

b. There has been a Regulatory Per Se Taking as a Result of the City's Failure to Follow NRS Chapter 37

In the Sisolak case, supra, the Nevada Supreme Court held that a regulatory per se taking may also occur under Nevada's Constitution where the City seeks to acquire property for a public use listed in NRS 37.010, fails to follow the procedures set forth in NRS Chapter 37, and takes private property for a public use without paying just compensation for the taking. Id. Here, as explained above, the City actions have amounted to a de facto taking of the 35 Acre Property for a public park, a public use authorized in NRS 37.010(1)(j). The City, however, failed to follow any of the procedures set forth in NRS Chapter 37, which require the filing of a complaint to take the Property, the description in the complaint of the Property being taken, and a service of summons / lis pendens. NRS 37.060, 37.070, and 37.075. The City has also failed to offer just compensation for the taking. Instead, the Landowner has been forced to bring this inverse condemnation cause of action. Accordingly, there has been a regulatory per se taking under this Nevada Supreme Court standard.

The Landowners have properly pled this Regulatory Per Se Taking Claim and the above facts supporting the claim and, accordingly, the City's Motion to Dismiss the claim should be denied.

3. THERE HAS BEEN A NON-REGULATORY TAKING ALSO REFERRED TO AS A "DE FACTO" TAKING - Sixth Claim for Relief in Inverse Condemnation - Complaint, ¶ 85-93

Generally, a non-regulatory / de facto taking occurs when a government entity takes action that substantially deprives an owner of the use and enjoyment of his property.[64] In this connection, it is well settled that there does not have to be a physical invasion to establish a non-

[64] State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015); Envtl. Indus., Inc. v. Casey, 675 A.2d 392 (Pa. Commw. 1996).

regulatory / de facto taking.[65] Nichols on Eminent Domain,[66] the foremost authority on eminent domain law, generally describes this cause of action as follows: "[c]ontrary to prevalent earlier views, it is now clear that a de facto taking does **not** require a physical invasion or appropriation of property. Rather, a substantial deprivation of a property owner's use and enjoyment of his property may, in appropriate circumstances, be found to constitute a 'taking' of that property or of a compensable interest in the property..." 3A Nichols on Eminent Domain §6.05[2], 6-65 (3rd rev. ed. 2002). (emphasis supplied). Nevada law and the nearly unanimous law from other state and federal jurisdictions support a finding of a de facto taking in this case.

a. Nevada Law Supports a Finding of a Non-regulatory / De Facto Taking

The Nevada Supreme Court has recognized that Nevada "enjoys a rich history of protecting private property owners against Government takings," and, accordingly, has adopted expansive

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[65] Petition of Borough of Boyertown, 77 Pa. Commw. 357, 466 A.2d 239 (1983).

[66] Nichols is considered the foremost authority on eminent domain law in the country and the Nevada Supreme Court has repeatedly relied upon Nichols to adopt and support Nevada eminent domain law. *See e.g.* Buzz Stew v. City of North Las Vegas, 181 P.3d 670, 671, 672 (2008); State Dept. of Transp. v. Cowan, 120 Nev. 851, 854, 103 P.3d 1, 3 (2004); County of Clark v. Sun State Properties Ltd., 119 Nev. 329, 336, 72 P.3d 954, 958 (2003); City of Las Vegas v. Bustos, 119 Nev. 360, 362, 75 P.3d 351, 352 (2003); City of Las Vegas v. Pappas, 119 Nev. 429, 441, 76 P.3d 1, 10 (2003); National Advertising Co. v. State, Dept. of Transp., 116 Nev. 107, 113, 993 P.2d 62, 66 (2000); Argier v. Nevada Power Co., 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998); Schwartz v. State, 111 Nev. 998, 1002, 900 P.2d 939, 942 (1995); Stagecoach Utilities Inc. v. Stagecoach General Imp. Dist., 102 Nev. 363, 365, 724 P.2d 205, 207 (1986); Manke v. Airport Authority of Washoe County, 101 Nev. 755, 759, 710 P.2d 80, 81 (1985); Sloat v. Turner, 93 Nev. 263, 268, 563 P.2d 86, 89 (1977); State v. Olsen, 76 Nev. 176, 187, 351 P.2d 186, 192 (1960).

property rights[67] in the context of inverse condemnation cases to protect Nevada landowners.[68] In this connection, the Court held that a non-regulatory / de facto taking occurs 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."[69] To support this rule, the Court cited to the Ninth Circuit Richmond Elks Hall case that holds "[t]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property rights."[70] In Richmond Elks Hall, the government action caused several of the landowner's tenants to vacate, leaving less than one-third of the property occupied. Id., at 1329-30. The Ninth Circuit held that this rendered the landowner's property "unuseable in the open market" and "severely limited" the property's use for its intended purposes, resulting in a de facto taking. Id., at 1330-31.

Here, the City actions and the impact to the Landowners' property is significantly more extreme than that which justified the taking in the Richmond Elks Hall case. In Richmond Elks Hall, the government action, although severe, still allowed the landowner to rent nearly 1/3 of the property. The aggregate of City actions in this case, listed above, have rendered the 35 Acre vacant property entirely useless and valueless. Accordingly, there has been a non-regulatory / de facto taking of the Landowners' property.

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[67] Further proof that Nevada has adopted "expansive" property rights for landowners in the context of eminent domain proceedings is the fact that in 2006 and 2008, the Nevada electorate voted overwhelmingly to expand Nevada Landowners' eminent domain rights by amending the Nevada Constitution through the initiative process to adopt the Peoples Initiative to Stop the Taking of Our Land (PISTOL), which was written by Landowners' counsel. PISTOL was approved by over 62% of the Clark County electorate in both 2006 and 2008. These PISTOL eminent domain amendments are now included as article 1, section 22 of the Nevada State Constitution.

[68] McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1126-27 (Nev. 2006).

[69] State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015).

[70] Richmond Elks Hall Assoc. v. Richmond Red. Agency, 561 F.2d 1327, 1330 (9th Cir. Ct. App. 1977).

b. Eminent Domain Law From Other State and Federal Jurisdictions Supports a Finding of a Non-regulatory / De Facto Taking

The great majority of other state and federal jurisdictions have adopted similar non-regulatory/de facto taking law that also supports a finding of a de facto taking in this case. Generally, these Courts hold that: 1) a non-regulatory/de facto taking occurs where a government entity substantially deprives an owner of the use and enjoyment of his property; and 2) there does not have to be a physical invasion to establish a de facto taking.[71] Two cases are instructive. In Citino v. Redevelopment Agency of City of Hartford,[72] the Court held that "[o]nce the results of the acts of the authority have made it clear that the property owner is no longer able to use its property as it had before, and the landowner's capacity to dispose freely of its property has been for all practical purposes arrested, property has been taken in the constitutional sense."[73] In McCracken v. City of Philadelphia, the Court held that a court should focus on the "cumulative effect" of government action and "[a] de facto taking occurs when an entity clothed with eminent domain power substantially deprives an owner of the use and enjoyment of his property" or where there is an "'adverse interim consequence' which deprives an owner of the use and enjoyment of the property."[74]

It cannot be disputed that the City action in this case is a substantial deprivation of the Landowners' use and enjoyment of their Property. The Landowners have diligently pursued development on the 35 Acre Property for which they have a "right to develop," only to be deprived by the City of all opportunities to use and enjoy their property. Therefore, the case law from other state and federal jurisdictions supports a finding of a non-regulatory / de facto taking in this case.

4. ADOPTING THE CROCKETT ORDER WILL ADD A JUDICIAL TAKING CLAIM

Finally, as explained above, if this Court elects to follow the Crockett Order that entirely ignore the Landowners' hard zoning and vested right to develop, this will add a judicial taking claim,

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[71] The de facto taking law from other state and federal jurisdictions is lengthy and, therefore, attached hereto as *Exhibit 86*

[72] Citino v. Redevelopment Agency of City of Hartford, 721 A.2d 1197 (Conn.App. 1998), o*verruled on other grounds*.

[73] Id., at 1209. Emphasis supplied.

[74] McCracken v. City of Philadelphia, 451 A.2d 1046, 1050 (1982).

because the Crockett Order recharacterize the Landowners' 35 Acre Property from a hard zoned residential property with the vested "rights to develop" to a public park / open space.

D. THE LANDOWNERS' TAKING CLAIMS ARE "MUCH MORE FORMIDABLE" AS: 1) THE CITY ACTION TARGETS THEIR SINGLE PROPERTY; 2) THE PROPERTY IS VACANT; AND 3) THE CITY'S ACTIONS ARE IN BAD FAITH

1. Courts are "Much More" Inclined to Find a Taking Where the Government Action Singles out and Targets One Property

It is well settled that where the government engages in taking actions that single out and target one particular property or one particular landowner, the taking claim becomes "much more formidable:"

> In analyzing 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. See, e.g., A.A. Profiles, Inc. v. Ft. Lauderdale, 850 F.2d 1483, 1488 (CA11 1988); Wheeler v. Pleasant Grove, 664 F.2d 99, 100 (CA5 1981); Trustees Under Will of Pomeroy v. Westlake, 357 So.2d 1299, 1304 (La.App.1978); see also 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); *1074 Huttig v. Richmond Heights, 372 S.W.2d 833, 842–843 (Mo.1963). As one early 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).[75]

Here, it is undisputed that all of the above cited City actions single out and target only the Landowners and their Property. For example, 1) the Bills to prohibit development on the 250 Acre Residential Zoned Land are referred to as the "Yohan Lowie Bill" by one of the City's own councilpersons; 2) another City councilperson says "over his dead body" will development be allowed on this one property; and 3) another City councilperson calls a Landowner representative a "motherfucker," is trying to get "dirt" on the Landowners so he can get "rough," and that he will "vote against the whole thing [related to this one property]." Accordingly, the City action in targeting solely the Landowners and their singular property makes the Landowners' taking claims "much more formidable."

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[75] Lucas, at 1074 (law cited in Justice Stevens dissent).

2. Courts are More Inclined to Find a Taking Where the Government Action Targets Vacant Property

A taking claim also becomes much more formidable when the government targets vacant land. Courts have recognized that "possession of unimproved and untenanted property is a desirable economic asset only if: '1) the property may appreciate in value; and, 2) the owner is afforded the opportunity to improve the property toward whatever end he might desire."[76] The Nevada Supreme Court recognizes that when vacant property is taken both the "investment value" and "development value" are "frozen" and the value of vacant and unimproved land to the owner is "destroyed."[77] The Federal Claims Court has held that where vacant land is targeted for a taking no prudent person would be interested in purchasing it and it would be futile to begin the development process.[78] The Washington Supreme Court has also acknowledged that the effect of condemnation activity targeting vacant land "chains" landowners to the property.[79] Finally, it has been recognized that these government acts result in improperly making the landowner an "involuntary lender" who is forced to finance public projects without the payment of just compensation.[80]

The Landowner's 35 Acre Property is vacant and unimproved with a "right to develop." Under Nevada law, the City's actions in denying this right to develop have "frozen" and "destroyed" the only use of this vacant property – its investment potential and development potential. Further, the City's actions forced the Landowners to be involuntary trustees and bear a disproportionate burden in financing the City park as the Landowners have been forced to hold their property in a vacant condition until the City gets around to formally taking the property for the park. Accordingly, the marketability and development potential of the Landowners' vacant property has been eliminated by the City's actions making the Landowners taking claims much more formidable.

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76 Ehrlander v. State, 797 P.2d 629, 634 (1990).

77 Manke v. Airport Authority, 101 Nev. 755, 757, 710 P.2d 80, 81 (1985).

78 Althaus v. U.S., 7 Cl.Ct. 688 at 695 (1985).

79 Lange v. State, 86 Wash.2d 585, 595, 547 P.2d 282, 288 (1976).

80 Community Redevelopment Agency of City of Hawthorne v. Force Electronics, 55 Cal.App.4th 622, 634, 64 Cal.Rptr.2d 209 (1997).

3. Although Not Necessary, Some Courts Consider the Government's Bad Faith Actions When Finding a Taking

"Whether the governmental entity acted in bad faith may also be a consideration in determining whether a governmental action gives rise to a compensable taking."[81] No reasonable person could possibly argue that the City's actions, described above, are anything but bad faith. Accordingly, this is another grounds for which the Landowners' taking claims are "much more formidable."

E. THE LANDOWNERS' CLAIMS ARE SUPPORTED BY ANOTHER EIGHTH JUDICIAL DISTRICT COURT ORDER

Although not binding on this Court, it is worth noting that another Eighth Judicial District Court Judge agrees with the Landowner's position in this case and found a taking under similar facts. In Boulder Karen, LLC v. County of Clark, Eighth Judicial District case number A-10-630446-C, the Honorable Judge Rob Bare not only held it was improper to dismiss inverse condemnation claims, but granted a motion for summary judgment finding a de facto taking where the County of Clark denied Boulder Karen's development request because a public roadway "will be going through the landowner's property."[82] Similar to the County in Boulder Karen, the City is denying all use of the Landowners' 35 Acre Property so the City can use it for a park in the future.

F. CONCLUSION RELATED TO SUMMARY JUDGMENT FOR LIABILITY

All of the above listed City actions are confirmed in the City's own documentation which cannot be disputed and these City actions clearly meet the elements of a taking. Accordingly, since liability for a taking is a question of law to be decided by this Court, it is respectfully requested that this Court grant the Landowners' Motion for Summary Judgment and enter an order that the Landowners' 35 Acre Property has been taken mandating payment of just compensation.

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[81] Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468, 487 (Tx. 2012). *See also* City of Austin v. Teacgue, 570 S.W.2d 389 (Tx. 1978) (recovery of damages warranted where the government's action against an economic interest of an owner is for its own advantage.).

[82] *Exhibit 88, page 3 lines 1-2.*

ARGUMENT REGARDING INDIVIDUAL ISSUES THE CITY MAY RAISE REGARDING LIABILITY

The City may raise several arguments to deny liability, nearly all of which have already been presented and rejected by the United States and Nevada Supreme Courts.

A. ARGUMENT REGARDING THE STATUTE OF LIMITATIONS AND WAIVER

The City may assert that the Landowners filed their claims too late, because, according to the City, a PR-OS (parks, recreation, open space) designation was written over the 35 Acre Property on the City's General "Plan" map in 1992 and the statute of limitations to challenge this designation is only 15 years, meaning the statute ran in 2007. This argument presupposes that merely writing "PR-OS" over the 35 Acre Property on the City's General Plan map amounts to a taking. Otherwise, the statute of limitations could not commence in 1992. This argument, however, has been repeatedly rejected by the Nevada Supreme Court.

1. Under Nevada Inverse Condemnation Law a Designation on the City's General Plan Map Does Not Amount to a Taking; Liability Does Not Arise Until the Government Implements the Plan

Well-settled Nevada inverse condemnation law holds that merely writing a land use designation over a parcel of property on a City land use plan is "insufficient to constitute a taking for which an inverse condemnation action will lie."[83] This rule and its policy are set forth by the Nevada Supreme Court as follows:

> If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of the several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no hyperbole to suggest that if every landowner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect

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[83] Sproul Homes of Nev. v. State ex rel. Dept of Highways, 96 Nev. 441, 443 (1980) *citing to* Selby Realty Co. v. City of San Buenaventura, 169 Cal.Rptr. 799, 514 P.2d 111, 116 (1973) (Inverse claims could not be maintained from a City's "General Plan" showing public use of private land). *See also* State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015) (City's amendment to its master plan to allow for a road widening project on private land did not amount to a regulatory taking).

> of the plan upon his land, the courts of this state would be inundated with futile litigation.[84]

Nevada law is very clear that the government cannot become liable for a taking until the government "takes steps" to implement or enforce the planning document against a particular parcel of property or otherwise takes action to acquire or preclude use of the property: "[t]he pivotal issue . . . is whether the public agency's activities have gone beyond the planning stage to reach the "acquiring stage.'"[85] Simply stated, it is the "government action" to enforce the land use designation on the general land use plan that is relevant; not what was written on the "planning" document.

Therefore, merely writing "PR-OS" over the 35 Acre Property on the City's 1992 general "plan" does not begin the commencement of the statute of limitations period for the Landowners' inverse condemnation claims. Instead, it is the aggressive and systematic actions taken by the City (listed above) to preclude any and all use of the 35 Acre Property in order to preserve the property for the City park that gives rise to the taking claims in this case. All of these City taking actions occurred in or after 2015.[86] Therefore, all City actions leading to the taking in this case have occurred within the 15-year statute of limitations period.

2. The Landowner Can Challenge a Pre-existing Regulation That Amounts to a Taking

The City may also assert that because the PR-OS was written on the City's 1992 "plan" prior to the Landowners purchasing the 35 Acre Property, the Landowners cannot now challenge as a taking the City's current aggressive and systematic actions to implement the PR-OS (park – open space) on the 35 Acre Property. As shown above, however, the inverse condemnation claims in this case are properly based on the City taking steps after 2015 to systematically and aggressively apply the PR-OS to the Landowners' Property. The claims are not based on the City writing "PR-OS" over the 35 Acre Property on a City land use map back in 1992. More importantly, in Palazzolo v. Rhode

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[84] Id., at 444.

[85] State v. Barsy, 113 Nev. 712, 720 (1997). *See also* State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015) (citing to federal law that even where there is no government regulation, if the government has "taken steps" that render the property useless or valueless to the landowner, there is a taking. Id., at 742).

[86] Further discovery may show other City actions that should be considered as part of the taking prior to this 2015 date.

Island, the United States Supreme Court rejected the following argument which is identical to the City's waiver argument in this case: "[a] purchaser or a successive title holder like petitioner is deemed to have notice of any earlier-enacted restriction and is barred from claiming that it effects a taking."[87] In rejecting this argument, the Court reasoned that "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."[88] Accordingly, the Landowners clearly have the right to challenge any and all restrictions placed on the 35 Acre Property by the City.

Moreover, a landowner's knowledge of a potential taking of property at the time he purchased the property is "totally irrelevant" in an eminent domain proceeding.[89] This is the case even if the landowner's claim is one in inverse condemnation.[90] The public policy reason for this rule is clear. First, it is well settled that condemnation "is not a taking of rights of persons in the ordinary sense but an appropriation of the land or **property** itself."[91] It is an in rem (property) proceeding that focuses on the use and value of the taken **property** to arrive at "just compensation."[92] The Nevada State Constitution recognizes this rule, providing that "[i]n all

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[87] Palazzolo v. Rhode Island, 533 U.S. 606, 626, 121 S.Ct. 2448, 2462 (2001).

[88] Palazzolo at 627.

[89] Depart. of Transp. V. Newmark, 34 Ill.App.3d 811, 814, 341 N.E.2d 133, 136 (Ill. App. 1975) ("[t]he admission of evidence and counsel's arguments on the question of defendants 'prior knowledge,' other property holdings, and business acumen, were improper because they were totally irrelevant to the issues before the jury" and manifestly prejudicial); See also Babinec v. State, 512 P.2d 563, 572 (Alaska 1973) (" evidence of prior knowledge is ordinarily irrelevant and inadmissible" to a claim for original property value and severance damages to property not taken.); and, Boehm v. Backs, 493 N.W.2d 671, 673(N.D. 1992) ("[t]he irrelevance of knowledge of the expected improvement is confirmed by precedents elsewhere" for recovery of business loss resulting from the government permanently impairing access to the business property).

[90] *See* Depart. of Transp. V. Newmark, 34 Ill.App.3d 811, 814, 341 N.E.2d 133, 136 (Ill. App. 1975).

[91] "It is well settled that 'a condemnation proceeding is a proceeding in rem." U.S. v. 6.45 Acres of Land, 409 F.3d 139, 145-46 (2005) (internal citations omitted). "In rem"- Latin for "against a thing" involving or determining the status of a thing and therefore the rights of person generally with respect to that thing." Blacks Law Dictionary, 797 (Bryan A. Garner ed., 7th ed., West 1999).

[92] Id.

eminent domain actions where fair market value is applied, it shall be defined as the highest price **the property** would bring on the open market" and that "the taken or damaged **property** shall be valued at **its** highest and best use."[93] Here, the res[94] (or property) that has been taken is the 35 Acre Property. This means that the only relevant inquiry in this "in rem" action is the "government action" that rises to the level of a taking of the Landowners' Property, not what the Landowners may have known about the taking.

Related to the statute of limitations argument, the City may also assert that the Landowners waived their property rights, because they "stepped into the shoes" of their predecessor. There is no waiver of property rights, because, as explained above, the entire 250 Acre Residential Zoned Land has been hard zoned residential since 1986, meaning the Landowners "stepped into" a residential hard zoned property with vested rights to develop.

3. Statute of Limitations and Waiver Do Not Apply as Any Land Use Designation for the Subject Property from the 1990's was "Repealed" by the City in 2001

The statute of limitations and waiver arguments fail for the additional reason that a PR-OS or other open space designation has not always been on the 35 Acre Property. City Ordinance 5353, which was "passed, adopted and approved" by the City Council on August 15, 2001, confirmed the hard zoning and the land use designation of R-PD7 and states unequivocally that: "all ordinances or parts of ordinances or sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Las Vegas, Nevada 1983 Edition **in conflict herewith are hereby repealed**." *Exhibit 2: 1 App LO 00000003.* This means that even if PR-OS, or some similar open space designation, was written over the 35 Acre Property on a City land use plan prior to August 15, 2001, it was repealed and replaced with hard zoning and a land use designation of R-PD7 (allowing 7 residential units per acre) going forward.[95]

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[93] Nev. Const., art. 1, sec. 22 (3), (5) (emphasis supplied).

[94] "Res" - Latin for "thing" an object, interest or status, as opposed to a person. Blacks Law Dictionary, 1307 (Bryan A. Garner ed., 7th ed., West 1999).

[95] It was discovered that sometime on or about 2005 a fugitive PR-OS (Parks Recreation/Open Space) designation appeared on the City's general plan over the Landowners' property. The Landowners demanded that the City remove the improper PR-OS designation, but the City refused even though they acknowledged that it was improperly placed on the Landowners' property. *Exhibit 9: 3 App LO 00000619-62.* "Brad Jerbic: If I can jump in too and just say that

B. ARGUMENT REGARDING A 25 DAY STATUTE OF LIMITATIONS

The City may additionally assert that the Landowners' inverse condemnation claims are barred, because, according to the City, the Landowners need to challenge the underlying City action before bringing inverse condemnation claims and this challenge is time barred under NRS 278.0235's 25 day time limit. First, the United States Supreme Court has pointedly rejected this City argument, holding that a landowner that alleges a taking as a result of government action / regulation is not required to challenge the underlying purpose or validity of the regulation as a precondition to bringing a taking action.[96] Instead, the landowner may in the first instance assert that the regulation or government action results in a taking of his property. Second, the Nevada Supreme Court has adopted a 15 year statute of limitations to bring an inverse condemnation action.[97] Finally, it is well settled Nevada law that the constitutional right to just compensation for a taking is a "self executing" right and cannot be preconditioned by a very short 25 day limitations period.[98] The Court has held

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everything Tom said is absolutely accurate. The R-PD7 preceded the change in the General Plan to PR-OS. There is absolutely no document that we could find that really explains why anybody thought it should be changed to PR-OS, except maybe somebody looked at a map one day and said, hey look, it's all golf course. It should be PR-OS. I don't know." *Exhibit 77: 12 App LO 00002924.*

[96] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (landowner may proceed with taking action based on adoption of Beachfront Management Act and impact from this Act to his property even though the landowner "believed it unnecessary to take issue with either the purpose behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes." Id., at 1020). *See also* Palazzolo, supra, ("The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the **Council** determining the permitted use for the land." . . . "A final decision by the **responsible state agency** informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property." . . . "While a landowner must give a **land-use authority** an opportunity to exercise its discretion, once […] the permissible uses of the property are known to a reasonable degree of certainty, a taking claim is likely to have ripened." Id. at 618, 620 (emphasis supplied)).

[97] White Pine Limber v. City of Reno, 106 Nev. 778 (1990).

[98] Alper v. Clark County, 93 Nev. 569, 572, 571 P.2d 810, 811 (1977) (County sought to dismiss inverse condemnation claims, claiming owner had failed to file its claim under a six month claim statute per NRS 244.245 and NRS 244.250. Court held government cannot impose a precondition of the federally created and protected right to receive just compensation when private property is taken for public use.). *See also* State v. Linnecke, 86 Nev. 257, 260, 468 P.2d 8, 9 (1970); and, Schwartz v. State, 111 Nev. 998, 1003, 900 P.2d 939 (1995).

that even a six month claims statute cannot be imposed on a landowner in a taking action, reasoning "to impose a requirement of compliance with our claims statutes would allow a state to impose a precondition to sue on a federally created and protected right."[99] The Court held that "the claims statutes should not be construed to apply to actions for inverse condemnation, for to do so would deny due process of a constitutionally guaranteed right."[100] The reason for this rule is:

> "The right to just compensation for private property taken for the public use is guaranteed by both the United States and the Nevada Constitutions. [Internal Citations omitted.] These provisions, as prohibitions on the state and federal governments, are self executing. The effect of this is that they give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one. As a corollary, such rights cannot be abridged or impaired by statute."[101]

The Court went on to hold that the "constitutional guaranty [of just compensation] needs no legislative support, and is beyond legislative destruction."[102] Accordingly, the Landowners were not required to bring a challenge to the City's actions within the NRS 278.0235 25 day limitations period.

C. ARGUMENT REGARDING EXHAUSTION OF ADMINISTRATIVE REMEDIES / RIPENESS

1. The Exhaustion of Administrative Remedies Requirement for Ripeness Does Not Apply to Four of the Landowners' Inverse Condemnation Claims

The City may allege that the Landowners' claims are not ripe in these proceedings. First, the Nevada Supreme court has held that a ripeness / exhaustion of administrative remedies argument does not apply to the four inverse condemnation claims for which the Landowners' are requesting summary judgment - regulatory per se, non-regulatory / def facto, categorical, or temporary taking of property.[103] The reason for this rule is that the taking is known in these type of inverse

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99 Id., at 574. Emphasis added.

100 Id. Emphasis added.

101 Id., at 572. Emphasis added.

102 Id., at 572, *internal citations omitted*. Emphasis added.

103 Hsu v. County of Clark, supra, ("[d]ue to the "per se" nature of this taking, we further conclude that the landowners were not required to apply for a variance or otherwise exhaust their administrative remedies prior to bringing suit." Id., at 732); McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006) ("Sisolak was not required to exhaust administrative remedies or obtain a final decision from the Clark County Commission by applying for a variance before bringing his inverse condemnation action based on a regulatory per se taking of his private property." Id. at 664).

condemnation claims and, once the taking is known, the payment of just compensation is "self-executing," meaning there can be no barriers or preconditions (such as exhaustion of administrative remedies) to this constitutional guarantee.[104]

2. Even if a Ripeness / Exhaustion of Administrative Remedies Analysis Applies, the Landowners' Have Met the Standard

Although the ripeness analysis does not apply to four of the Landowners' claims (it only applies to the Penn Central Regulatory Takings Claim that is not at issue in this motion), if this Court does apply the analysis, all claims are ripe[105]

a. The Landowners Made At Least One Meaningful Application and It Would be Futile to Seek Any Further Approvals From the City

"While a landowner must give a land-use authority an opportunity to exercise its discretion, once […] the permissible uses of the property are known to a reasonable degree of certainty, a [regulatory] taking claim [Penn Central claim] is likely to have ripened."[106] The purpose of this rule is to understand what the land use authority will and will not allow to be developed on the property at issue. But, "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[107] "[W]hen exhausting available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review."[108] In Del Monte Dunes[109] the United States Supreme Court held that a taking claim

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104 Alper v. Clark County, 571 P.2d 810, 811-812 (1977).

105 The Nevada Supreme Court has stated regulatory takings claims are generally "not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41 (2015) (*quoting* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)).

106 Palazzolo v. Rhode Island, 533 U.S. 606, 620, (2001) ("The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land." *Id.,* at 618.).

107 Palazzolo, at 621. *Citing to* Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed. 2d 882 (1999).

108 State v. Eighth Judicial Dist. Court of Nev., 351 P.3d 736, 742 (Nev. 2015). For example, in Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed. 2d 882 (1999) "[a]fter five years, five formal decisions, and 19 different site plans, [internal citation omitted] Del Monte Dunes decided the city would not permit development of the property under any circumstances." Id., at 698. "After reviewing at some length the history of

was ripe where the City of Monterey required 19 changes to a development application and then asked the landowner to make even more changes, causing the landowner to file inverse condemnation claims. The United States Supreme Court approved the Ninth Circuit opinion as follows: "to require additional proposals would implicate the concerns about repetitive and unfair procedures" and "the city's decision was sufficiently final to render [the landowner's] claim ripe for review."[110] The United States Supreme Court re-affirmed this rule in the Palazzolo case, holding the "Ripeness Doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted uses."[111]

Here, the Landowners already gave the City the opportunity to approve any use of the 35 Acre Property and the City denied each and every use. As explained above, the City denied the Landowners' applications to develop the 35 Acre Property, even though the applications met every City Code requirement and the City's own planning staff recommended approval. The Landowners also worked on a Master Development Agreement (MDA) with the City for over two years that would have allowed development of the 35 Acre Property with the other parcels included in the 250 Acre Residential Land. The City made over 700 changes to the MDA, sent the Landowners back to the drawing board at least 16 times to redo the MDA, and the Landowners agreed to more concessions than any landowner ever to appear before the City Council. The MDA even included the requirements for a major modification and the City denied the MDA altogether. *Exhibit 24: 5*

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attempts to develop the property, the court found that to require additional proposals would implicate the concerns about repetitive and unfair procedures expressed in MacDonld, Commer & Frates v. Yolo County, 477 U.S. 340, 350 n. 7, (1986) [*citing* Stevens concurring in judgment from Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 at 205-206, 105 S.Ct. 3108 at 3126 (1985)] and that the city's decision was sufficiently final to render Del Monte Dunes' claim ripe for review." Del Monte Dunes, at 698. The "Ripeness Doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted uses." Palazzolo v. Rhode Island, at 622.

109 526 U.S. 687, 119 S.Ct. 1624 (1999).

110 Del Monte Dunes, at 698.

111 Palazzolo, at 622.

App LO 00001128-112. The Landowners could not have submitted more comprehensive and detailed applications and made more concessions. Moreover, the Landowners cannot even get a permit to fence ponds on the 250 Acre Residential Zoned Land or a permit to access the property. The City adopted two Bills that effectively eliminate all use of the entire 250 Acre Residential Zoned Land. Councilman Seroka stated that "over his dead body" will development be allowed and Councilman Coffin referred to the Landowners' representative as a "motherfucker" and put in writing that he will vote against any development on the 35 Acre Property. The City has even sought funding to purchase the 250 Acre Residential Zoned Land for 1% of its fair market value[112] for a City Park thereby showing the motive to prevent any use of the property (which is not even a requirement to show a taking). Accordingly, the Landowners claims are ripe and it is futile to submit any further applications with the City. *Exhibits 25-33.*

b. Any Allegation that the MDA Application was Grandiose is Profoundly Disingenuous

The City may assert that the Landowners' MDA proposal was a "grandiose development proposal" and these are not the type of development applications that, when denied, can give rise to a taking claim. This would be a disingenuous argument. First, the City mandated that the Landowners develop the entire 250 Acre Residential Zoned Land under one development - the MDA.[113] Second, the MDA was, for the most part, drafted entirely by the City itself.[114] Third, when the Landowners filed an application to develop the 35 Acre Property as one parcel, apart from the

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[112] *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

[113] The Landowners explained that they were going through this process at the request of the City: "[w]e've been working on this agreement [MDA] at length for two years, because the direction of this Council was that you prefer to have a holistic, universal plan, and we have done that." *Exhibit 24: 4 App LO 00000990 lines 375-377.* Importantly, the Landowners expressed their concern that the time, resources, and effort it was taking to negotiate the MDA may cause them to lose the property. *Exhibit 5: 2 App LO 00000447-450.*

[114] The changes to the MDA were extensive and always at the request of the City: "[w]e have done that through many iterations, and those changes were not changes that were requested by the developer. They were changes requested by the City and/or through homeowners to the City." *Exhibit 24: 4 App LO 00000990 lines 378-380.* The MDA went through at least 16 versions, meaning that the City sent the Landowners back to the drawing board at least 16 times to give more concessions and revise the MDA. Exhibit 28, which consists of 16 versions of the MDA generated from January, 2016 to July, 2017. *Exhibit 28: 5 App LO 00001188- 8 App L0 00001835.*

MDA and the other 250 acres, the City rejected this application for only one reason - the City wanted one MDA that would cover any and all development of all parcels (17, 35, 65, or 133 acre parcels). *Exhibit 5: 2 App LO 00000363, 372, 376.* In denying the applications to develop the 35 Acre Property individually, the City assured the Landowners that the MDA would be approved, stating we are "very, very close" and "we are going to get there." *Exhibit 5: 2 App LO 00000367 line 336; 370 line 408; Exhibit 5: 2 App LO 00000466 lines:2987-2989; 475 lines 3251 to 476 line 3256; Exhibit 5: 2 app LO 00000467 lines 3020-3021.* As explained above, however, the City also flatly denied the MDA altogether.

c. The Crockett Order Does Not Defeat Ripeness

The City may also assert that the Crockett Order defeats ripeness as it holds a "major modification" application is necessary to develop and the Landowners never submitted a major modification application to the City. This argument, however, has been rejected in the two above cited Judge Smith Orders, which were affirmed by the Nevada Supreme Court. As explained, no "major modification" application is necessary - the property is already zoned residential, its intended use.

d. The Landowners' MDA Applications Exceeded Any Alleged Major Modification Requirements

Even if a "major modification" is required to exhaust administrative remedies / ripen the Landowners' taking claims (which it is not as explained above), the Master Development Agreement (MDA) the Landowners worked on with the City for over two years included and far exceeded all of the requirements of a major modification application. First, the MDA included over 55 pages of specific development standards for the 250 Acre Residential Zoned Land. *Exhibit 28: 5 App LO 00001188- 8 App L0 00001835.* Second, "Exhibit C" to several of the draft MDAs included the necessary application and documents for a Major Modification. *See e.g. Exhibit 28, 5 App LO 00001234, 00001236; 6 App LO 00001278, 00001280, 00001321, 00001323.* Third, as explained above, the City mandated the MDA and, for the most part, drafted the MDA and, therefore, the MDA included all of the City requirements. Fourth, the City gave the neighbors an unprecedented and

oppressive opportunity to participate in the MDA.[115] And, as explained, the City outright denied the MDA anyway.

D. THE CITY'S MAJOR MODIFICATION REQUIREMENT SUPPORTS THE TAKING

It is worth noting that any City argument that the Landowners need to file for a major modification fully supports the Landowners inverse condemnation claims. The argument presupposes that the City would be required to approve an application that included a major modification, otherwise, there would be no purpose in making the argument. Here, as explained above, the MDA (that included the 35 Acre Property) far exceeded and included the major modification requirements, the City's own Planning Staff recommended "approval" of the MDA,[116] and the City still denied the MDA altogether. Accordingly, any argument that a major modification is needed fully supports ripeness and liability for the taking, because the City denied all use even though the major modification requirements were met.

E. THE MAJOR MODIFICATION ARGUMENT MAKES NO COMMON SENSE

This Court should also consider the "practical reality"[117] facing landowners in inverse condemnation actions; the Court is not required to abandon all common sense and reason. Any argument that all the Landowners need to do is file a major modification with the City to be approved ignores reality. Simply put, the argument asserts that if the Landowners had written the

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[115] The City Attorney even commented on how oppressive the neighbors' involvement became: "So if anybody has a list of things they think should be in this agreement that are not, I say these words, speak now or forever hold your peace, because I will listen to you and we'll talk about it. And if it needs to be in that agreement, we'll do our best to get it in it. But I do not like the tactics that look like we're working, we're working, we're working and, by the way, here's something you didn't think of I could have been told about six months ago. So I understand Mr. Lowie's frustration. There's some of that going on. There really is. And that's unfortunate. I don't consider that good faith, and I don't consider it productive." Exhibit 5, LO 00000466.

[116] *Exhibit 24: 4 App LO 00000985 line 236 – 00000986 line 245; LO 00001071-00001073; and Exhibit 40: 9 App LO 00002047-2072.*

[117] City of Sparks v. Armstrong, 103 Nev. 619 (1987) (court upheld taking claim, explaining that the City of Sparks, in arguing that the taking did not occur earlier failed to recognize "the practical reality" the landowners faced as owner of the property).

words "major modification" at the top of its MDA or other applications,[118] then: 1) the City's councilmen would not have called the Landowners' representative a "motherfucker," would not have stated "over my dead body" will development ever be allowed, and would not have stated he will "vote against the whole thing;" 2) the City would not have adopted the "Yohan Lowie Bills" and would not have strategically adopted the Bills to deny all applications to develop; 3) the City would not have denied the 35 Acre Property applications and the MDA (that included significantly more than any major modification application); 4) the City would not have made it impossible to get a drainage study; 5) the City would not have denied the fence and access applications; 6) the City would not have denied the applications to develop the 133 Acre Property; 7) the City would not have identified $15 million of City funds to take over the property for a "park;" 7) the City would not be vehemently trying to claw back the 17 Acre Property approvals; and 8) the 35 Acre Property would be fully developed today. No reasonable person, considering the above cited facts, could possibly believe this argument.

F. ISSUE PRECLUSION DOES NOT APPLY

The City may also argue that issue preclusion requires application of the Crockett Order to this 35 Acre Property case. As recognized by the City, "the following factors are necessary for application of issue preclusion: '(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation'; and (4) the issue was actually and necessarily litigated."[119]

These factors are conjunctive and the City cannot establish all four factors to apply the Crockett Order in this case. The issues in the Crockett Order are not identical, because both of those cases involved petitions for judicial review. The issue, therefore, was whether the City's zoning actions were based on substantial evidence. This issue in this case is different; it is whether the City's actions rise to the level of a taking. The ruling in the Crockett Order also was not on the

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[118] This is because the Landowners applications exceeded the City's major modification requirements.

[119] Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 714 (2008).

merits relevant to a taking in this case and they have not become final as the Nevada Supreme Court has not addressed either order. Finally, the constitutional taking issues present in this case were not actually nor necessarily litigated in the Crockett Order. Accordingly, issue preclusion does not apply.

Rather the preclusive effect of a prior order is more applicable to the Judge Smith Orders, because both orders directly address the underlying issue of the vested right to develop and they have become final as they have been affirmed by the Nevada Supreme Court. In fact, the Judge Smith orders are more than preclusive; they are the settled law on these issues.

CONCLUSION

Based on the foregoing, the Landowners respectfully request that this Court enter summary judgment on liability for three taking claims - categorical taking, regulatory per se taking, and non-regulatory / de facto taking.

Respectfully submitted this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*

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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 11th day of December, 2018, a true and correct copy of the foregoing **PLAINTIFF LANDOWNERS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY FOR THE LANDOWNERS' INVERSE CONDEMNATION CLAIMS** was made by electronic means pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic 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

180 LAND COMPANY, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **PLAINTIFF LANDOWNERS' REQUEST FOR REHEARING / RECONSIDERATION OF ORDER / JUDGMENT DISMISSING INVERSE CONDEMNATION CLAIMS** Hearing date: Hearing time:

COMES NOW Plaintiffs, 180 LAND COMPANY, LLC, a Nevada Limited Liability Company, FORE STAR, Ltd, and SEVENTY ACRES, LLC, a Nevada Limited Liability Company (hereinafter the "Landowners") by and through their attorney of record, the Law Offices of Kermitt L. Waters and Hutchison & Steffen, and hereby file Plaintiff Landowners' Request for Rehearing / Reconsideration of Order / Judgment Dismissing Inverse Condemnation Claims.

This Motion is based upon the Memorandum of Points and Authorities included herein, the exhibits attached hereto, the pleadings and papers on file in this matter, and such oral arguments as may be heard by the Court at the time of the hearing in this matter.

DATED this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
KERMITT L. WATERS, ESQ.
Nevada Bar # 2571
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AUTUMN WATERS, ESQ.
Nevada Bar #8917

Attorney for Plaintiff Landowners

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVE that the undersigned will bring the above and foregoing Plaintiff Landowners' Request for Rehearing/Reconsideration of Order/Judgment Dismissing Inverse Condemnation Claims on for hearing before the above-entitled Court, on the 17 day of January, 2019, at the hour of 9:00 a.m./p.m. or as soon thereafter as counsel may be heard in the Regional Justice Center, Department No. XVI, Courtroom ~~12D~~ 3H, 200 Lewis Avenue, Las Vegas, Nevada, 89101

DATED this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
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Attorney for Plaintiff Landowners

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case began as one involving two types of claims asserted by Plaintiff Landowners (hereinafter "Landowners') against the City of Las Vegas (hereinafter the "City" or "Government") - inverse condemnation claims and a petition for judicial review. In regards to the inverse condemnation claims, the City requested that these claims be dismissed and this court denied the request, holding the claims were properly pled and are ripe for adjudication, but stayed the claims and bifurcated them until after the petition for judicial review is decided. About six months later, this Court held a one day hearing on the Landowners' petition for judicial review claim wherein the inverse condemnation claims were not adjudicated or even mentioned as those claims were bifurcated and stayed. This Court denied the Landowners' petition for judicial review, but then

went one step further and also *sua sponte* dismissed the Landowners' inverse condemnation claims. Not only was the dismissal of the inverse condemnation claims without notice or an opportunity to be heard, but the decision is clearly erroneous. Therefore, this motion requests a rehearing / reconsideration of this Court's order dismissing the Landowners' inverse condemnation claims.

The Landowners have also filed concurrently with this motion for rehearing a motion for summary judgment on the inverse condemnation claims, which further supports the request for a rehearing. Many exhibits in this motion refer to the motion for summary judgment exhibits.

FACTUAL AND PROCEDURAL BACKGROUND

On September 7, 2017, the Landowners filed an amended complaint alleging two types of claims: 1) a petition for judicial review of the City's denial of land use applications for the 35 Acre Property; and, 2) claims in inverse condemnation for the taking of the 35 Acre Property. This Court held two hearings, one for the inverse condemnation claims and one on the petition for judicial review, and has entered two separate and conflicting orders from each hearing.

1. January 11, 2018, Hearing and Order

On January 11, 2018, this Court held a hearing on the City's request to dismiss the Landowners' inverse condemnation claims. *Exhibit 1, Reporter's Transcript of Motions, January 11, 2018.* The City asserted that the inverse condemnation claims should be dismissed: 1) for lack of ripeness; and, 2) because, according to the City, the claims were improperly alleged in the same action with the petition for judicial review. This January 11, 2018, hearing was properly noticed and both parties had the opportunity to be heard on whether the inverse condemnation claims should be dismissed.

During the hearing, the interplay between the petition for judicial review claim and the inverse condemnation claims was discussed. First, it was explained that, if there is a finding the City action was arbitrary and capricious or without substantial evidence and the Landowners are permitted to build on the 35 Acre Property, then there would be a temporary taking of the 35 Acre Property during the delay period. *Exhibit 1,* 17:18-18:4. Second, it was explained that, if there is a finding the City actions were not arbitrary and capricious and, therefore, the Landowners cannot build on the 35 Acre Property, then there would be a total taking of the property. *Exhibit 1,* 18:6-11.

After this discussion, this Court specifically stated on the record that it understood the petition for judicial review and inverse condemnation claims were different:

> THE COURT: And I just want to make sure for the record I truly understand the difference in the standards that would be teed up for any trial judge as it relates to the petition for judicial review - - . . . However, that's a totally different animal when it comes to decisions that restrict the use of property that somehow makes it to the point where it has no value. Then it's a governmental taking. **I get the difference**. *Exhibit 1,* 16:15-19.

This Court also understood that a decision on the petition for judicial review claim would be limited to those claims:

> Now, I'm looking at this in a different light in that, okay, if I sever them out, the judicial review petition there will be no discovery on that issue, and it would be limited to the record on appeal, and I make a decision as to whether the city council was arbitrary and capricious in their decision or not. **That's all**. *Exhibit 1,* 41:10-15.
> . . .
>
> Regarding the motion to dismiss, I'm going to deny that. Regarding the strike, I'm going to deny that. However, we're going to sever off the inverse condemnation claims, and the Court will only - - and we're going to stay those. **And we're going to deal specifically with the petition for judicial review**. *Exhibit 1,* 48:7-16.

This Court then denied both City requests. In regards to whether the Landowners' inverse condemnation claims should be dismissed, this Court held the claims were properly plead and ripe as follows:

> The Landowners "appropriately stated inverse condemnation claims against the City,"
>
> "[t]he Inverse condemnation claims relied on allegations that - if true- would entitle [the Landowners] to relief;"
>
> "[t]he claims were ripe, because [the Landowners] obtained a final decision from the City regarding the property at issue and 'a final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of 'all economical beneficial use' of the property.'"
> *Exhibit 2, Order Denying Motion to Dismiss, February 22, 2018, 6:1-4, Conclusion of Law #5*

This Court then severed the petition for judicial review claims from the inverse condemnation claims and ordered the Landowners to file an amended complaint for the inverse condemnation claims, which the Landowners did. *Exhibit 2, pp. 3-4.* Finally, this Court stayed all proceedings in the inverse condemnation claims pending the Court's decision on the petition for judicial review. *Id.*

Accordingly, following the January 11, 2017, hearing, this Court's order was threefold; 1) the Landowners' properly pled their inverse condemnation claims; 2) the claims were ripe for review; and, 3) the claims were severed and stayed until **after** this Court enters a decision on the petition for judicial review.

2. June 29, 2018, Petition for Judicial Review Hearing and Order

On June 29, 2018, this Court held a full day hearing to address only the petition for judicial review issues. As explained, this Court already denied the City's motion to dismiss the inverse condemnation claims, held the claims are ripe, and stayed the claims pending a decision on the petition for judicial review. And, the inverse condemnation claims were not discussed at all at the June 29, 2018, petition for judicial review hearing.

Ultimately, this Court denied the petition for judicial review. However, this Court also *sua sponte*, without notice or a hearing, dismissed the Landowners' inverse condemnation claims as follows:

> "[w]here Petitioner [Landowners] has no vested right to have its development applications approved, and the Council properly exercised its discretion to deny the applications, there can be no taking as a matter of law such that Petitioner's [Landowner's] alternative claims for inverse condemnation must be dismissed."
>
> "Further, Petitioner's alternative claims for inverse condemnation must be dismissed for lack of ripeness."
>
> "Here, Petitioner failed to apply for a major modification, a prerequisite to any development of the Badlands Property. ... Having failed to comply with this necessary prerequisite, Petitioner's alternative claims for inverse condemnation are not ripe and must be dismissed."
>
> This Court concluded" IT IS HEREBY ORDERED, ADJUDGED and DECREED that Petitioner's alternative claims in inverse condemnation are hereby DISMISSED.

Exhibit 3, Findings of Fact and Conclusions of Law on Petition for Judicial Review, November 26, 2018, pp. 23-24.

Therefore, this Court dismissed constitutionally based inverse condemnation claims (which it previously held were properly pled, ripe, bifurcated and stayed) without notice or a hearing for these claims. For the following reasons, this Court's order is erroneous and reconsideration should be granted so the Landowners at least have an opportunity to be heard on this matter.

LEGAL ARGUMENT

1. Standard for Rehearing / Reconsideration

EDCR rule 2.24 and NRCP Rules 52(b), 59, and 60 allow for rehearing or reconsideration of the ruling of a court and amendment to or relief from judgments. Grounds to allow rehearing or relief from an order or judgment include, in part, mistake, the judgment is void, new issues of fact or law are raised supporting a ruling contrary to the ruling already reached,[1] or the decision is clearly erroneous.[2] The following shows that this standard is met and this Court should grant reconsideration of its order dismissing the Landowners' inverse condemnation claims.

2. This Court's Order Violates the Due Process Clause

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." United States Supreme Court precedents "establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." U.S. v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993). Here, the Landowners brought inverse condemnation claims for the taking of their property that are based in the Fifth Amendment to the United States Constitution. This Court first held these claims are properly pled and ripe, but stayed the claims. During the stay period, however, this Court *sua sponte* dismissed these property based Fifth Amendment claims without notice or even any opportunity whatsoever to be heard on the dismissal. This is a prima facie due process violation. Accordingly, this Court should grant reconsideration of its order dismissing the Landowners' inverse condemnation claims and give the Landowners an opportunity to be heard on why it is error to dismiss the claims.

3. This Court's Order Violates Well Established United States Supreme Court Precedent Applicable to Government "Discretion" and Taking Jurisprudence

The United States Supreme Court held in the case of Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), that simply because government action is proper (or not arbitrary or capricious) does not mean it cannot amount to a taking. In Lucas, Mr. Lucas purchased two ocean

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[1] Moore v. City of Las Vegas, 92 Nev. 402 (1976).

[2] Masonry and Tile v. Jolley, Urga, Wirth, 113 Nev. 737 (1997).

front vacant lots in Charleston County, South Carolina to develop them residentially. Id., at 1006-07. Thereafter, the Beachfront Management Act (Act) was adopted that prevented the development on the two lots. Id., at 1008-09. Mr. Lucas conceded the validity of the Act as it was intended to protect the South Carolina beaches that were eroding, but challenged the Act as an uncompensated taking of his property and, after a bench trial, was awarded approximately $1,200,000.00 for the taking. Id., at 1009-10. On appeal to the United States Supreme Court, it was asserted that there was not a taking, because Mr. Lucas conceded to the validity of the Act and did not challenge it. Id, at 1044-46. The United States Supreme Court rejected this argument, holding Mr. Lucas was not required to challenge the underlying Act as a precondition to bringing his inverse condemnation claim, and held that there had been a deprivation of all economic use of the property, resulting in a "categorical taking." In other words, even though it was conceded that the government action (the Beachfront Management Act) was valid (not arbitrary or capricious), the Act still amounted to a taking for which just compensation was constitutionally mandated.

Here, this Court dismissed the Landowners' inverse condemnation claims on the grounds that "the Council properly exercised its discretion to deny the applications." This is not grounds to deny a taking. As held in Lucas, even if the Government "properly exercises its discretion," if, in exercising that discretion, the government action results in a taking, just compensation is still constitutionally mandated. For example, in the Lucas case, the landowner conceded that the government properly exercised its discretion in adopting the Beachfront Management Act, but the United States Supreme Court held this is not a defense to a taking. The Court still held the Act amounted to a taking, because it foreclosed the use of the landowners' property.

Therefore, simply because the City "properly exercised its discretion" does not shield it from liability and it is error to hold otherwise. Here, that "discretion" resulted in a total deprivation of the use of the Landowners' 35 Acre Property, the same as in the Lucas case. *See concurrently filed Motion for Summary Judgment.* And, the same as in the Lucas case, this Court should find a taking. Accordingly, this is additional grounds to grant reconsideration of this Court's order dismissing the Landowners' inverse condemnation claims.

4. This Court Order Violates Well Established General Nevada "Vested Rights" Law

The Nevada Supreme Court has held twice that Nevada landowners have the "vested" right to use their property, even if the landowner has not put the property to a beneficial use.[3] The Court also limited the City's "discretion" on land use decisions by requiring: 1) that the decisions be based on "valid zoning and related regulations;" and, 2) the zoning regulations must not "give rise to a takings claim."[4] The public policy for these rules is clear. If the City had absolute discretion to grant or deny the use of property, then the Just Compensation Clause would be entirely eliminated. The City could deny all use of all properties in the City (under the City's alleged discretionary power) and never pay any compensation whatsoever for these denials.[5] This despotic argument is not the law and never will be the law as it would bring all property transactions in the State of Nevada to an immediate and abrupt halt. No entity or person would ever purchase property in this State, because there would be no property rights. The only "thing" that would be purchased in a property transaction is dirt for which there are no rights, because the local entities, like the City, could tell the new owner that he cannot use the property at all under the City's absolute discretion argument.

Here, this Court adopted a blanket, far reaching holding that the Landowners' have "no vested right to have its development applications approved." This Court failed to recognize the

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[3] McCarran Intl. Airport v. Sisolak, 122 Nev. 645 (2006) (landowner had a vested right to use the airspace above his property pursuant to NRS 493.040, even though he never used it and the County never approved the use. Schwartz v. State, 111 Nev. 998 (1995) (Nevada landowners have a vested right to access roadways adjacent to their property, even though the access has never been built)

[4] Sisolak, at 660, fn 25.

[5] The City has repeatedly cited to Stratosphere Gaming Corp. v. City of Las Vegas, 11 Nev. 804 (1995), in ths matter, for the proposition that development rights do not vest unless the property is not subject to further discretionary acts. Stratosphere, however, is inapplicable to this case. In Stratosphere, the vested right to use the property had already been exercised (the Stratosphere hotel/casino was built) and the owner was trying to ***add*** an additional attraction to the property. The Court held that the Stratosphere owner did not have the vested right to add this additional attraction, ***but had numerous other economic uses of the property***. The case at bar involves the underlying right to use the property in the first instance. If the City had told the Stratosphere back before it was originally built that a hotel/casino could not be built; that the property could only be used as open space, then there would have been a taking of a vested right to use the property as clearly provided in the Sisolak case.

limitations the Nevada Supreme Court placed on the City discretion, namely, 1) that the City decisions must be based on "valid zoning and related regulations;" and, 2) the City actions must not "give rise to a takings claim"[6] without payment of just compensation. In fact, this Court could not have considered these limitations, because this Court never provided notice or even an opportunity to be heard on these limitations. And, it is clear that the City actions "give rise to a taking claim" in this case, because the City actions foreclose any and all use of the Landowners' Property, which is recognized as a categorical taking. *See concurrently filed Motion for Summary Judgment.* Accordingly, this Court should grant reconsideration so that these limitations on the City's actions may be properly considered in the context of an inverse condemnation action.

5. This Court Order Violates "Vested Rights" Law Specifically Applicable to The Landowners' Property - The Nevada Supreme Court Very Recently Upheld the Landowners' Vested "Right To Develop" Residentially

The pointed issue of whether the Landowners' entire 250 Acre Residentially Zoned Property (that includes the 35 Acre Property) is R-PD7 hard zoned which grants the Landowners a "right to develop" has been fully litigated before the Honorable Judge Douglas E. Smith and affirmed by the Nevada Supreme Court. *Exhibit 83, Findings of Fact and Conclusions of Law and Judgment, filed November 30, 2016; Exhibit 7, Findings of Fact and Conclusions of Law, Final Order and Judgment, filed January 1, 2017; Exhibit 84, Order of Affirmance; Exhibit 98, Order Denying Rehearing - these exhibits are attached to the concurrently filed Motion for Summary Judgment.*

Following significant and lengthy briefing and oral argument, Judge Smith entered the following findings, concluding the hard zoning of R-PD7 controls over any other conflicting land use plans, thereby granting the Landowners the "right to develop" the 35 Acre Property with a residential use:[7]

- On March 26, 1986, a letter was submitted to the City Planning Commission requesting permission to use the 250 Acre Residential Zoned Land for a "golf course," however, the zoning that was sought was R-PD "as it allows the developer flexibility and the City design control." "Thus, **keeping the golf course [250 Acre Residential Zoned Land] for potential future development as residential was an intentional part of the plan**." Exhibit 83, p. 14, finding #59. (emphasis supplied).

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[6] Sisolak, at 660, fn 25.

[7] All exhibits that follow in this section are attached to the concurrently filed Motion for Summary Judgment.

- Even though there is a 1986 map that shows a golf course around the location of the Landowners' 250 Acre Residential Zoned Land, "the current Badlands Golf Course [250 Acre Residential Zoned Land] is not the same as what is depicted on the map" (Exhibit 83, p. 14, finding #61) and the Landowners "have the **right to close the golf course** and not water it" (Exhibit 7, p. 9, finding #26). (emphasis supplied).

- The Zoning Bill No. Z-2001, Ordinance 5353, "demonstrates that the R-PD7 Zoning was codified and incorporated into the Amended Atlas in 2001." Exhibit 83, pp. 13-14, finding #58.

- "[T]wo letters from the City of Las Vegas to Frank Pankratz dated December 20, 2014, **confirm the R-PD7 zoning on all parcels held by Fore Stars, Ltd.** [the 250 Acre Residential Zoned Land]." Exhibit 83, p. 14, finding #60.

- "The Court finds that the GC Land [250 Acre Residential Zoned Land] owned by the Developer Defendants [Landowners] has **'hard zoning' of R-PD7. This allows up to 7.49 units per acre subject to City of Las Vegas requirements**." Exhibit 83, p. 18, finding #82; Exhibit 7, p. 33, finding #130. (emphasis supplied).

- "Notwithstanding any alleged 'open space' land use designation, the zoning on the GC Land [250 Acre Residential Zoned Land], as supported by the evidence, is R-PD7." The Court then rejected the argument that "suggests the land is 'zoned' as 'open space' and that they [Queensridge homeowners] have some right to prevent any modification of that alleged designation under NRS 278A." Exhibit 7, pp. 17-18, finding #64, p. 34, finding # 132.

- The language from NRS 278.349(3)(e) supports the Landowners' position that the hard residential zoning trumps any other land use designation that may have been applied at any time to the Landowners 250 Acre Residential Zoned Land. Exhibit 7, p. 18, finding # 66.

- **"The court finds that the Developer Defendants [Landowners] have the right to develop the GC Land [250 Acre Residential Zoned Land]."** Exhibit 83, p. 18, finding 81. (emphasis supplied). This finding was repeated in the subsequent order twice as follows: "The zoning on the GC Land [250 Acre Residential Zoned Land] dictates its use and **Defendants rights to develop their land**" (Exhibit 7, p. 17, finding #61 (emphasis supplied)) and the Landowner has the **"right to develop their land."** (Exhibit 7, p. 33, finding # 130) (emphasis supplied)).

- Judge Smith even held that the initial steps to develop, parceling the 250 Acre Residential Zoned Land, had proceeded properly: "The Developer Defendants [Landowners] properly followed procedures for approval of a parcel map over Defendants' property [250 Acre Residential Zoned Land] pursuant to NRS 278.461(1)(a) because the division involved four or fewer lots. The Developer Defendants [Landowners] parcel map is a legal merger and re-subdividing of land within their own boundaries." Exhibit 83, p. 10, finding #41.

Judge Smith then held the Queensridge Community could not control or restrain the Landowners "right to develop their land:"

- The 250 Acre Residential Zoned Land is not a part of the Queensridge Community and, therefore, is not subject to the Queensridge CC&Rs and "cannot be enforced

against the GC Land [250 Acre Residential Zoned Land]."[8] Exhibit 83, p. 12, finding #51; p. 13, findings #53-57; pp. 14-17, findings 62-79; Exhibit 7, pp. 4-5 findings 5-7, p. 6, findings 15-16, p. 8, finding #24, pp 9-10, finding #29, 31, p. 12, findings 38-40, pp. 17-18, findings # 64-65, pp. 18-19, findings #68-70, p. 24, finding # 88, p. 27, finding #102, p. 30-31, findings # 120-124, p. 35, finding # 135.

- The Queensridge Community, the geographic area where the 250 Acre Residential Land is located "may, but is not required to, include ... a golf course." Exhibit 83, p. 16, finding #70.

- The Queensridge Homeowners transfer documents "evidence that no such guarantee [that the 250 Acre Residential Zoned Land would remain a golf course] was made and that Plaintiffs were advised **that future development to the adjoining property [250 Acre Residential Zoned Land] could occur, and could impair their views or lot advantages."**[9] Exhibit 7, p. 15, finding 53, p. 6, finding # 13, p. 12 finding 38, p. 15, finding #53.

The Landowners' vested right to develop residentially is so irrefutable that Judge Smith found any challenge to this vested right is "frivolous" and "baseless," warranting an award of attorney fees.[10] *Exhibit 7, pp. 25-26, finding #95, p. 27, finding #102, attached to the concurrently filed Motion for Summary Judgment.*

The Nevada Supreme Court affirmed Judge Smith. The Court held "[b]ecause the record supports the district court's determination that the golf course [250 Acre Residential Zoned Land] was not part of the Queensridge community under the original CC&Rs and public map and records,

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[8] The CC&Rs for the Queensridge Community plainly state "[t]he existing 18-hole golf course commonly known as the 'Badlands Golf Course' [250 acre property] **is not a part** of the Property or Annexable Property" governed by the Queensridge CC&R's. *Exhibit 66: 11 App LO 00002552-2704.* Also, the "Master Plan" for the Queensridge CC&Rs shows that the 250 acre property is "NOT A PART" of the Queensridge Community. *Id.*

[9] Every purchaser of property within the Queensridge Community was required to accept, as part of their purchase agreement, that there were no representations on how the 250 acre property would be developed: "Purchaser is not relying upon any warranties, promises, guarantees, advertisements or representations made by Seller or anyone…." and "….Seller has made no representations or warranties concerning zoning or the future development of phases of the Planned Community or the surrounding area or nearby property." *Exhibit 69, at LO 00002733-34, attached to the concurrently filed Motion for Summary Judgment.*

[10] Given this intervening ruling and now controlling law, this Court should reverse its order allowing the Intervenors participation in this litigation and strike all pleadings filed by the Intervenors as the Supreme Court has now ordered they do not have standing and any claim by the Intervenors regarding an interest in or right to control the 250 Acre Residential Zoned Land is "baseless."

regardless of the amendment, we conclude the district court did not abuse its discretion in denying appellants' motion for NRCP 60(b) relief." *Exhibit 84, p. 2, attached to the concurrently filed Motion for Summary Judgment.* The Court continued, "[a]ppellants filed a complaint alleging the golf course land [250 Acre Residential Zoned Land] was subject to the CC&Rs when the CC&Rs and public maps of the property demonstrated that the golf course land [250 Acre Residential Zoned Land] was not." Id., p. 4. The Supreme Court also upheld the award of $128,131.22 in attorney fees and costs. Id. The Court also denied rehearing, further holding the Queensridge Community has no control over the 35 Acre Property as it "was never annexed into the Queensridge master community." *Exhibit 98, Order Denying Rehearing, p. 2 attached to the concurrently filed Motion for Summary Judgment.*

Therefore, it is settled law that the Landowners have the vested right to develop the 250 Acre Residential Zoned Land (which includes the 35 Acre Property) with a residential use, and the Intervenors/Queensridge owners have no right or standing to challenge because the Property has always been zoned residential, the intent was always to develop the Property residentially, and hard zoning trumps any other conflicting land use plan designation.

This Court's holding, without notice or a hearing, that the Landowners did not have the vested right to have their residential development applications approved clearly violates this controlling Nevada Supreme Court precedent specific to the 35 Acre Property. Accordingly, this Court should grant reconsideration so that the vested rights issue may be properly considered in light of the above Nevada Supreme Court decision and in the context of an inverse condemnation action.

6. This Court Order Violates Well Established Nevada Eminent Domain Law Regarding the Ripeness Doctrine

A. The Exhaustion of Administrative Remedies Requirement for Ripeness Does Not Apply to Four of the Landowners' Inverse Condemnation Claims

The Nevada Supreme Court has held that the exhaustion of administrative remedies / ripeness doctrine only applies to a Penn Central type inverse condemnation claim; it does not apply to regulatory per se, non-regulatory / de facto, categorical, or temporary taking inverse condemnation

claims.[11] The reason for this rule is that the taking is known in these type of inverse condemnation claims and, once the taking is known, the payment of just compensation is "self-executing," meaning there can be no barriers or preconditions (such as exhaustion of administrative remedies/ripeness) to this constitutional guarantee.[12]

This Court, however, held all of the Landowners' inverse condemnation claims, including the regulatory per se, non-regulatory / de facto, categorical, and temporary taking claims, "must be dismissed for lack of ripeness." As this ripeness doctrine cannot be used as a basis to dismiss these claims, it was error to dismiss them on this ground. Accordingly, this Court should grant reconsideration so that all of these claims may properly be considered.

B. This Court Failed to Consider the Doctrine of Futility As It Applies to the Landowners' Penn Central Inverse Condemnation Claims

The United States and Nevada Supreme Court have adopted a futility exception to the ripeness doctrine, holding that "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[13] However, "when exhausting available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review."[14] In other words, when it is clear that the government will not grant a

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[11] Hsu v. County of Clark, supra, ("[d]ue to the "per se" nature of this taking, we further conclude that the landowners were not required to apply for a variance or otherwise exhaust their administrative remedies prior to bringing suit." Id., at 732); McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006) ("Sisolak was not required to exhaust administrative remedies or obtain a final decision from the Clark County Commission by applying for a variance before bringing his inverse condemnation action based on a regulatory per se taking of his private property." Id. at 664).

[12] Alper v. Clark County, 571 P.2d 810, 811-812 (1977).

[13] Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001), *citing to* Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed. 2d 882 (1999).

[14] State v. Eighth Judicial Dist. Court of Nev., 351 P.3d 736, 742 (Nev. 2015). For example, in Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed. 2d 882 (1999) "[a]fter five years, five formal decisions, and 19 different site plans, [internal citation omitted] Del Monte Dunes decided the city would not permit development of the property under any circumstances." Id., at 698. "After reviewing at some length the history of attempts to develop the property, the court found that to require additional proposals would implicate

land use application, it is futile to submit any further applications and the inverse condemnation claims are ripe for review. Stated another way, the government will often require "repetitive and unfair" applications to avoid a taking, but once it denies even one meaningful application and it appears futile to re-submit another application (such as a "major modification" application), a landowner's inverse condemnation claim are ripe and he may proceed to court on these claims.

Here, in the concurrently filed motion for summary judgment, this futility doctrine as it applies in this case is fully briefed. However, the following gives this Court just a small understanding of how futile it would be to file the "major modification" application with the City mentioned in this Court's order dated November 21, 2018. The City denied stand alone development applications for the 35 Acre Property on the basis that the City did not want "piecemeal" development. The City then denied a Master Development Agreement (MDA) and any and all other applications to develop any parcel, as a whole or as single parcels, on any part of the 250 Acre Residential Zoned Land.[15] The Landowners cannot even get a permit to fence ponds on the 250 Acre Residential Zoned Land or a permit to access the Property. The City also adopted two Bills which solely target the 250 Acre Residential Zoned Land that eliminates all use of the entire 250 acres. Councilman Seroka stated that "over his dead body" will development be allowed and Councilman Coffin referred to the Landowners' representative as a "motherfucker" and put in writing that he will vote against any development on the 35 Acre Property. The City has even sought funding to purchase the 250 Acre Residential Zoned Land for 1% of its fair market value[16] for a City Park thereby showing the motive

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the concerns about repetitive and unfair procedures expressed in MacDonld, Commer & Frates v. Yolo County, 477 U.S. 340, 350 n. 7, (1986) [*citing* Stevens concurring in judgment from Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 at 205-206, 105 S.Ct. 3108 at 3126 (1985)] and that the city's decision was sufficiently final to render Del Monte Dunes' claim ripe for review." Del Monte Dunes, at 698. The "Ripeness Doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted uses." Palazzolo v. Rhode Island, at 622.

[15] The City did approve an application to develop on the 17 Acre Property, but has subsequently taken aggressive action to claw back that approval.

[16] *Exhibit 34: 8 App LO 00001915 and Exhibit 35: 8 App LO 00001922.*

to prevent any use of the property (which is not even a requirement to show a taking). Accordingly, it is futile to submit any further applications with the City and any assertion that the Landowners just need to go back to the City and change the wording on the top of the MDA or the other applications to "Major Modification" is a red herring and just an attempt to delay this matter.

This Court could not have considered this futility doctrine as part of its order dismissing the inverse condemnation claims, because there was no notice or a hearing on the issue. Accordingly, this Court should grant reconsideration so that this futility doctrine can be properly briefed and analyzed in this case.

7. This Court's Order Violates Well Established Nevada Law Related to Dismissal of Inverse Condemnation Claims

Nevada law is clear that only under "rare" circumstances is dismissal proper, such as where plaintiff can prove no set of facts entitling him to relief.[17] The Nevada Supreme Court has recognized this "rare" circumstances standard and held that a motion to dismiss "is subject to a rigorous standard of review on appeal," that it will recognize all factual allegations as true, and draw all inferences in favor of the plaintiff.[18] The Court rejected the "reasonable doubt" standard and held that a complaint should be dismissed "only" where it appears "beyond a doubt" that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief.[20]

This "rigorous" standard to dismiss is especially appropriate in inverse condemnation proceedings, because there is no "magic formula" in every case for determining whether particular government interference constitutes a taking under the U.S. Constitution; there are "nearly infinite variety of ways in which government actions or regulations can effect property interests."[21] In this

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[17] Williams v. Gerber Prod., 552 F.3d 934, 939 (9th Cir. Ct. App. 2008).

[18] Buzz Stew, LLC v. City of North Las Vegas, 181 P.3d 670, 672 (2008). (emphasis supplied).

[20] Id., see also fn. 6 in Buzz Stew decision.

[21] State v. Eighth Jud. Dist. Ct., 351 P.3d 736, 741 (Nev. 2015) (citing Arkansas Game & Fish Comm's v. United States, 568 U.S. --- (2012)). *See also* Lehigh-Northampton Airport Auth. v. WBF Assoc., L.P., 728 A.2d 981 (Comm. Ct. Penn. 1999) ("There is no bright line test to determine when government action shall be deemed a de facto taking; instead, each case must be examined and decided on its own facts." Id., at 985-86).

connection, the Courts are clear that these are "ad hoc" proceedings that require "complex factual assessments."[22] Since these inverse condemnation claims are so fact intensive, it is gross error to grant a motion to dismiss before the landowner has the opportunity to fully present all facts, after discovery, to the court.

Here, this Court dismissed the Landowners' inverse condemnation claims, which require a "complex factual assessment," without allowing the Landowners to appear and present these facts in the context of an inverse condemnation hearing. This is clear error. Accordingly, this Court should allow reconsideration so that the "complex factual assessment" may be presented and this case can be decided on the facts.

8. This Court Should Grant Reconsideration Because This Court's Order Violates Inverse Condemnation Law that Requires a Finding of a Taking

As mentioned above, the Landowners have concurrently filed a motion for summary judgment on the inverse condemnation claims. That motion clearly shows that not only was it error to dismiss the Landowners' inverse condemnation claims, but this Court should grant summary judgment on liability for the inverse condemnation claims. Accordingly, this is an additional grounds to grant reconsideration of this Court's order dismissing the Landowners' inverse condemnation claims.

9. This Court's Order Amounts to a Judicial Taking

Considering the Nevada Supreme Court's recent order recognizing and affirming the development rights in the Landowners' Property since 1986, if this Court elects to follow the Crockett order that entirely ignores the Landowners' hard zoning and vested right to develop, this will be a judicial taking of the 35 Acre Property. The United States Supreme Court has held that judicial action that "recharacterizes as public property what was previously private property is a judicial taking."[23] The Court explained that this is a proper taking claim, because the Taking Clause is concerned with the "act" that results in the taking and does not focus on the particular "government actor," meaning the judiciary also may engage in taking actions.[24] Application of the

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[22] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720 (1999).

[23] Stop the Beach Renourishment, Inc.v. Florida Dept. of Env. Protec., 130 S.Ct. 2592 (2010).

[24] Id., at 2601.

Crockett order in this case would amount to a judicial taking, because the order would be applied to recharacterize the Landowners' 35Acre Property from a hard zoned residential property with the vested "rights to develop" (as confirmed by the Nevada Supreme Court) to a public park / open space with zero developable units. This is yet another grounds to grant reconsideration of this Court's order dismissing the Landowners' inverse condemnation claims.

CONCLUSION

Based on the foregoing, it is respectfully requested that this Court grant rehearing / reconsideration of its order dismissing the Landowners' inverse condemnation claims.

DATED this 11th day of December, 2018.

LAW OFFICES OF KERMITT L. WATERS

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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 11th day of December, 2018, a true and correct copy of the foregoing **PLAINTIFF LANDOWNERS' REQUEST FOR REHEARING / RECONSIDERATION OF DISMISSAL OF INVERSE CONDEMNATION CLAIMS** was made by electronic means pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic 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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Exhibit 1

Reporter's Transcript of Motions, January 11, 2018

CASE NO. A-17-758529-J

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

180 LAND COMPANY LC,

Plaintiff,

vs.

LAS VEGAS CITY OF,

Defendant.

REPORTER'S TRANSCRIPT
OF
MOTIONS

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED THURSDAY, JANUARY 11, 2018

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

APPEARANCES:

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* * * * *

LAS VEGAS, NEVADA; THURSDAY, JANUARY 11, 2018

10:58 A.M.

P R O C E E D I N G S

* * * * * * *

THE COURT: All right. Good morning to everyone.

MR. WATERS: Good morning, your Honor.

THE COURT: Let's go ahead and note our appearances for the record.

MR. DOROCAK: Jeff Dorocak for the City of Las Vegas.

MR. WATERS: I'm Kermitt Waters.

MR. LEAVITT: Jim Leavitt, Michael Schneider, the landowner, and Ryan Daniels for the -- from Chris Kaempfer's office.

THE COURT: All right. Once again, good morning. And, I guess, for the record we're calling the 180 Land Company LLC versus City of Las Vegas case. All right. And it's my understanding we have the City of Las Vegas' motion to dismiss or in the alternative motion to strike.

MR. DOROCAK: That is correct, your Honor. The city believes this morning the Court's decision on our motion begins and essentially ends with a

10:58:50 determination of what exactly 180 Land Co filed as its initially pleading in this matter.

If they filed a petition that is a petition for judicial review with a regional claims for inverse
10:59:05 condemnation, then the so-called alternative claims for inverse condemnation must be dismissed. The Supreme Court opined clearly in Nationstar a petition for judicial review is not an avenue for bringing original claims.

10:59:18 On the other hand if, as 180 Land Co now concedes in its reply, it filed a combination complaint and petition or a complaint with claims for judicial review and inverse condemnation, then the judicial review component must be dismissed. Such a pleading
10:59:35 like that is in clear contravention of NRS 278's judicial review procedures.

NRS Chapter 278 allows a party to challenge a governing body's land use decision by filing a petition for judicial review. It does not permit the filing of
10:59:52 a complaint or some combination document that they now claim to have filed.

As we noted in our briefs, dismissal of the petition or the original inverse condemnation claims is supported as a matter of law and as a matter of
11:00:05 practicality. The Court will put on its appellate hat

11:00:09 to review the city council's land use determination and decision. But the Court will sit as fact finder and trial court to review the inverse condemnation claims.

With these different rules come different

11:00:22 standards of review, vastly different records to review. The judicial review component will only involve the record from below at city council. The inverse condemnation claim, obviously, is full-blown discovery followed by a trial.

11:00:36 And significantly, there are issues of appealability. If we proceed with both issues as part of this one action, even if the Court were to go ahead and allow the unsupported motion to stay the inverse condemnation claims, the city or 180 Land Co could not

11:00:57 then appeal the PJR determination until the inverse condemnation claims are complete. So that poses, obviously, a major problem.

In the end, the practical differences alone make it apparent that these two sets of claims should

11:01:14 not have been brought together. More importantly, though, as I mentioned, the law is plain. However 180 Land Co wants to describe their initial pleading, that pleading is improper and is impermissible as a matter of law.

11:01:29 And, finally, as of this moment, the filing

11:01:32 date of their original petition is still one day past the strict 25-day deadline found in NRS Chapter 278. Strict compliance with the statute is a precondition to jurisdiction. So the Court is not obliged to excuse 11:01:50 the untimely filing. Thank you.

THE COURT: Thank you, sir.

MR. LEAVITT: Your Honor, I think I'm going to address the timeliness issue first since, obviously, that is the basis for the -- original basis for the 11:01:59 city's motion that was filed in this case.

Your Honor, the -- and I know the facts are set forth very clearly in the pleadings. The petition was sent down to the clerk of the court in a timely manner on July 17.

11:02:11 Under the rules, Rule 5 and -- I mean, we have an Eighth Judicial District Court rule right on point, Rule 8. That petition should have been filed with the clerk of the court on July 17. The clerk of the court instead kicked it back, for reasons unknown to us, your 11:02:30 Honor. And the very next day, we refiled the exact same pleading with the clerk of the court, and it was filed.

Now, this isn't a new issue. This issue has come up numerous times. It's come up in the Second 11:02:44 Federal Circuit Court.

11:02:45 THE COURT: Actually, I think it's very problematic anyway because -- and I thought about this scenario. Hypothetically, if I had taken a pleading down and there was a mistake on the cover page, all the
11:02:58 clerk would do is essentially this, strike it outright.

MR. LEAVITT: Right.

MR. SCHNEIDER: I mean, I get that.

MR. LEAVITT: Okay.

THE COURT: You know, because I'm looking at
11:03:05 it. I don't -- I don't really see this as a big issue. I'm willing to rule right now as a matter of law the petition for judicial review was timely filed.

MR. LEAVITT: Okay. And could we have a ruling, your Honor, it was timely filed on July 17?

11:03:20 THE COURT: Absolutely.

MR. LEAVITT: Thank you, your Honor.

THE COURT: You know, I mean, the rule is pretty clear in that regard. Here's my real concern.

MR. LEAVITT: Sure.

11:03:25 THE COURT: And I want you to discuss these issues because I took the opportunity to review the pleading. Hopefully, I have it in front of me here. Yes. The first amended petition for judicial review and alternative verified claims in inverse
11:03:44 condemnation.

11:03:44 MR. LEAVITT: Right, your Honor.

THE COURT: And to be quite candid with everyone, I thought it such a fascinating case just in a general sense. But my question is essentially this, 11:03:53 because I've looked at it from two perspectives. I'm wondering if they're mutually exclusive. And what I mean by that is this: Number one, clearly, if a complaint was filed and it was assigned to Department 16 specifically as it relates to the issues 11:04:15 that are raised in the petition, for example, inverse condemnation, and, I guess, there's really different categories, number one would be a taking, secondly, Penn Central regulating and so on, I'd have the jurisdiction pursuant to Article 6, Section 6 of the 11:04:42 Nevada Constitution and all the statutes. I get that.

Then on the flip side, we have the appellate procedure as it relates to the appeal of a decision by a political subdivision of the state of Nevada. And in this case it would be the Las Vegas City Council. And 11:05:05 that's set forth under NRS 278.31954. And I've made a determination as a matter of law that it was timely.

MR. LEAVITT: Right.

THE COURT: So I'm sitting here, and I'm thinking about it. And I'm saying to myself, Okay, are 11:05:25 these mutually exclusive? Because if you're triggering

11:05:29 the Court's jurisdiction based upon the statute, I might limit it to either judicial review or pursuant to the statute. Or I might -- or if I handled it, it's going to be the inverse condemnation claim.

11:05:48 MR. LEAVITT: Correct.

THE COURT: You see where I'm going?

MR. LEAVITT: I know exactly where you're going.

THE COURT: Because I've never seen a hybrid

11:05:54 like that.

MR. LEAVITT: Your Honor, it is a unique case.

THE COURT: Yes.

MR. LEAVITT: It is. And this is not uncommon, your Honor, where people file inconsistent

11:06:01 claims. I mean, the Rule 8 specifically says --

THE COURT: I took it -- I took a look at Rule 8, and, typically, it's my recollection, Rule 8 deals specifically with the pleadings.

MR. LEAVITT: Right.

11:06:10 THE COURT: And you have complaints. You have answers. You have counter claims. You have third-party complaints.

MR. LEAVITT: Right.

THE COURT: I get that.

11:06:17 MR. LEAVITT: And so, okay, so we'll -- I'll

11:06:18 go past Rule 8. Let me go to the public policy reasons for why we did it this way, your Honor. First of all, when you review the petition for judicial review --

THE COURT: I'm listening. I'm listening.

11:06:29 MR. LEAVITT: Okay, I got you -- you're going to review certain facts and circumstances, right, transactions and occurrences. Those same exact fact and circumstances and transaction and occurrences are going to be those which apply in the inverse condemnation action. So under the one-action rule, which is in our constitution, which our Nevada Supreme Court has repeatedly cited to --

THE COURT: Here's my question, though.

MR. LEAVITT: Sure.

11:06:51 THE COURT: Is -- and I thought about that too, and --

MR. LEAVITT: Right.

THE COURT: -- the reason why I say that is this: I said to myself, Okay, I truly get -- and understand the dilemma. Number one, you're looking at it from this perspective. You said, Look, we have to exhaust our administrative remedies in order to trigger the jurisdiction of the Court. I get that. There's a lot of case law out there that stands for that

11:07:15 proposition, and that's -- that's well known, and

11:07:18 that's an area that we can all agree.
MR. LEAVITT: Right.
THE COURT: However, and I don't necessarily know the answer to this. I have -- I think I have a
11:07:30 pretty good idea what would be an appropriate response. It appears to me your dilemma would be this: Okay. If we don't file our petition for judicial review, does that stand for the proposition that there will be a bar of our inverse condemnation --
11:07:46 MR. LEAVITT: Correct.
THE COURT: -- action?
MR. LEAVITT: Right.
THE COURT: That's the concern; right?
MR. LEAVITT: That's one of the concerns,
11:07:49 absolutely, your Honor.
THE COURT: I get that. I really do.
MR. LEAVITT: Um-hum.
THE COURT: And...
MR. LEAVITT: Well, so, your Honor, can I
11:07:57 address the ripeness issue first?
THE COURT: You can address all -- anything you want.
MR. LEAVITT: Let me address --
THE COURT: Okay. We're not in a hurry.
11:08:03 Trust me.

11:08:04 MR. LEAVITT: Okay. Let me address the ripeness issue first. And I want to make sure we're all on the same page what the ripeness issue is because what the city has alleged is that there's a two-step
11:08:12 process that you have to go through before you get to the inverse condemnation action.

THE COURT: Okay.

MR. LEAVITT: First, you have to exhaust your administrative remedies with the city.

11:08:19 THE COURT: Right.

MR. LEAVITT: And then we have to exhaust our court remedies with the court. Okay. I have been practicing in this area for 22 years, Mr. Waters for 45 years. We've never ever heard that rule, ever.

11:08:30 THE COURT: To be quite candid, I never heard that either.

MR. LEAVITT: Yeah.

THE COURT: But go ahead.

MR. DOROCAK: It's never been the rule, your
11:08:36 Honor. In a hundred years of eminent domain practice- -- or not practice, but precedent, we've never seen that rule. Palazzolo was accepted by the Nevada -- or I'm sorry, the United States Supreme Court in 2006 to straighten that rule out, and they state the
11:08:47 rule no less than four different times that all that is

11:08:51 required to exhaust your administrative remedies in order to bring an inverse condemnation action to Judge Williams in the Eighth Judicial District Court is a final decision from the City of Las Vegas. That's it.

And we have that final decision by the City of Las Vegas, which is you cannot build on the property. So those administrative remedies have been exhausted. So the question is now, where does the landowner get to file the inverse condemnation action? It's ripe. It's ready to go.

THE COURT: I understand that.

MR. LEAVITT: Okay. So we're past that because that's an argument that the city made. I just wanted to make sure that was clear.

So now the question is do we file it in the same case as the petition for judicial review where the exact same facts will be heard by the Court that will be heard in the inverse condemnation action? Or do we go down the hall and we file it in a different courtroom in a separate case to be heard by a different judge? That's really the issue. And that's the issue that Rule 8 addresses. Obviously, Rule 8 wants the cases to be heard together because if they arise out of the same facts and circumstances, they should be heard

11:09:53 together. But here's our main concern, your Honor. Here's the number one concern.

THE COURT: This is where the rubber meets the road.

11:09:59 MR. LEAVITT: This is where the rubber meets the road. Is there's a strong public policy here of consistency. Okay. We are very concerned that if you hear the petition for judicial review, and you make certain findings of facts and conclusions of law, and 11:10:15 then we go down to another courtroom, and the city, after having either prevailed or lost on the petition for judicial review depending on what the outcome is, and we're arguing the inverse condemnation action in another courtroom, the city makes the exact opposite 11:10:29 arguments that it made to you. And then we have to file motions for judicial estoppel. We've done them before numerous times in these cases.

And we have a big concern that they'll try and say, Well, what Judge Williams really meant when he 11:10:42 entered his order in the petition for judicial review is not what Mr. Leavitt or Mr. Waters is arguing to you. He really meant something different, and we're going to have to try and bring these facts, bring this law to this new judge after you've already heard all 11:10:54 these same exact facts and these same exact

11:10:57 circumstance. That's our number one concern, your Honor.

THE COURT: And I just want to make sure for the record I truly understand the differences in the 11:11:05 standards that would be teed up for any trial judge as it relates to the petition for judicial review --

MR. LEAVITT: Um-hum.

THE COURT: And the thrust and the focus of the trial court would be essentially this: Was there 11:11:20 substantial evidence in the record to support the findings of the city?

MR. LEAVITT: Right.

THE COURT: First of all.

MR. LEAVITT: Correct.

11:11:25 THE COURT: However, that's a totally different animal when it comes to decisions that restrict the use of property that somehow makes it to the point where it has no value. Then it's a governmental taking. I get the difference.

11:11:45 MR. LEAVITT: Right.

THE COURT: And so, those are -- I would anticipate a decision could be made versus the petition for judicial review that would have no impact on inverse condemnation, Penn Central --

11:12:02 MR. LEAVITT: Right.

11:12:02 THE COURT: -- and those things. I was actually reading cases about that. I thought it was real fascinating. But and I'm not a -- what do you call that? I was not involved in real property
11:12:12 practice, but it's a fascinating area.

But go ahead.

MR. LEAVITT: Okay. Thank you, your Honor. And, your Honor, that exact issue is why we requested the stay. And so what we said in our countermotion is
11:12:22 we said, Judge, we understand that the outcome of the judicial review may impact the inverse condemnation claims. And so we said let's go. Let's litigate in front of Judge Williams the petition for judicial review. Let's get a decision on the petition for
11:12:36 judicial review. And that, absolutely you're right, your Honor, will impact how we proceed in the inverse condemnation action.

Let me explain that, your Honor, because I think this is where, again, where the rubber meets the
11:12:47 road. So you hear the petition for judicial review. And you make a decision that -- let's say, you make a decision that the city acted arbitrary and capricious or that there's not substantial evidence; right?

THE COURT: Right.

11:13:01 MR. LEAVITT: And then your decision is the

landowner gets to build on his property. Okay. The inverse condemnation action would still proceed because there would be a temporary time when the property was taken by the City of Las Vegas through their action.

THE COURT: I understand.

MR. LEAVITT: Okay. Now, let's take the opposite position where you say that the city's actions were not arbitrary and capricious, and, therefore, the landowner cannot build. Again, it would impact the inverse condemnation action, and we would make a claim for a total taking of the property.

And, your Honor, I think the best question is: Is there a rule which prohibits the landowner from bringing the inverse condemnation action in the same case under the same case number where a petition for judicial review has been filed? And there's not a rule, your Honor.

THE COURT: Well, you know what, and I don't mind saying this because -- just because something has never happened before based upon custom and practice doesn't mean it's necessarily prohibited.

MR. LEAVITT: Absolutely.

THE COURT: I kind of get that. I do. And I thought about that too. I did. For example, I even thought about maybe there's an application of Rule 9(C)

11:14:11 as it relates to condition precedents to this case. Because a petition precedent would be the filing of the petition for judicial review. And so -- I mean, I don't know. But it's fascinating. It just is.

11:14:24 MR. LEAVITT: But here's --

THE COURT: But go ahead.

MR. LEAVITT: Here's the really important issue here again, your Honor, is we're going to litigate the same facts in the petition for judicial review that are going to be heard in the inverse condemnation action. There is absolutely no rule which prohibits us from bringing both of those claims as parallel claims. And, your Honor, I think Mr. Daniels did a phenomenal job in the graph which was submitted, your Honor, and I'm showing it to you right now.

11:14:48 THE COURT: I saw that.

MR. LEAVITT: And the graph. This is the city's position is that what we've tried to do is the Nationstar attempt. In Nationstar what happened is the land -- the individual filed a fraud claim as a petition for judicial review. And the Court said, Listen, you can't file a fraud claim as a petition for judicial review. That's not what we've done in this case. So Nationstar doesn't even apply here.

11:14:58 11:15:11 We didn't file the inverse condemnation claim

11:15:15 as a petition for judicial review. Again, as you've well recognized here today, we filed a petition for judicial review with another claim which runs parallel to it, which is the inverse condemnation claim.

11:15:28 So here's all -- what the city -- what the city really wants us to do today, your Honor, is the city wants you to dismiss our inverse condemnation claim and go down and file it in another courtroom. That makes absolutely no sense whatsoever to do that.

11:15:42 It's not judicially efficient. It will not create consistency in the decision that comes out of this Court.

And frankly, your Honor, the Nevada Supreme Court has said that in these type of circumstances, we

11:15:53 have a duty to bring these claims together to make sure that there's not claims of res judicata, that there's not claims of -- or arguments of claim preclusion. We have a duty to bring these claims together. If we had filed the claim in another courtroom, there would be an

11:16:14 argument that they should be consolidated because they arise out of the same exact fact and circumstances, your Honor.

Now, what the city has also argued is they've argued that Rule 278, NRCP 278 has some rule that

11:16:28 prohibits you from bringing an inverse condemnation

11:16:30 claim with a petition for judicial review. That rule appears nowhere. I know that counsel cites in his -- in his pleading that says you can only bring a petition for judicial review under Rule 278.

11:16:41 Okay. That might be the case that under 278 you bring a petition for judicial review, but there's absolutely nothing in Rule 278 that says you cannot also bring another claim under that same case number that arises out of the same exact fact and

11:16:56 circumstances such as an inverse condemnation claim. There's nothing that prohibits that. Absolutely nothing. And we have a strong policy in Nevada to bring all claims together under Rule 8.

So, your Honor, we're trying to comply with

11:17:09 the pleading practice of the state of Nevada. We're trying to comply with Rule 8. Again, unless somebody can state to me a public policy for having the inverse condemnation action heard in another courtroom, I don't think there's any reason in law or public policy to

11:17:25 separate them out. Absolutely none, your Honor.

And, your Honor, so that -- so here's the solution. And I understand the city's concern. The only concern the city really has been able to say is that, Hey, well, we have these standards for petition

11:17:40 for judicial review that are different than the

11:17:41 standards for inverse condemnation.

That's why we said Let's stay the inverse condemnation. Let's hear the petition for judicial review. Get your decision on that, and then we can 11:17:50 determine from that decision whether there's been a temporary taking or a total taking of the landowner's property in the inverse condemnation claim, your Honor.

And if you have any more questions, your Honor, I would absolutely address them.

11:18:06 THE COURT: Not at this time.

MR. LEAVITT: Not. Okay. Thank you, your Honor.

MR. DOROCAK: As your Honor mentioned you've never seen a hybrid like this because these two claims 11:18:19 are, yes, mutually exclusive. And, in fact, there are plain rules and laws preventing what they've attempted to file here with their first amended petition.

As we cited earlier --

THE COURT: I have a question for you.

11:18:34 MR. DOROCAK: Yeah.

THE COURT: What is the city's position as it relates to the exhaustion of the administrative remedies? Is the city taking a position that as a condition precedent to filing a complaint for inverse 11:18:49 condemnation, the plaintiffs in this case must seek

11:18:53 final adjudication from the state courts for the state of Nevada?

MR. DOROCAK: That was our good-faith argument, your Honor. Obviously, with our reply we've moved on to what we believe are the stronger arguments here. Which is that the statute NRS 278, and the case law from 2016 in Nationstar basically make it obvious that you cannot file a document that includes a claim for judicial review with original claims specifically for inverse condemnation in this matter.

And to your point, what 180 Land Co seems to be suggesting -- well, what they do suggest vis-à-vis the countering of our exhaustion argument is that in reality the claims aren't connected. We wouldn't need a complete exhaustion of the city's determination --

THE COURT: But what I'm really focusing on, I want to make sure I'm perfectly clear.

MR. DOROCAK: Yeah.

THE COURT: As a condition precedent to invoking the general jurisdiction of the district court as it relates to the inverse condemnation claims, are you saying that an appeal has to be final as it relates to the petition for judicial review?

MR. DOROCAK: That was our argument, yes. That is our argument, yeah. But our argument that we

11:20:15 believe trumps even that argument is the plain language of Nationstar where the Supreme Court in 2016 said a judicial review -- a petition, so the document, a petition for judicial review cannot include original 11:20:29 claims. So, therefore, that prevents their inverse condemnation claims.

Now on the other hand, if they want to go with the argument that we have a judicial review claim next to the inverse condemnation claims, well then they are 11:20:42 running directly afoul of the statute that allows the Court to even have jurisdiction over the city council's decision, which is NRS 278. And as cited just this past December, December 2017 in the state of Nevada, which is Samantha Inc., when the legislature creates a 11:20:59 specific procedure for review of an administrative agency decision, such procedure is controlling.

Here the procedure in 278.3195, as your Honor mentions, and also cited in Kay versus Nunez, a Supreme Court case:

11:21:12 > A party who has administratively appealed to the board under the local ordinance may challenge the board's decision by filing a timely petition for judicial review.

We can focus on the claims and we can also 11:21:23 focus on the initial pleading here, but, essentially,

11:21:25 it gets to the same point. If you're filing a petition, the petition can only involve judicial review when we're talking about a 278 appeal of a governing body decision.

11:21:36 If we're talking about some other type of initial pleading, that is not a petition for judicial review as explicitly designated by the legislature in 278 as the vehicle for pursuing judicial review of the governing body's decision.

11:21:52 So something has to give in terms of these claims. And there is, obviously, NRS 278 and case law from 2016, case law from this past December that supports the city's proposition that this cannot proceed forward with the judicial review claim and

11:22:09 inverse condemnation claims all together.

The other point mentioned by counsel was that these facts are all the same. It's all -- it's essentially the same case and just two different claims. The only common fact here is that the city

11:22:22 made a decision with respect to the 35 acres.

On the review of the city's decision, all the Court is going to do is examine the record for substantial evidence to support that decision. They will then either allow that decision to go forward or

11:22:38 remand it because there wasn't substantial evidence to

support the decision. Those are the options for the Court.

With respect to the inverse condemnation claim, the decision by the city council effectively may go -- may go to one or two of the six elements required for inverse condemnation. With respect that would be a taking and an action by a public entity. Beyond that these are so dramatically different that, just as practical matter as we mentioned, they shouldn't be together, and that seems to be what the Court's point was in 2016 in Nationstar where they said, you know, If you have original claims, you bring a complaint so then you can do discovery, and then you can have a jury trial or in this matter a bench trial to resolve the matter.

The other point that seems to just be completely ignored is why didn't 180 Land Co simply bring a complaint for inverse condemnation. That should have been done. That could have been done. And there seems to be no --

THE COURT: Well, I think their position based upon listening to the arguments on that issue is the city is taking a position that you have to exhaust all remedies. And, in essence, as a condition precedent to doing something like that, there would have to be a

11:23:50 decision, a final decision by the Court of Appeals and/or the Nevada Supreme Court as it relates to the petition for judicial review. That might take two, three years; right?

11:24:00 MR. DOROCAK: The city made the exhaustion argument in November of last year. They filed their original petition in this matter in the summer of last year. They could have brought the -- I mean, I think it would be a stretch to say they were waiting to see

11:24:13 if the city was going to argue exhaustion.

I think something may have just triggered the idea we're going to attach the inverse condemnation claims, but then now in looking at the case law and NRS 278, they shouldn't have done that. They should

11:24:28 have just brought it on its own.

This idea that the city is going -- and that -- again, they tried to take us off point by, Well, we need a motion to stay here because the city is going to make exact opposite arguments in different

11:24:44 courtrooms. Well, the point then to keep in mind is that we have an improper pleading that is impermissible as a matter of law. Something needs to be dismissed from that pleading.

But to their point that we're going to argue

11:24:53 the exact opposite arguments, the petition for judicial

11:24:58 review is just going to require, your Honor, to, again, review the record. The city's argument is going to be that it's supported by substantial evidence. I don't know what argument there is then going to be taken and
11:25:08 the exact opposite presented down in an inverse condemnation claim courtroom. It just doesn't seem like that's going to -- that holds weight.

And then finally, this, again, to distract from the fact that they have an improper pleading here,
11:25:26 well, judicial efficiency. There's no judicial efficiency here. The only thing that they seem to continue to go back to is, Well, stay our inverse condemnation claims, which we incorrectly attached to the petition so that when you make a decision on the
11:25:41 petition, we can decide whether or not we proceed with those claims.

Well, who's getting the judicial efficiency out of that? It's a tactical move purely by 180 Land Co. And as I mentioned earlier, the problem with that
11:25:53 if your Court -- if your Honor goes against either party on the PJR, either both parties would be prevented from appealing the PJR, and it's a matter of right until the inverse condemnation claims are resolved. That is a major problem for keeping these
11:26:09 claims. And that's the key. We have a -- we have a

judicial review claim, inverse condemnation claim attached to the same unorthodox, unknown, we don't even know what to call it, initial pleading.

I mean, again, you know, they can talk about no rule. They can talk about no law. We have Nationstar that says you don't bring original claims vis-à-vis a petition for judicial review. And the key there is you don't bring original claim vis-à-vis a petition.

And then the other point that has been affirmed by our Supreme Court just in December 2017 all the way back to '89: When a procedure exists for allowing judicial review, which is the procedure that will allow this Court to even review an administrative decision, you must file that procedure. NRS 278's procedure is that a petition for judicial review is filed. It doesn't mention any -- the legislature didn't create some option of petition for judicial review and other related claims, petition for judicial review and complaint with claims.

It is plain. It is simple. It's been brought up in Kay versus Nunez. It was just less than a 20 year old case, I think 2006, that you bring a petition in order to challenge a 278 governing body decision.

The bottom line issue here is which part of

11:27:30 their improper pleading do we want to get rid of today? The petition can go because they're now arguing that, Oh, this isn't a petition. This is some hybrid document. Well, that does not comply with 278.

11:27:43 If, on the other hand, it's a petition, well, then we know from Nationstar that the Supreme Court does not want original claims as part of a petition. It doesn't make sense for the reasons your Honor has even mentioned. We have completely different discovery

11:27:56 standards, standards of review, and appellate issues.

So I think overall, the idea that there's no rule to support this, no case law to support what we're arguing is exactly -- is the exact opposite. You haven't seen anything like this before because it

11:28:12 shouldn't have been brought like this. And they should -- something should be dismissed, and they can try to bring it back vis-à-vis a new complaint with respect to the inverse condemnation. Or if your Honor wants to dismiss the petition because they're now

11:28:20 saying they don't even have -- they haven't filed a petition, they filed a hybrid initial pleading, than the petition is gone and that's it for that.

So that's where the city stands. And, again, we don't believe this claim that somehow these are so

11:28:35 factually connected. There's one fact that connects

11:28:38 them. The city council made a decision on 35 acres. Beyond that, everything else is a matter of two completely different sets of claims. Inverse condemnation, which as your Honor pointed to, is a big 11:28:49 process, six elements, full-blown discovery, constitutional issues. Or a quick judicial review of: Was that decision supported by substantial evidence?

The idea that somehow they have to be together is just a way for 180 Land Co to basically distract 11:29:08 from the fact that they filed an improper pleading here, and we need to, basically, make it correct.

Thank you.

THE COURT: I have a question for you. What am I to do then based upon the proposition that the 11:29:19 city's taking that they have to exhaust not just administrative remedies, but all judicial remedies as a condition precedent to filing an inverse condemnation claim in district court? Because I think that's an important factor to consider. Because I was -- I'm 11:29:36 thinking about this. And there's no question it's unique. I don't mind handling cases and issues that are unique.

Why can't a trial court that has potentially jurisdiction based upon the statute, more specifically 11:29:51 NRS 278, but also the jurisdiction under the Nevada

11:29:58 Constitution and the appropriate statutes as far as, I guess that would be, NRS 13.040 just sever off claims pursuant to Rule 42? Why can't I just sever them off, and they go by, and they're handled separately?

11:30:20 Because I'm just throwing that up for you to think about. Because, I mean, I was thinking about this. I was looking at the rule. And before I make that decision, if I made a decision based upon this, I'd give you an opportunity to, of course, brief that.

11:30:32 But it says here separate trials. The court in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy may order separate trials of any claims, cross claims, counter claims, third-party claims, or of

11:30:50 any separate issue, et cetera.

So I'm sitting here thinking about it. And why -- especially under the facts of this case where the city is saying, Look, you got to pursue not just administrative remedies and exhaust them but also

11:31:09 judicial remedies. Why couldn't I just say, Okay, Counsel, as far as your petition -- I should say first amended petition for judicial review and alternative verified claims of inverse condemnation, say, Clean it up, make the petition a separate document, and file an

11:31:33 amended complaint, and move on? Why couldn't I do

11:31:37 that?
MR. DOROCAK: Well, with respect to that right there --
THE COURT: And I realize it's new. I'm not
11:31:43 going to make a decision.
MR. DOROCAK: Right.
THE COURT: I just want to know why couldn't I do that as a trial judge. Because it does say here the court in furtherance of convenience or to avoid
11:31:52 prejudice. There's pretty broad.
MR. DOROCAK: To sever their claims would be to suggest that their claims were brought properly. Their claims were not brought properly. The judicial review cannot -- it cannot be on a petition with
11:32:09 original claims.
THE COURT: Well, but see, in essence, and I'm not really focusing on that, but assuming that is the case, why can't the Court in light of the position the city is taking just sever off the claims as it relates
11:32:28 to inverse condemnation? The city can file an answer. And you can have a 16.1 and go down that road as far as that is concerned. Then regarding the first amended petition for judicial review, we can set a status check for two weeks as it relates to a briefing schedule and
11:32:49 transmit the record and those types of things? Is

11:32:53 that -- can I do that or not do that?
MR. LEAVITT: Your Honor, I see no reason why you can't do that. And we would suffer no prejudice. And the city would suffer no prejudice on this. And
11:33:02 we'd have one courtroom --
MR. DOROCAK: The city would be prejudiced.
MR. LEAVITT: We'd have one courtroom hearing all the facts and circumstances. And let me address that. Counsel makes the argument that these facts are
11:33:11 going to be different. Let me tell you they're not. In the petition for judicial review the issue is going to be focused on the government action towards the property.
In the inverse condemnation action I don't
11:33:22 know what six elements counsel is talking about here, but the focus will be on government action towards the landowner's property. The same exact fact and circumstances will arise. And, your Honor, your role here or your suggestion is what we've essentially
11:33:37 suggested by staying these claims.
THE COURT: No. I understand.
MR. LEAVITT: Yeah.
THE COURT: Just stating it in a different way.
11:33:43 MR. LEAVITT: Which is no problem with that.

11:33:43 We can -- we can make an order to that effect. Or if you want us to do a pleading to that effect, but I do want to address one issue, your Honor. Okay. Because counsel has made an argument that there's a
11:33:52 precondition to bringing an inverse condemnation action. The Nevada Supreme Court addressed that issue in County of Clark versus Alper and said unequivocally there are no preconditions to bringing an inverse condemnation action once the government entity makes a
11:34:10 decision. No preconditions.

In County of Clark v Alper what happened is the county adopted a claim statute, a six-month claim statute and said you need to take certain action before you can file an inverse condemnation action. The
11:34:23 Nevada Supreme Court said that is unconstitutional. That once the city made its decision to deny the landowner the use of this property, the right to just compensation became self-executing. That's addressed. And the reason I'm bringing this up because that goes
11:34:37 to the ripeness issue. This issue in inverse condemnation is absolutely ripe right now. It should be brought in this case.

It -- and, in fact, your Honor, the Nevada Supreme Court said it must be brought in this type of
11:34:52 case where you have the same exact fact and

11:34:54 circumstances so you don't have issues of claim preclusion and issue preclusion coming up. And so that's why, your Honor, even though both of these cases could go simultaneously, there's no reason that these 11:35:06 cases couldn't go forward simultaneously because the inverse condemnation case is ripe pursuant to Nevada Supreme Court precedent, the petition for judicial review is ripe pursuant to Nevada Supreme Court precedent. They're both ripe to go forward.

11:35:20 But we suggested a course of conduct which is absolutely convenient. Does not prejudice the city in any way, shape, or form. The city says it's going to be prejudiced if we try both issues in this courtroom instead of having the inverse condemnation action tried 11:35:37 in another courtroom. I am yet to hear how the city could possibly be prejudiced under these circumstances where we have one judge hear all of the facts for consistency purposes, your Honor.

So, your Honor, I think your suggestion is 11:35:50 correct. It's similar to what we've suggested. And I think we should proceed in that manner, your Honor. But again, I don't want a ruling that this petition for judicial review is some type of precondition to moving forward with the inverse condemnation action because 11:36:02 that would be directly --

11:36:03 THE COURT: I think that's -- that -- regardless of what decision I make, it's going to pivot on that issue.

MR. LEAVITT: Well, then I need to address that very clearly, your Honor.

11:36:11 THE COURT: Yeah.

MR. LEAVITT: In the Sisolak case, a Nevada Supreme Court case, and in County of Clark, a Nevada Supreme Court case, both of those decisions -- Sisolak is a 2006 decision, County of Clark versus Alper is a 1985 decision -- the Nevada Supreme Court had two opportunities to address this issue of whether the government, the City of Las Vegas, can argue for or even adopt a statute to place preconditions on an inverse condemnation action. And they stated unequivocally that you cannot. The legislature cannot. And if the legislature cannot, the city cannot come in here and argue for preconditions which don't exist. There's none, your Honor.

11:36:53 And there's -- the policy behind this is clear is once the government takes property, the Fifth Amendment to the United States Constitution kicks in and the landowner is automatically entitled to payment of just compensation. Automatically. So these two claims can proceed at the same time.

11:37:14 So what -- how do that apply in this case? Once the City of Las Vegas made its final decision and stated that the landowner cannot develop his property, we then listed our claims in inverse condemnation
11:37:26 because they were automatic, your Honor.

We're entitled to be paid just compensation for the taking of property automatically without any preconditions at this time. And that's -- I mean, your Honor, that's well established inverse condemnation law
11:37:40 in the state of Nevada that there cannot be preconditions. This petition for judicial review cannot act as a precondition.

There's another important reason for that, your Honor, also, is the statute of limitations in an
11:37:53 inverse condemnation case is 15 years. If a petition for judicial review is a precondition to bringing an inverse condemnation action, you've now shortened that 15 years to 25 days because that's the time frame to bring a petition for judicial review.
11:38:09 So it's directly contrary to the White Pine Lumber case, the 15-year statute of limitations. It's directly contrary to the County of Clark, the claims preclusion case. And it's directly contrary to Sisolak, which is another exhaustion of administrative
11:38:24 remedies case. And, your Honor, it is directly

11:38:26 contrary to Palazzolo, the United States Supreme Court case that says you, in order to exhaust your administrative remedies, only need a decision from the governing agency.

11:38:35 There's nothing in any case I've ever read ever that says you can put preconditions on an inverse condemnation case, that you have to go through the petition for judicial review process. Never have read it, your Honor. And we have four cases right on point, 11:38:50 three in -- two in the State of Nevada, and one at the United States Supreme Court saying you cannot put those preconditions on.

Thank you, your Honor.

MR. DOROCAK: Your Honor, I think, mentioned a 11:39:02 question earlier. I don't remember it exactly, but it was on the point of exhaustion. And unsurprisingly, 180 Land Co is focused on preconditions and exhaustion when today we are conceding that that is, obviously, a weak city argument because they are trying to avoid the 11:39:17 obvious which is that these two sets of claims have no business being together on the same initial pleading. Your Honor asked how would we be prejudiced by keeping them together. For some reason that's --

THE COURT: Well, that's not what I asked.

11:39:29 MR. DOROCAK: Oh.

11:39:29 MR. WATERS: How would you be prejudiced if the -- if I made a determination, Look, amend the petition, and specifically relating to the petition for judicial review and file -- and I will sever out the 11:39:49 same case, and they can file an amended complaint as it relates to the issue of inverse condemnation?

And the reason why I'm saying that is essentially this, I'm looking at it from this perspective. The city is taking the position that you 11:40:06 have to -- it appears to me, that whether -- that you have to exhaust not just administrative remedies, but also judicial remedies and appeals, and obtain a final decision as a condition precedent to pursuing an inverse condemnation claim for relief in district 11:40:29 court. And whether that's a strong position or not, I'm not going to make that decision today because that's not really teed up for me.

What's teed up for me is essentially this: There's been a hybrid petition filed. And here's 11:40:48 what's fascinating because I was listening to you, and I was looking at the Nationstar Mortgage versus Rodriquez case. And really one of the issues of fraud that occurred in that case, or one of the allegations, and, I guess, this is what Judge Earl did, who I 11:41:04 respect and I worked for. I don't mind saying that. I

worked for Judge Earl and actually tried a few cases with Judge Earl.

And, but anyway, it appeared to me that there appeared to be an issue regarding notice and whether notice was received as it related to the Nevada Foreclosure Mediation Program, and that was a big problem. So Judge Earl took a, appeared to me, a very cautious approach and said, You know, maybe there should be some discovery on that issue.

Now, I'm looking at this in a different light in that, Okay, if I sever them out, the judicial review petition there will be no discovery on that issue, and it would be limited to the record on appeal, and I make a decision as to whether the city council was arbitrary and capricious in their decision or not. That's all.

But just as important from a safety perspective and concern, and there's other issues too, because I do have to worry about, from what I can see, in furtherance of convenience to avoid prejudice, or -- and understand that's an "or". These are all disjunctive. It's not conjunctive. It's not an "and". The Court can, you know, sever cases, you know, sever issues. They can do that. And that's -- and that's my question.

And so if I severed them out, I'm trying to

11:42:49 articulate where there would be a prejudice to the city. Because I understand the different standards. And so is it your position that prejudice would be essentially this: The plaintiffs have to pick one or
11:43:05 the other, and they don't have a right to file a petition for judicial review and proceed with an inverse condemnation claim for relief, say, hypothetically, even in another court at the same time? That's what I'm trying to figure out.

11:43:21 MR. DOROCAK: No, your Honor. Our position today and our position stated in our reply is that you bring inverse condemnation claims vis-à-vis a complaint. You bring a judicial review of an NRS 278 local governing body decision via petition. You can't
11:43:35 bring them together. To allow them to tack on the inverse condemnation claims to their petition gives them a mid-2017 filing date on claims vis-à-vis an initial pleading. That's frankly not allowed by case law or the statute.

11:43:52 To sever out and allow them to do an amended complaint, I guess, within your department and then give them a filing date of that amended complaint when it's filed, city would be open to that. But the prejudice comes from allowing them to take advantage or
11:44:06 to basically defy 278 --

11:44:09 THE COURT: Interesting.
MR. DOROCAK: -- and NRS 278 and Nationstar and basically just throw everything together in a petition and, therefore, get with their first amended
11:44:19 petition the day from the original petition, which, until recently, was filed untimely. That's the potential prejudice to the city. There's an issue with the filing date. We don't know what it --
THE COURT: Well, I've already decided that.
11:44:31 MR. DOROCAK: Yeah, yeah.
THE COURT: So that's preserved for appellate purposes.
MR. DOROCAK: Sorry, your Honor. There's an issue with the filing date in terms of getting the
11:44:37 inverse condemnation claims on a 2017 petition versus if you make them file an amended with a filing date of January 2018. I don't know specifically, you know, if it's going to effect any statute of limitations, but we're talking six months. And for some reason with
11:44:53 their first amended petition, they wanted those inverse condemnation claims on the petition despite NRS 278 and despite Nationstar.
And so I'm going -- you know, I have to guess. I have to speculate. But you're asking me what might
11:45:06 be the prejudice here. Something happened that they

decided instead of just filing a complaint, which they admit they could have just done, there's no preconditions. There's no preconditions. We can file whenever. They decided, No, we're going to tack this on to our petition. The other point is there are six elements to inverse condemnation. That's a recent case, Washoe County. It's within the last few years.

THE COURT: Okay. I'm not going to decide --

MR. DOROCAK: No, I know. I mean, in terms of where --

MR. LEAVITT: Your Honor, again, I've heard no prejudice. And if there's an issue with the day on what the date should have been on the filing, we can address that at a later time, your Honor. I mean, that's not something that -- what he said is there might be some prejudice to the city that we don't know about now, and so we want you to take the extraordinarily act of -- extraordinary act of dismissing this claim and making us file it in a different courtroom, which would be incredibly inconvenient, which is not judicially efficient. And frankly, your Honor, I'm glad you found Rule 42 because it flies in the face of Rule 42 and your jurisdiction to go ahead and split these up, which is what we've asked to do, your Honor.

11:46:05 We think -- and, frankly, your Honor, we don't need to split them up. I'll just say that. We can have them go at the same time. But we thought, Okay, Well, they have a concern that they don't want these
11:46:14 heard at the same time. So we said, Let's go ahead and just split them up.

THE COURT: Well, the reason for that is essentially this. I mean, I thought it was such a unique issue. I'd never seen it. I've been on the
11:46:24 bench 12 years. And I think all my law clerks will tell you, I really enjoy what I do. And I was having fun. And I was just thinking about this case like I think about all cases.

And I was wondering at the end of the day what
11:46:40 would be the appropriate result. And I was looking at the different rules. I looked at, I think it was 9(C), you know, conditions precedent. And I looked at Rule 42. And I was saying to myself because -- because I understood what you're saying. You're saying, Look,
11:46:55 Judge, stay this. Don't decide this.

Well, and I want to make sure whatever I do it doesn't run afoul of what our Supreme Court mandates. And they could be sticklers for certain reasons, for whatever reason.

11:47:08 MR. LEAVITT: Sure.

11:47:09 THE COURT: I want to make sure I don't confuse them. So I just wanted to make sure we had a clear record as to specifically what was going on. And so I thought about why can't that be severed out. And 11:47:19 it would be very clear. The only standards I would rely upon would be the typical standards we utilize when there's a petition for judicial review filed; consequently, I would determine that. But just as important too, it does plead in the alternative which 11:47:41 you can do.

MR. LEAVITT: Sure.

THE COURT: And I do understand that it's a petition. There's a difference between a petition and the complaint. I want to make sure everyone 11:47:48 understands that.

MR. LEAVITT: Correct.

THE COURT: So it appears to me that when I looked at this document, we had a petition, and in the same document there was a complaint.

11:47:58 MR. LEAVITT: Right. And so, your Honor --

THE COURT: Right?

MR. LEAVITT: -- it would really just be a matter of form over substance. What we would do is we could just go forward with the petition and the 11:48:06 complaint and just stay the inverse condemnation part

11:48:10 of that pleading which is the complaint part. Or if you wanted, we could file an amended complaint which is separate from that document. Just re-alleging --

THE COURT: Why can't we do this, and I

11:48:23 don't -- maybe we won't --

MR. LEAVITT: Right.

THE COURT: -- do it that way because I haven't thought about appellate -- yeah. Why can't we just amend -- file an amended complaint that would

11:48:37 include all claims for relief that would be non-petition for judicial review related in the same case? And have that over there, maybe stay that and hear the petition for judicial review.

And the city is actually nodding their head on

11:48:58 that.

MR. LEAVITT: So that would be in this -- under this purview of this same case number?

THE COURT: Yes.

MR. LEAVITT: I don't see any issue with that,

11:49:04 your Honor.

MR. DOROCAK: I don't -- sorry. Yeah. I don't have any issue with that either because it would essentially be if you were to dismiss their inverse condemnation claim, tell them to bring it back

11:49:12 vis-à-vis a complaint, and then we just move it into

this department anyways. So, yeah, we're open to that.

THE COURT: All right.

MR. LEAVITT: Your Honor, you've done a good job today.

THE COURT: That's what we'll do.

MR. LEAVITT: Okay.

THE COURT: So, in essence, what I'm going to do as far as -- let me make sure I get this right. Regarding the motion to dismiss, I'm going to deny that. Regarding the strike, I'm going to deny that. However, we're going to sever off the inverse condemnation claims, and the Court will only -- and we're going to stay those. And we're going to deal specifically with the petition for judicial review. And those will be the standards that shall be applied for the petition for judicial review.

MR. DOROCAK: And an amended complaint will be filed with the inverse condemnation claims?

THE COURT: Yes.

MR. DOROCAK: Okay.

MR. LEAVITT: We can go ahead and do that, your Honor.

THE COURT: All right.

MR. LEAVITT: If you have no objection over here.

11:50:07 MR. DANIELS: No.

MR. LEAVITT: We can do that, your Honor.

MR. SCHNEIDER: Give us time. When do you need the amended complaint filed, Judge? What's fair?

11:50:13 30 days? 20 days?

THE COURT: What do you think, 30 days, sir?

MR. DOROCAK: Fine with me.

THE COURT: And answer, and then we can do it the right way. And trust me, I think I just saved you

11:50:22 two years on appeal.

MR. LEAVITT: That's very good, your Honor. Thank you.

THE COURT: Right.

MR. SCHNEIDER: All right.

11:50:26 THE COURT: Everyone, enjoy your day.

IN UNISON: Thank you.

(Proceedings were concluded.)

* * * * * * * * *

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF NEVADA.

_____
PEGGY ISOM, RMR, CCR 541

Exhibit 2

Order Denying Motion to Dismiss, February 2, 2018

Electronically Filed
2/2/2018 8:19 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Petitioner, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I	Case No.: A-17-758528-J Dept. No.: XVI **NOTICE OF ENTRY OF ORDER DENYING MOTION TO DISMISS AND COUNTERMOTION TO STAY LITIGATION** **Hearing Date: January 11, 2017** **Hearing Time: 9:00 a.m.**

through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendant.

PLEASE TAKE NOTICE than an Order Denying Motion to Dismiss Countermotion to Stay Litigation was entered in the above-referenced case on February 1, 2018. A copy of the Order is attached as Exhibit 1.

DATED this 2nd day of February, 2018.

KAEMPFER CROWELL

BY: /s/ Ryan W. Daniels

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Attorneys for Petitioner

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the foregoing **NOTICE OF ENTRY OF ORDER DENYING MOTION TO DISMISS AND COUNTERMOTION TO STAY LITIGATION** was made this date by electronic means pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic 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:

Bradford R. Jerbic
Philip R. Byrnes
Jeffry M. Dorocak
City Attorney's Office
Counsel for City of Las Vegas

DATED this 2nd day of February, 2018.

/s/ Gina Muscari
an employee of Kaempfer Crowell

EXHIBIT 1

ORD
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DISTRICT COURT
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180 LAND COMPANY, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Petitioners, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I	Case No.: A-17-758528-J Dept. No.: XVI **ORDER DENYING MOTION TO DISMISS AND COUNTERMOTION TO STAY LITIGATION** **Hearing Date: January 11, 2017** **Hearing Time: 9:00 a.m.**

JAN 24 2018

through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X,

Defendant.

This court heard the City Of Las Vegas' (the "City") Motion to Dismiss/Motion to Strike and 180 Land Company, LLC's ("180 Land") Countermotion on January 11, 2017. Jeffry Dorocak appeared on behalf of the City and Kermit Waters, James Leavitt, Michael Schneider, and Ryan Daniels appeared on behalf of 180 Land. Having considered the pleadings and papers on file and the argument of counsel, this Court makes the following findings of fact and conclusions of law and orders as follows:

FINDING OF FACT

1. 180 Land filed its Petition for Judicial Review on July 17, 2017.

2. 180 Land later amended its Petition for Judicial Review and added alternative verified claims in inverse condemnation.

3. Both the Petition for Judicial Review and Alternative Verified Claims in Inverse Condemnation comprise one action for which this Court has jurisdiction.

CONCLUSIONS OF LAW

4. Under EJDCR 8.03, "[a] document that is E-Filed shall be deemed to have been received by the Clerk of the Court on the date and time of its transmittal." Since 180 Land transmitted its Petition for Judicial Review on July 17, 2017, as a matter of law, it timely filed its petition on July 17, 2017.

5. 180 Land appropriately stated inverse condemnation claims against the City when it amended its Petition for Judicial Review. The Inverse Condemnation claims relied on

allegations that—if true—would entitle 180 Land to relief. Moreover, the claims were ripe because 180 Land obtained a final decision from the City regarding the property at issue and "a final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618, 121 S. Ct. 2448, 2458 (2001).

6. Given the one form of action rule in the Nevada Constitution Article 6, Section 14, and Nevada Rules of Civil Procedure 2 and 8, 180 Land could bring both the Petition for Judicial Review and the Alternative Verified Claims in Inverse Condemnation in the same action.

7. Nonetheless, according to N.R.C.P 42, this Court may order "a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury" "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."

Based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the City's Motion to Dismiss 180 Land's Petition for Judicial Review and Alternative Claims in Inverse Condemnation is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the City's Motion to strike 180 Land's claims for Inverse Condemnation is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Alternative Claims in Inverse Condemnation are ripe and will be severed from the Petition for Judicial review pursuant to N.R.C.P. 42 and the Countermotion to stay the litigation is GRANTED which includes a stay of the N.R.C.P. 41(e) time periods (including without limitation the two (2) year

and five (5) year trial periods) during the stay period and these time periods shall not commence for the Alternative Inverse Condemnation Claims until a final decision on the Petition for Judicial Review is entered. This Court will consider the Petition for Judicial Review first while the Alternative Inverse Condemnation claims are stayed pending this Court's decision on the petition.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that 180 Land shall have 30 days from entry of this Order to file an amended complaint for the alternative claims in inverse condemnation in this action.

IT IS SO ORDERED

Dated this 25th day of January, 2018.

DISTRICT COURT JUDGE

Submitted By:

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Exhibit 3

Findings of Fact and Conclusion of Law on Petition for Judicial Review

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION FOR JUDICIAL REVIEW**

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; STEVE 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,

Intervenors.

NOTICE IS HEREBY GIVEN to all parties that Findings of Fact, Conclusions of Law were entered in the above-captioned case on the 21st day of November, 2018, a copy of which is attached hereto.

Dated this 26th day of November, 2018.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 26th day of November, 2018, a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION FOR JUDICIAL REVIEW** was 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

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION FOR JUDICIAL REVIEW**

OCT 30 2018

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; STEVE 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,

Intervenors.

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Petitioner 180 Land Company, LLC filed a petition for judicial review ("Petition") of the Las Vegas City Council's June 21, 2017 decision to deny four land use applications ("Applications") filed by Petitioner to develop a 34.07-acre portion of the Badlands Golf Course ("the 35-Acre Property"). The Court granted a motion to intervene filed by surrounding homeowners ("Intervenors") whose real property is adjacent to and affected by the proposed development of the 35-Acre Property. The Court having reviewed the briefs submitted in support of and in opposition to the Petition, having conducted a hearing on the Petition on June 29, 2018, having considered the written and oral arguments presented, and being fully informed in the premises, makes the following findings of facts and conclusions of law:

I. FINDINGS OF FACT

A. The Badlands Golf Course and Peccole Ranch Master Development Plan

1. The 35-Acre Property is a portion of 250.92 acres of land commonly referred to as the Badlands Golf Course ("the Badlands Property"). (ROR 22140-201; 25819).

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2. The Badlands Property is located between Alta Drive (to the north), Charleston Boulevard (to the south), Rampart Boulevard (to the east), and Hualapai Way (to the west), and is spread out within existing residential development, primarily the Queensridge Common Interest Community. (ROR 18831; 24093).

3. The Badlands Property is part of what was originally the Venetian Foothills Master Development Plan on 1,923 acres of land, which was approved by the Las Vegas City Council (the "Council") on May 7, 1986. (ROR 25820).

4. The plan included two 18-hole golf courses, one of which would later become known as "Badlands." (ROR 2635-36; 2646).

5. Both golf courses were designed to be in a major flood zone and were designated as flood drainage and open space. (ROR 2595-2604; 2635-36; 4587).

6. The Council required these designations when approving the plan to address flooding, and to provide open space in the master planned area. (*Id.*).

7. The City's General Plan identifies the Badlands Property as Parks, Recreation and Open Space ("PR-OS"). (ROR 25546).

8. The City holds a drainage easement within the Badlands Property. (ROR 4597; 5171; 5785).

9. The original master plan applicant, William Peccole/Western Devcor, Inc., conveyed its interest to an entity called Peccole Ranch Partnership. (ROR 2622; 20046-47; 25968).

10. On February 15, 1989, the Council approved a revised master development plan for 1,716.30 acres, known as "the Peccole Ranch Master Development Plan" ("the Master Development Plan"). (ROR 25821).

11. On April 4, 1990, the Council approved an amendment to the Master Development Plan to make changes related to Phase Two, and to reduce the overall acreage to 1,569.60 acres. (*Id.*).

12. Approximately 212 acres of land in Phase Two was set aside for a golf course, with the overall Peccole Ranch Master Plan having 253.07 net acres for golf course, open space and

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drainage. (ROR 2666; 25821).

13. Like its predecessor, the Master Development Plan identified the golf course area as being for flood drainage and golf course purposes, which satisfied the City's open space requirement. (ROR 2658-2660).

14. Phase Two of the Master Plan was completed such that the golf course is now surrounded by residential development. (ROR 32-33).

15. The 35-Acre Property that is the subject of the Applications at issue here lies within the Phase Two area of the Master Plan. (ROR 10).

16. Through a number of successive conveyances, Peccole Ranch Partnership's interest in the Badlands Property, amounting to 250.92 acres, was transferred to an entity called Fore Stars, Ltd., an affiliate of Petitioner. (ROR 24073-75; 25968).

17. On June 18, 2015, Fore Stars transferred 178.27 acres to Petitioner and 70.52 acres to Seventy Acres, LLC, another affiliate, and retained the remaining 2.13 acres. (*Id.*).

18. The three affiliated entities – Petitioner (i.e., 180 Land Co., LLC), Seventy Acres LLC and Fore Stars, Ltd. (collectively, "the Developer") – are all managed by EHB Companies, LLC, which, in turn, is managed by Paul Dehart, Vicki Dehart, Yohan Lowie and Frank Pankratz. (ROR 1070; 1147; 1154; 3607-3611; 4027; 5256-57; 5726-29). The Court takes judicial notice of the complaint filed by 180 Land Co., LLC, Fore Stars, Ltd., Seventy Acres, LLC, and Yohan Lowie in the United States District Court, Case No. 2:18-cv-00547-JCM-CWH ("the Federal Complaint"), which alleges these facts.

19. Mr. Lowie and various attorneys represented the Developer with regard to its development applications before the Council. (ROR 24466-24593).

B. The Developer's Prior Applications to Develop the Badlands Property

20. On November 15, 2015, the Developer filed applications for a General Plan Amendment, Re-zoning and Site Development Plan Review to change the classification of 17.49 acres within the 250.92-acre Badlands Property from Parks Recreation/Open Space to High Density ("the 17-Acres Applications"). (ROR 25546; ROR 25602; ROR 25607).

21. The 17-Acre Property is located in the northeast corner of the Badlands Property,

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distant from and not adjacent to existing residential development. (ROR 33).

22. In reviewing the 17-Acres Applications, the City's planning staff recognized that the 17-Acre Property was part of the Master Development Plan and stated that any amendment of the Master Development Plan must occur through a major modification pursuant to Title 19.10.040 of the City's Unified Development Code. (ROR 25532).

23. Members of the public opposed the 17-Acre Applications on numerous grounds. (ROR 25768-78).

24. On February 25, 2016, the Developer submitted an application for a major modification to the Master Development Plan (the "Major Modification Application") and a proposed development agreement (which it named the "2016 Peccole Ranch Master Plan") for the entire 250.92-acre Badlands Property ("the proposed 2016 Development Agreement"). (ROR 25729; 25831-34).

25. In support of the Major Modification Application, the Developer asserted that the proposed 2016 Development Agreement was in conformance with the Las Vegas General Plan Planning Guidelines to "[e]ncourage the master planning of large parcels under single ownership in the growth areas of the City to ensure a desirable living environment and maximum efficiency and savings in the provision of new public facilities and services." (ROR 25986).

26. The Developer also asserted that it would "guarantee that the development of the golf course property would be accomplished in a way that ensures that Queensridge will retain the uniqueness that makes living in Queensridge so special." (ROR 25966).

27. Thereafter, the Developer sought abeyances from the Planning Commission on the 17-Acres Applications to engage in dialogue with the surrounding neighbors, and to allow the hearings on the Major Modification Application and the 17-Acre Applications to proceed simultaneously. (ROR 25569; 25613; 25716; 25795; 26014; 26195; 26667; 27989).

28. The Council heard considerable opposition to the Major Modification Application and the proposed 2016 Development Agreement regarding, among other things, traffic, conservation, quality of life and schools. (ROR 25988-26010; 26017-45; 26072-89; 26091-107).

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29. At a March 28, 2016 neighborhood meeting, 183 members of the public attended who were "overwhelmingly opposed" to the proposed development. (ROR 25823-24).

30. The City received approximately 586 written protests regarding the proposed 2016 Development Agreement plus multiple e-mails to individual Council members in opposition. (ROR 31053; ROR 989-1069).

31. In approximately April 2016, City Attorney Brad Jerbic became involved in the negotiation of the proposed 2016 Development Agreement to facilitate discussions between the Developer and the nearby residents. Over the course of the next year, Mr. Jerbic and Planning Director Tom Perrigo met with the Developer's representatives and various members of the public, including representatives of the Queensridge HOA and individual homeowners, in an effort to reach consensus regarding a comprehensive development plan for the Badlands Property. (ROR 27990).

32. The Mayor continued to inquire about the status of the negotiations, and Council members expressed their desire that the parties negotiate a comprehensive master plan that meets the City's requirements for orderly and compatible development. (ROR 17335).

33. Prior to the Council voting on the Major Modification Application, the Developer requested to withdraw it without prejudice. (ROR 1; 5; 6262).

34. Several members of the public opposed the "without prejudice" request, arguing that the withdrawal should be with prejudice to ensure that the Developer would create a development plan for the entire Badlands Property with input from neighbors. (ROR 1077-79, 1083).

35. In response, the Mayor received assurances from the Developer's lawyer that the Developer would engage in good-faith negotiations with neighboring homeowners. (ROR 1115).

36. The Developer also represented that it did not seek to develop the Badlands Property in a piecemeal fashion: "[I]t's not our desire to just build 17.49 acres of property that we wanted to build the rest of it, and that's why we agreed to the withdrawal without prejudice to meet [with neighboring property owners] to try to do everything we can." (ROR 1325). Based on these assurances, the Council approved the Developer's request to withdraw the Major

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Modification Application and proposed 2016 Development Agreement without prejudice. (ROR 2; 1129-1135).

37. The Mayor reiterated that the Council sought a comprehensive plan for the entire Badlands Property to ensure that any development would be compatible with surrounding properties and provide adequate flood control. (ROR 17321-22).

38. The Developer's counsel acknowledged the necessity for a master development plan for the entire Badlands Property. (ROR 17335).

39. City Planning Staff recommended approval of the 17-Acres Applications with several conditions, including the approval of both (1) the Major Modification Application and (2) the proposed 2016 Development Agreement. (ROR 27625-26, 27629).

40. On October 18, 2016, the City's Planning Commission recommended granting the 17-Acres Applications but denying the Major Modification Application. (ROR 1; 31691-92).

41. The Council heard the 17-Acres Applications at its November 16, 2016 meeting. (ROR 1075-76).

42. The Council members expressed that a comprehensive plan for the entire Badlands Property was necessary to avoid piecemeal development and ensure compatible land densities and uses. (ROR 1310-14).

43. Nevertheless, the Council and the Planning Director recognized the 17-Acre Property as distinct from the rest of the Badlands Property due to its configuration, lot size, isolation and distance from existing development. (ROR 1311-12).

44. To allow time for negotiations between the Developer and the project opponents on a comprehensive development agreement, the Council held the 17-Acres Applications in abeyance until February 15, 2017. (ROR 1342; 6465-6470, 11231).

45. On February 15, 2017, the Council again considered the 17-Acres Applications. (ROR 17235).

46. The Developer stated that it had reduced the requested number of units from 720 to 435 to match the compatibility of adjacent Queensridge Towers. (ROR 17237-38).

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47. Based on the reduction and compatibility effort made by the Developer, the Council approved the 17-Acres Applications with certain modifications and conditions. (ROR 11233; 17352-57).

48. Certain nearby homeowners petitioned for judicial review of the Council's approval of the 17-Acres Applications. *See Jack B. Binion, et al v. The City of Las Vegas, et al.*, A-17-752344-J.

49. On March 5, 2018, the Honorable James Crockett granted the homeowners' petition for judicial review, concluding that a major modification of the Master Development Plan to change the open space designation of the Badlands Golf Course was legally required before the Council could approve the 17-Acres Applications ("the Crockett Order"). The Court takes judicial notice of the Crockett Order.

C. The 35-Acres Applications at Issue in this Petition for Judicial Review

50. The instant case seeks judicial review of the Council's denial of the Applications filed by Petitioner to develop the 35-Acre Property.

51. The Applications consisted of: an application for a General Plan Amendment for 166.99 acres to change the existing City's General Plan designation from Parks Recreation/Open Space to Low Density Residential (ROR 32657); a Waiver on the size of the private streets (ROR 34009); a Site Development Review for 61 lots (ROR 34050); and a Tentative Map Plan application for the 35-Acre Property. (ROR 34059).

52. The development proposed in the Applications was inconsistent with the proposed 2016 Development Agreement that was being negotiated. (ROR 1217-1221; 17250-52; 32657; 34050; 34059).

53. The Council members expressed concern that the Developer was not being forthcoming and was stringing along neighboring homeowners who were attempting to negotiate a comprehensive development plan that the Council could approve. (ROR 1305; 1319).

54. The Applications came up for consideration during the February 14, 2017 Planning Commission meeting. (ROR 33924).

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55. Numerous members of the public expressed opposition, specifically identifying the following areas of concern: (1) existing land use designations did not allow the proposed development; (2) the proposed development was inconsistent with the Master Development Plan and the City's General Plan; (3) the Planning Commission's decision would set a precedent that would enable development of open space and turn the expectations of neighboring homeowners upside down; (4) the Applications required a major modification of the Master Development Plan; (5) neighboring residents have a right to enjoyment of their property according to state statutes; (6) the proposed development would negatively affect property values and the characteristics of the neighborhood; and (7) the development would result in over-crowded schools. (ROR 33934-69).

56. Project opponents also expressed uncertainty and anxiety regarding the Developer's lack of a comprehensive development plan for the entire Badlands Property. (*Id.*).

57. The Planning Commission did not approve Petitioner's application for the General Plan Amendment, which required a super-majority vote, but did approve the Waiver, Site Development Review and the Tentative Map applications, subject to conditions as stated by City Staff and during the meeting. (ROR 33998-99; 34003).

58. After several abeyances (requested once by City Planning Staff and twice by Petitioner), the four Applications for the 35-Acre Property came before the Council on June 21, 2017. (ROR 17360; 18825-27; 20304-05; 24466).

59. The objections that had been presented in advance of and at the Planning Commission meeting were included in the Council's meeting materials. (ROR 22294-24196).

60. As had occurred throughout the two-year history of the Developer's various applications, the Council heard extensive public opposition, which included research, factual arguments, legal arguments and expert opinions. (ROR 22205-78; 22294-24196). The objections included, among others, the following:

a. The Council was allowing the Developer to submit competing applications for piecemeal development, which the City had never previously allowed for any other developer. (ROR 24205).

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b. The Applications did not follow the process required by planning principles. (Report submitted by Ngai Pindell, Boyd School of Law professor of property law, ROR 24222-23).

c. The General Plan Amendment application exceeds the allowable unit cap. (ROR 24225-229).

d. The Developer failed to conduct a development impact notice and assessment. (ROR 24231-36).

e. The Applications are not consistent with the Master Development Plan or the City's General Plan. (ROR 24231-36).

f. The design guidelines for Queensridge, which were approved by the City and recorded in 1996, reference the golf course, and residents purchased property and built homes in reliance on that document. (ROR 24237-38).

g. The Applications were a strategic effort by the Developer to gain leverage in the comprehensive development agreement negotiations that were ongoing. (Queensridge HOA attorney Shauna Hughes, ROR 24242-44).

h. Security would be a problem. (ROR 24246-47).

i. Approval of the Applications in the absence of a comprehensive plan for Badlands Property would be irresponsible. (ROR 24254-55).

j. The proposed General Plan Amendment would approve approximately 911 homes with no flood control or any other necessary requirements. (ROR 24262).

61. After considering the public's opposition, the Mayor inquired as to the status of negotiations related to a comprehensive development agreement for the entire Badlands Property. The City Attorney responded that no agreement had been reached. (ROR 24208-09).

62. The Developer and its counsel represented that only if the Council approved the four Applications would it then be willing to negotiate a comprehensive development agreement and plan for the entire Badlands Property. (ROR 24215, 24217, 24278-80).

63. The Council voted to deny the Applications. (ROR 24397).

64. On June 28, 2017, the City issued its final notices, which indicated that the

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Council's denial of the Applications was "due to significant public opposition to the proposed development, concerns over the impact of the proposed development on surrounding residents, and concerns on piecemeal development of the Master Development Plan area rather than a cohesive plan for the entire area." (ROR 35183-86).

65. The Petitioner filed this petition for judicial review to challenge the Council's denial of the Applications.

66. Petitioner has not presented any evidence to the Court that it has a pending application for a major modification for the 35-Acre Property at issue in this Petition for Judicial Review.

II. CONCLUSIONS OF LAW

A. Standard of Review

1. In a petition for judicial review under NRS 278.3195, the district court reviews the record below to determine whether the decision was supported by substantial evidence. *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 271, 236 P.3d 10, 15-16 (2010) (*citing Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006)).

2. "Substantial evidence is that which a reasonable mind could accept as sufficient to support a conclusion." *Id.*

3. The scope of the Court's review is limited to the record made before the administrative tribunal. *Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982).

4. The Court may "not substitute its judgment for that of a municipal entity if substantial evidence supports the entity's action." *Id.*

5. "[I]t is not the business of courts to decide zoning issues… Because of the [governing body's] particular expertise in zoning, courts must defer to and not interfere with the [governing body's] discretion if this discretion is not abused." *Nevada Contractors v. Washoe Cty.*, 106 Nev. 310, 314, 792 P.2d 31, 33 (1990).

6. The decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. *See Enterprise*

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

7. "If a discretionary act is supported by substantial evidence, there is no abuse of discretion." *Cty. of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998), *superseded by statute on other grounds*.

8. Zoning actions are presumed valid. *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92,94, 769 P.2d 721, 722 (1989).

9. A "presumption of propriety" attaches to governmental action on land use decisions. *City Council of City of Reno v. Irvine*, 102 Nev. 277, 280, 721 P.2d 371, 373 (1986). A disappointed applicant bears a "heavy burden" to overcome this presumption. *Id.*

10. On a petition for judicial review, the Court may not step into the shoes of the Council, reweigh the evidence, consider evidence not presented to the Council or make its own judgment calls as to how a land use application should have been decided. *See Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 500, 654 P.2d 531, 533 (1982).

B. Substantial Evidence Supported the City Council's Decision

11. The record before the Court amply shows that the Council's June 21, 2017 decision to deny the Applications for the 35-Acre Property ("the Decision") was supported by substantial evidence.

12. "Substantial evidence can come in many forms" and "need not be voluminous." *Comstock Residents Ass'n v. Lyon County Bd. of Comm'rs*, 385 P.3d 607 (Nev. 2016) (unpublished disposition), *citing McKenzie v. Shelly*, 77 Nev. 237, 240, 362 P.2d. 268, 269 (1961); *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994).

13. Public opposition to a proposed project is an adequate basis to deny a land use application. *Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760; *C.A.G.*, 98 Nev. at 501, 654 P.2d at 533.

14. "[A] local government may weigh public opinion in making a land-use decision." *Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760; *accord Eldorado Hills, LLC v. Clark*

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County Bd. of Commissioners, 386 P.3d 999, 2016 WL 7439360, *2 (Nev. Dec. 22, 2016) (unpublished disposition).

15. "[L]ay objections [that are] substantial and specific" meet the substantial evidence standard. *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) (distinguishing *City Council, Reno v. Travelers Hotel, Ltd.*, 100 Nev. 436, 683 P.2d 960 (1984)); *Stratosphere Gaming*, 120 Nev. at 529-30, 96 P.3d at 761.

16. "Section 19.18.050(E)(5) [of the Las Vegas Municipal Code] provides that the site development plan review process is intended to ensure that the proposed development is 'harmonious and compatible with development in the area' and that it is not 'unsightly, undesirable, or obnoxious in appearance.' The language of this ordinance clearly invites public opinion." *Stratosphere Gaming*, 120 Nev. at 528–29, 96 P.3d at 760.

17. The considerable public opposition to the Applications that was in the record before the Council meets the substantial evidence standard. That record included written and stated objections, research, legal arguments and expert opinions regarding the project's incompatibility with existing uses and with the vision for the area specified in the City's General Plan and the Peccole Ranch Master Development Plan. (ROR 2658-2666, 22294-24196, 24492-24504, 25821). The opponents argued that a development must be consistent with the General Plan, and what the Developer proposed was inconsistent with the Parks, Recreation and Open Space designation for the Badlands Golf Course in the City's General Plan. (ROR 24492-24504, 32820-21; 32842-55; 33935-36). If the applications were granted, they argued, it would set a precedent that would enable development of open space in other areas, thereby defeating the financial and other expectations of people who purchased homes in proximity to open space. (ROR 24492-24504, 33936). Because of the open space designation in the Peccole Ranch Master Development Plan, the opponents contended, the Applications required a major modification, which had not been approved. (ROR 24494-95; 33938). The opponents also expressed concerns regarding compatibility with the neighborhood, school overcrowding and lack of a development plan for the entire Badlands Property. (ROR 24492-24504, 24526, 33934-69).

18. The record before the Council constitutes substantial evidence to support the

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Decision. *See Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760.

19. The Court rejects the evidence that the Developer contends conflicts with the Council's Decision because the Court may not substitute its judgment for that of the Council. "[J]ust because there was conflicting evidence does not compel interference with the Board's decision so long as the decision was supported by substantial evidence." *Liquor & Gaming Licensing Bd.*, 106 Nev. at 98, 787 P.2d at 783. The Court's job is to evaluate whether substantial evidence supports the Council's decision, not whether there is substantial evidence to support a contrary decision. *Nevada Power Co. v. Pub. Utilities Comm'n of Nevada*, 122 Nev. 821, 836 n.36, 138 P.3d 486, 497 (2006). This is because the administrative body alone, not a reviewing court, is entitled to weigh the evidence for and against a project. *Liquor & Gaming Licensing Bd.*, 106 Nev. at 99, 787 P.2d at 784.

C. The Council's Decision Was Within the Bounds of the Council's Discretion Over Land Use Matters

20. "For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures." NRS 278.020(1).

21. The City's discretion is broad:

> A city board acts arbitrarily and capriciously when it denies a [land use application] without any reason for doing so.... [The essence of the abuse of discretion, of the arbitrariness or capriciousness of governmental action in denying a[n] ... application, is most often found in an apparent absence of any grounds or reason for the decision. We did it just because we did it. .*Irvine*, 102 Nev. at 279-80, 721 P.2d at 372-73 (quotations omitted).

22. The Council's Decision was free from any arbitrary or capricious decision making because it provided multiple reasons for denial of the Applications, all of which are well supported in the record.

23. The Council properly exercised its discretion to conclude that the development proposed in the Applications was not compatible with surrounding areas and failed to set forth an orderly development plan to alter the open space designation found in both the City's General Plan and the Peccole Ranch Master Development Plan.

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24. The concept of "compatibility" is inherently discretionary, and the Council was well within its discretion to decide that the development presented in the Applications was not compatible with neighboring properties, including the open space designation on the remainder of the Badlands Golf Course. *See Stratosphere*, 120 Nev. at 529, 96 P.3d at 761.

25. Residential zoning alone does not determine compatibility. The City's General Plan, the Peccole Ranch Master Development Plan, density, design and other factors do as well. The property adjacent to the 35-Acre Property remains used for open space and drainage, as contemplated by the City's planning documents, so the Developer's comparison to adjacent residential development is an incomplete "compatibility" assessment.

26. The City's Unified Development Code seeks to, among other things, promote "orderly growth and development" in order to "maintain … the character and stability of present and future land use and development." Title 19.00.030(G). One stated purpose is:

> To coordinate and ensure the execution of the City's General Plan through effective implementation of development review requirements, adequate facility and services review and other goals, policies or programs contained in the General Plan. Title 19.00.030(I).

27. The City's Unified Development Code broadly lays out the various matters the Council should consider when exercising its discretion. Those considerations, which include broad goals as well as specific factors for each type of land use application, circumscribe the limits of the Council's discretion. UDC 19.00.030, 19.16.030, 19.16.100, 19.16.130.

28. The Council was within the bounds of its discretion to request a development agreement for the Badlands Property before allowing a General Plan Amendment to change a portion of the property from Parks, Recreation and Open Space to residential uses. *See* Title 19.00.030(I). A comprehensive plan already exists for the Badlands Property; it is found in the city's General Plan, which designates the property as Parks, Recreation and Open Space. The Developer sought to change that designation. Under these circumstances, it was reasonable for the Council to expect assurances that the Developer would create an orderly and comprehensive plan for the entire open space property moving forward.

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29. The Court rejects the Developer's argument that a comprehensive development plan was somehow inappropriate because the parcels that make up the Badlands Property have different owners. (PPA 17:12-18:13, 23:9-14). In presenting the Developer's arguments in favor of these Applications and other land use applications relating to the development of the Badlands Property, Yohan Lowie has leveraged the fact that the three owner entities of the Badlands Property are affiliates managed by one entity – EHB Companies, LLC – which in turn is managed by Mr. Lowie and just three others. (ROR 1325; 4027; 5256-57; 17336; 24544; 25968). The Developer promoted the EHB brand and other projects it has built in Las Vegas to advance the Applications. (ROR 3607-3611; 5726-29; 5870-76; 17336; 24549-50). Additionally, by proposing the 2016 Development Agreement for the entire Badlands Property, the Developer acknowledged that the affiliated entities are one and the same. (ROR 25729).

30. The cases cited by the Developer did not involve properties owned by closely affiliated entities and are therefore inapplicable. (PPA 35:3-37:7, *citing Tinseltown Cinema, LLC v. City of Olive Branch*, 158 So.3d 367, 371 (Miss. App. Ct. 2015); *Hwy. Oil, Inc. v. City of Lenexa*, 547 P.2d 330, 331 (Kan. 1976)). They also did not involve areas that are within a master development plan area.

31. There is no evidence in the record to support the Developer's contention that it is somehow being singled out for "special treatment" because the Council sought orderly planned development within a Master Development Plan area (PPA 37:11-23).

32. Planning staff's recommendation is immaterial to whether substantial evidence supported the Council's decision because a governing body has discretion to make land use decisions separate and apart from what staff may recommend. *See Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 455, 254 P.3d 641, 644 (2011) (affirming County Commission's denial of special use permit even where planning staff recommended it be granted); *Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760 (affirming City Council's denial of site development plan application even where planning staff recommended approval). The Court notes that the Planning Commission denied the Developer's General Plan Amendment application.

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33. The statements of individual council members are not indicative of any arbitrary or capricious decision making. The action that the Court is tasked with reviewing is the decision of the governing body, not statements made by individual council members leading up to that decision. *See* NRS 278.3195(4); *Nevada Contractors*, 106 Nev. at 313, 792 P.2d at 33; *see also Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. Adv. Op. 40, 419 P.3d 140, 142 (2018) (discussing when action by board is required); *City of Corpus Christi v. Bayfront Assocs., Ltd.*, 814 S.W.2d 98, 105 (Tex. Ct. App. 1991) ("A city can act by and through its governing body; statements of individual council members are not binding on the city."). "The test is not what was said before or after, but what was done at the time of the voting." *Lopez v. Imperial Cty. Sheriff's Office*, 80 Cal. Rptr. 3d 557, 560 (Cal. Ct. App. 2008). The Council's action to deny the Applications occurred with its vote, not with the prior statements made by individual council members. NRS 241.03555(1). The Court finds nothing improper in the statements by individual Council members and rejects the Developer's contention that the statements of individual Council members require the Court to overturn the Council's Decision.

D. The City's Denial of the Applications Was Fully Compliant With the Law

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

35. A zoning designation does not give the developer a vested right to have its development applications approved. "In order for rights in a proposed development project to vest, zoning or use approvals ***must not be subject to further governmental discretionary action affecting project commencement***, and the developer must prove considerable reliance on the approvals granted." *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (emphasis added); *see also Stratosphere Gaming*, 120 Nev. at 527–28, 96 P.3d at 759–60 (holding that because City's site development review process under Title 19.18.050 involved discretionary action by Council, the project proponent had no vested right to construct).

36. "[C]ompatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest." *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *see also Nevada Contractors*, 106 Nev. at 311,

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792 P.2d at 31-32 (affirming county commission's denial of a special use permit even though property was zoned for the use).

37. The four Applications submitted to the Council for a general plan amendment, tentative map, site development review and waiver were all subject to the Council's discretionary decision making, no matter the zoning designation. *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112; *Doumani*, 114 Nev. at 53, 952 P.2d at 17; *Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nevada, Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983).

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

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

40. The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS) and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor. (ROR 24073-75; 25968).

41. The General Plan sets forth the City's policy to maintain the golf course property for parks, open space and recreation. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723.

42. The City has an obligation to plan for these types of things, and when engaging in its General Plan process, chose to maintain the historical use for this area that dates back to the 1989 Peccole Ranch Master Development Plan presented by the Developer's predecessor. (ROR 24492-24504).

43. The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course. (ROR 2595-2604; 2635-36; 4587; 25820).

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

45. The Clark County Assessor's assessment determinations regarding the Badlands Property did not usurp the Council's exclusive authority over land use decisions. The information cited by the Developer in support of this argument is not part of the record on review and therefore must be disregarded.[1] *See C.A.G.*, 98 Nev. at 500, 654 P.2d at 533. The Council alone and not the County Assessor, has the sole discretion to amend the open space designation for the Badlands Property. *See* NRS 278.020(1); *Doumani*, 114 Nev. at 53, 952 P.2d at 17.

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

47. The City's General Plan provides the benchmarks to ensure orderly development. A city's master plan is the "standard that commands deference and presumption of applicability." *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723; *see also City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010) ("Master plans contain long-term comprehensive guides for the orderly development and growth for an area."). Substantial compliance with the master plan is required. *Nova*, 105 Nev. at 96-97, 769 P.2d at 723-24.

48. By submitting a General Plan Amendment application, the Developer acknowledged that one was needed to reconcile the differences between the General Plan

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[1] The documents attached as Exhibits 2-5 to Petitioner's points and authorities are not part of the Record on Review and are not considered by the Court. *See C.A.G.*, 98 Nev. at 500, 654 P.2d at 533. The documents attached as Exhibit 1, however, were inadvertently omitted from the Record on Review but were subsequently added by the City. *See Errata to Transmittal of Record on Review* filed June 20, 2018; ROR 35183-86.

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designation and the zoning. (ROR 32657). Even if the Developer now contends it only submitted the General Plan Amendment application at the insistence of the City, once the Developer submitted the application, nothing required the Council to approve it. Denial of the GPA application was wholly within the Council's discretion. *See Nevada Contractors*, 106 Nev. at 314, 792 P.2d at 33.

49. The Court rejects the Developer's contention that NRS 278.349(3)(e) abolishes the Council's discretion to deny land use applications.

50. First, NRS 278.349(3) merely provides that the governing body "shall consider" a list of factors when deciding whether to approve a tentative map. Subsection (e) upon which the Developer relies, however, is only one factor.

51. In addition, NRS 278.349(3)(e) relates only to tentative map applications, and the Applications at issue here also sought a waiver of the City's development standards, a General Plan Amendment to change the PR-OS designation and a Site Development Plan review. A tentative map is a mechanism by which a landowner may divide a parcel of land into five or more parcels for transfer or development; approval of a map alone does not grant development rights. NRS 278.019; NRS 278.320.

52. Finally, NRS 278.349(e) does not confer any vested rights.

53. "[M]unicipal entities must adopt zoning regulations that are in substantial agreement with the master plan." *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112, *quoting Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723; NRS 278.250(2).

54. The City's Unified Development Code states as follows:

> Compliance with General Plan
> Except as otherwise authorized by this Title, approval of all Maps, Vacations, Rezonings, *Site Development Plan Reviews*, Special Use Permits, Variances, *Waivers*, Exceptions, Deviations and Development Agreements shall be consistent with the spirit and intent of the General Plan. UDC 19.16.010(A).
>
> It is the intent of the City Council that all regulatory decisions made pursuant to this Title be consistent with the General Plan. For purposes of this Section, "consistency with the General Plan" means not only consistency with the Plan's land use and density designations, but also consistency with all policies and programs of the General Plan, including those that promote compatibility of uses and densities, and orderly development consistent with available resources. UDC 19.00.040.

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55. Consistent with this law, the City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development.

E. The Doctrine of Issue Preclusion Bars Petitioner from Relitigating Issues Decided by Judge Crockett

56. The Court further concludes that the doctrine of issue preclusion requires denial of the Petition for Judicial Review.

57. Issue preclusion applies when the following elements are satisfied: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008).

58. Having taken judicial notice of Judge Crockett's Order, the Court concludes that the issue raised by Intervenors, which once again challenges the Developer's attempts to develop the Badlands Property without a major modification of the Master Plan, is identical to the issue Judge Crockett decided issue in *Jack B. Binion, et al v. The City of Las Vegas, et al,* A-17-752344-J. The impact the Crockett Order, which the City did not appeal, requires both Seventy Acres and Petitioner to seek a major modification of the Master Plan before developing the Badlands Property. The Court rejects Petitioner's argument that the issue here is not the same because it involves a different set of applications from those before Judge Crockett; that is a distinction without a difference. "Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op. 28, 321 P.3d 912, 916–17 (2014).

59. Judge Crockett's decision in *Jack B. Binion, et al v. The City of Las Vegas, et al,* A-17-752344-J was on the merits and has become final for purposes of issue preclusion. A judgment is final for purposes of issue preclusion if it is "sufficiently firm" and "procedurally

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definite" in resolving an issue. *See Kirsch v. Traber,* 134 Nev., Adv. Op. 22, 414 P.3d 818, 822–23 (Nev. 2018) (citing Restatement (Second) of Judgments § 13 & cmt. g). "Factors indicating finality include (a) that the parties were fully heard, (b) that the court supported its decision with a reasoned opinion, and (c) that the decision was subject to appeal." *Id.* at 822-823 (citations and punctuation omitted). Petitioner's appeal of the Crockett Order confirms that it was a final decision on the merits.

60. The Court reviewed recent Nevada case law and the expanded concept of privity, which is to be broadly construed beyond its literal and historic meaning to encompass relationships where there is "substantial identity between parties, that is, when there is sufficient commonality of interest." *Mendenhall v. Tassinari*, 133 Nev. Adv. Op. 78, 403 P.3d 364, 369 (2017) (quoting *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081–82 (9th Cir. 2003) (internal quotation marks omitted). Applying the expanded concept of privity, the Court considered the history of the land-use applications pertaining to the Badlands Property and having taken judicial notice of the Federal Complaint, the Court concludes there is a substantial identity of interest between Seventy Acres and Petitioner, which satisfies the privity requirement. Petitioner's argument that it is not in privity with Seventy Acres is contradicted by the Federal Complaint, which reveals that Seventy Acres and Petitioner are under common ownership and control and acquired their respective interests in the Badlands Property through an affiliate, Fore Stars, Ltd.

61. The issue of whether a major modification is required for development of the Badlands Property was actually and necessarily litigated. "When an issue is properly raised and is submitted for determination, the issue is actually litigated." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. at 262, 321 P.3d at 918 (internal punctuation and quotations omitted) (citing *Frei v. Goodsell*, 129 Nev. 403, 407, 305 P.3d 70, 72 (2013)). "Whether an issue was necessarily litigated turns on 'whether the common issue was necessary to the judgment in the earlier suit.'" *Id.* (citing *Tarkanian v. State Indus. Ins. Sys.*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994)). Since Judge Crockett's decision was entirely dependent on this issue, the issue was necessarily litigated.

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62. Given the substantial identity of interest among Seventy Acres, LLC and Petitioner, it would be improper to permit Petitioner to circumvent the Crockett Order with respect to the issues that were fully adjudicated.

63. Where Petitioner has no vested rights to have its development applications approved, and the Council properly exercised its discretion to deny the applications, there can be no taking as a matter of law such that Petitioner's alternative claims for inverse condemnation must be dismissed. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994) ("The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'"); *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949).

64. Further, Petitioner's alternative claims for inverse condemnation must be dismissed for lack of ripeness. *See Herbst Gaming, Inc. v. Heller*, 141 P.3d 1224, 1230-31, 122 Nev. 877, 887 (2006).

65. "Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief." *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988), *quoting Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

66. Here, Petitioner failed to apply for a major modification, a prerequisite to any development of the Badlands Property. *See* Crockett Order. Having failed to comply with this necessary prerequisite, Petitioner's alternative claims for inverse condemnation are not ripe and must be dismissed.

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ORDER

Accordingly, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Petition for Judicial Review is DENIED.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Petitioner's alternative claims in inverse condemnation are hereby DISMISSED.

DATED: 11/18, 2018.

TIMOTHY C. WILLIAMS
District Court Judge

Submitted By:

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By: /s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 21st day of November, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION FOR JUDICIAL REVIEW** was 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

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; DOE INDIVIDUALS I through X; DOE CORPORATIONS I through X; and DOE LIMITED-LIABILITY COMPANIES I through X, Petitioners, v.	Case No. A-17-758528-J Dept. No. 16 **MOTION FOR A NEW TRIAL PURSUANT TO NRCP 59(e)** **AND**

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I through X; ROE CORPORATIONS I through X; ROE INDIVIDUALS I through X; ROE LIMITED-LIABILITY COMPANIES I through X; ROE QUASI-GOVERNMENTAL ENTITIES I through X, Defendants.	**MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND/OR RECONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW** **AND** **MOTION TO STAY PENDING NEVADA SUPREME COURT DIRECTIVES**

Petitioner 180 Land Co, LLC ("Petitioner" or "180 Land") moves the Court for a new trial pursuant to NRCP 59(e), to alter or amend the judgment pursuant to NRCP 52(b), to reconsider its findings of fact and conclusions of law on the petition for judicial review pursuant to EDCR 2.24. Alternatively, Petitioner moves to stay these proceedings pending Nevada Supreme Court directives. This motion is based on the following points and authorities, the attached exhibits, and any oral argument the Court may entertain.

DATED this 13th day of December, 2018.

HUTCHISON & STEFFEN, PLLC

Mark A. Hutchison (4639)
Joseph S. Kistler (3458)
Matthew K. Schriever (10745)

Attorneys for Petitioner
180 Land Co, LLC

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing **MOTION FOR A NEW TRIAL PURSUANT TO NRCP 59(e) AND MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND/OR RECONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MOTION TO STAY PENDING NEVADA SUPREME COURT DIRECTIVES** on for hearing before this Honorable Court on the 22 day of January, 2019, at the hour of 9:00 A.m., or as soon thereafter as counsel may be heard.

Dated this 13th day of December, 2018.

HUTCHISON & STEFFEN, PLLC

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POINTS AND AUTHORITIES

1. Introduction.

On November 21, 2018, the Court entered Findings of Fact And Conclusions of Law (the "Decision") drafted by the City denying 180 Land's Petition for Judicial Review and dismissing 180 Land's severed claims against the City for inverse condemnation. Both of these determinations were erroneous as a matter of law and both of the determinations were issued without consideration of the recent Nevada Supreme Court decision that directly impacts and contradicts this Court's decision. Accordingly, this Court should reconsider the Decision and issue relief as requested in this motion.[1]

2. Factual Overview.

This is one of five cases currently pending in the Nevada judicial system regarding the development of certain land zoned for residential development of up to 7 units per acre and formerly operated as the Badlands Golf Course in Clark County, Nevada (the "Property" or "Residential Zoned Property"). The Residential Zoned Property comprises approximately 250 acres on eight parcels located in the City of Las Vegas (the "City"). The various parcels have separate and distinct owners (each, a "Landowner," collectively, the "Landowners"): (1) 180 Land owns approximately 180 acres; and (2) Seventy Acres LLC ("Seventy Acres") owns approximately 70 acres. The Landowners have submitted separate and distinct applications for various parcels to develop multi-family and single-family residential properties.

This petition for judicial review concerned four land development applications ("Applications") regarding a portion of the Residential Zoned Property, approximately 35 acres of 180 Land's property (the "35 Acre Property") to be developed into 61 large single family residential lots (the "61 Large Lots"). The Petitioner did not seek zoning or rezoning of the 35 Acre Property since it is already zoned RPD 7 allowing development of up to 7 units per acre.

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[1] A motion for a new trial, to alter or amend and/or reconsider the findings of fact and conclusions of law related to the dismissal of the inverse condemnation claims pursuant to NRCP 52(b), 59, and 60 and EDCR 2.24 is filed separately and concurrently with this Motion.

In fact, neither the City nor the intervening Queensridge homeowners deny that the Property is zoned RPD 7. Rather, the opposition essentially claims that the zoning is meaningless.

Petitioner filed this request for judicial review after the City Council denied the Applications contrary to the legal framework or correct application of NRS 278 and Title 19 of the Las Vegas Municipal Code. This decision by the City Council specifically ignored the recommendations of approval and analysis by both the City Planning Department Staff and the Planning Commission and instead took an arbitrary and capricious position that development plans for the entire 250 acre Residential Zone Property needed to be presented to the City at one time rather than in market-driven separate applications for the various independent parcels This position that is neither codified by the laws nor accepted as general practice standards of development. In fact, the City assured the Landowner that after two years of working on development of the entire 250 acres of Residential Zoned Property, a comprehensive plan would be approved. This was the basis used to deny the Petitioner of its constitutional right to develop the 35 Acre Property under its already approved zoning. A month after the denial, the City likewise denied the development agreement submitted for the entire 250 Acres because Councilman Seroka had taken office and completely disregarded the nearly two and a half years of work done by the experienced City staff including the City Attorney, Planning Department, and Planning Commission and replaced their work with his own legal opinions.[2] The Decision of this Court was entered following a hearing on June 29, 2018. After the hearing and related post-hearing briefing, but before entry of the Decision, ***the Nevada Supreme Court on October 17, 2018 affirmed earlier orders by the Honorable Judge Douglas E. Smith in favor of the Landowners in related Case No. A-16-739654-C that involved 100% of the Residential Zoned Property.***[3] Specifically, the Nevada Supreme Court

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[2] Councilman Seroka ran on a platform of never allowing development on the 250 acre Residential Zoned Property. His reasons for denial were nothing more than a façade to disguise his intent to entirely prevent development on the Property. None of Seroka's claimed legal basis fell under NRS chapter 278 or LVMC Title 19. *See* Exhibit 1 pages 144-155 August 2, 2017 Transcript of City Council Hearing.

[3] *See* Exhibits 2, 3, 4, and 5, which chronologically provides the two Judge Smith Orders and the two Nevada Supreme Court decisions affirming those orders. Moreover, the two Judge Smith Orders are part

affirmed Judge Smith's two decisions that the Landowners have the vested right to develop the Residential Zoned Property ("Affirmed Smith Orders").[4] The Affirmed Smith Orders predate a a decision made by Judge Crockett ("Judge Crockett Decision")[5] which is repeatedly referenced and heavily relied upon in this Court's Decision. The Judge Crocket Decision is irreconcilable with the Affirmed Smith Orders, is pending review by the Nevada Supreme Court, and the opening brief has been filed.

The underlying Affirmed Smith Orders[6] specifically found, "*Notwithstanding any alleged 'open space' land use designation, the zoning on the GC Land [Residential Zoned Property], as supported by the evidence, is R-PD7*" and ***rejected*** the argument that "suggests the land is 'zoned' as 'open space' and that they [Queensridge homeowners] have some right to prevent any modification of that alleged designation under NRS 278A."[7] These conclusions, again, are at odds with the Judge Crockett Decision, which the Court concluded was entitled to preclusive effect in its Decision.

Given these conflicting decisions, the only case that can be relied on as the law of the land in relation to development of any of the 250 acre Residential Zoned Property is the recent Nevada Supreme Court decision affirming Judge Smith's order specifically holding that the Intervenors/Queensridge owners have no right or standing to challenge development because the Property has always been zoned RPD 7 with the intent to develop, and hard zoning trumps any other conflicting land use plan designation.[8]

As a result of the recent decisions by the Nevada Supreme Court, this Court should reconsider its Decision and grant the relief requested by Petitioner in the petition for judicial review in line with the Affirmed Smith Orders.

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of the record and referenced in this brief by the "ROR" cites when applicable. *See Peccole v. Fore Stars, Ltd.*, 2018 WL 5095389 (Nev. 2018) (unpublished).

[4] *Id.*

[5] *See* Exhibit A of Intervenors' Answering Brief.

[6] ROR034710-ROR034734 and ROR034775-ROR034816.

[7] ROR034710-ROR034734 at Finding #42 (emphasis supplied).

[8] *See* Exhibits 2, 3, 4, and 5.

3. Factual and Procedural Background

Petitioner filed this petition for judicial review on July 18, 2017, seeking relief from the City's final arbitrary and capricious decision denying Petitioner's Applications to develop the 35 Acre Property into 61 Large Lots abutting the Queensridge Common Interest Community ("Queensridge CIC"), located in Clark County, Nevada. On January 11, 2018, this Court held a hearing on the City's Motion to Dismiss the inverse condemnation claims. This Court denied the City's motion and made several determinations, including bifurcating the petition for judicial review from the inverse condemnation claims. At that time, only the City and the Petitioners were parties to these actions. On April 17, 2018, the Petitioners filed their Memorandum of Points and Authorities in Support of the Petition for Judicial Review. Although the case had been pending for nine months, Binion, et al. ("Intervenors") — identifying themselves in their Motion to Intervene[9] as "homeowners whose property abuts the property at issue in this Petition for judicial review, which was formerly known as the Badlands golf course," filed a motion to intervene that same day.

This is important because Petitioners did not address in its Points and Authorities any rogue arguments that a Title 19.10.040 "major modification" was required since this was a manufactured position by a handful of homeowners within the Queensridge CIC. The City had never taken the position that a Title 19.10.040 "major modification" was necessary to submit applications for development. In fact, on March 21, 2018, the City Attorney's Office considered Judge Crockett's decision to be "**legally improper**."[10] The City then hired outside counsel, flipped its position, and began using the Judge Crockett Decision contending that the City "abused its discretion" against itself. The City is now using this "abuse of discretion" order as a shield in a desperate attempt to avoid liability from inverse condemnation claims resulting from the City's denial of Petitioner's right to develop its R-PD7 zoned Property.

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[9] Motion filed April 17, 2018 and granted by Court order entered June 28, 2018.
[10] *See* Exhibit 6, Agenda Summary Page dated March 21, 2018.

On June 29, 2018, this Court heard oral argument on the Petition for Judicial Review. During that hearing, this Court made specific statements that it could not change the law: "One thing I can't do is this: I can't rewrite the statute; right?"[11] Yet by this Court's Decision, it did in fact change the law and adopted the argument that the land use designation governs the zoning in direct contravention of NRS 278.349. Finally, this Court adopted findings of fact and conclusions of law ("FFCL") submitted by the City that belies the record in this matter, the Nevada Revised Statutes, Nevada case law, and Title 19 of the Las Vegas Municipal Code.[12]

Importantly, these FFCL although submitted by the City are in complete contravention of the City's previously publicly stated and legally submitted positions of the interpretation of their own code. In other words, the City, after three years of legally and factually supported positions of approval of the development applications, now rejects their own position and their own interpretation of the Nevada Revised Statutes and the Unified Development Code of the Las Vegas Municipal Code. The City's drastic change in its legal position should be rejected by this Court as it conflicts with the Affirmed Smith Orders.

A. The Residential Zoned Property was Never Part of the Queensridge CIC and Likewise is Not Part of the Peccole Ranch Master Planned Community.

The Queensridge Master Plan is a common interest community organized under NRS 116 ("Queensridge CIC") and is governed by the Master Declaration of Covenants, Conditions, Restrictions and Easements of Queensridge ("Queensridge Master Declaration"), recorded with the Clark County Recorder's Office on May 30, 1995.[13] The 35 Acre Property was never annexed into the Queensridge CIC and is not a part of the Queensridge CIC.[14] Neither is the

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[11] Hearing Transcript, June 29, 2018, page 69 lines 24-25, page 70 lines 1-10.

[12] For example, the City deceptively and disingenuously crafted the findings of facts and conclusions of law to omit the fact that the City approved the 17 Acre Applications (Rezoning and General Plan Amendments) and specifically found that a Title 19 "major modification" was *not required* by those applications. ROR733-735.

[13] ROR009178-009327 (Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge).

[14] ROR023323 (Queensridge CIC Annexation History Property Per Master Declaration, showing the land within the Queensridge CIC, and the land within the Queensridge CIC does not include the Residential Zoned Property); ROR034710-ROR034734 at finding #53.

remaining acreage of Property as the Queensridge Master Declaration states in Recital B that "[t]he existing 18-hole golf course commonly known as the 'Badlands Golf Course' is not a part of the Property or the Annexable Property."[15] After the Badlands Golf Course was expanded to 27 holes, the Queensridge Master Declaration was recorded on August 16, 2002 entitled the "Amended and Restated Queensridge Master Declaration," stating "[t]he existing 27-hole golf course commonly known as the 'Badlands Golf Course' is not a part of the Property or the Annexable Property."[16] This is further evidenced in the recorded final map of the Queensridge CIC showing all parcels within that community.

The Peccole Ranch Master Plan is a common interest community organized under NRS 116 ("Peccole Ranch CIC") and is governed by the Master Declaration of Covenants, Conditions and Restrictions (Peccole Ranch Master Declaration). The 250 acre Residential Zoned Property was never annexed into the Peccole Ranch Master Planned Community, and thus is likewise not a part of the Peccole Ranch Master Planned Community.[18]

On January 26, 1996, the land that comprised Peccole Ranch Phase II was expressly defined by the filing of the Peccole Ranch Phase II Final Map Book 71 Page 76. The entirety of the land that comprised Peccole Ranch Phase II was depicted on the Peccole Ranch Phase II Final Map, and was south of Charleston. No land north of Charleston Boulevard was included in Peccole Ranch Phase II, nor annexed into the Peccole Ranch CIC. Neither the Queensridge CIC nor the Residential Zoned Property were annexed into the Peccole Ranch CIC, and neither are part of "Peccole Ranch." Accordingly, the Peccole Ranch Master Declaration does not and cannot govern the Residential Zoned Property.

Additionally, the Peccole Ranch Master Plan is *not* a "Special Area Plan" as defined in the City of Las Vegas 2020 Master Plan, and thus does not require the specifically defined

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[15] ROR019961-019962 (portion of Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge, at Recital B); ROR034710-ROR034734 at finding #71.
[16] ROR019959-019960 (Amended and Restated Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge, at Recital B); ROR034710-ROR034734 at finding #72.
[18] *See* Exhibit 7, PR Master Declaration and final map of Peccole Ranch.

mechanism called a "Major Modification."[19] The only other time that a major modification is required under the code is for Planned Development ("PD") districts. It is uncontested that the Residential Zoned Property is not a PD district, but is a R-PD district, and thus a major modification does not apply. The R-PD7 zoning has been repeatedly recognized in the Affirmed Smith Orders. Even if the 35 Acre Property were in a "Special Area Plan" or a PD district, the land use classification for the 35 Acre Property in the Peccole Ranch Master Plan and the Queensridge CIC Master Plan is RESIDENTIAL.

Simply put, there is nothing to modify. The land use under R-PD7 and the Applications is RESIDENTIAL, which is the same land use classification for the property as in the Peccole Ranch Master Plan and the Queensridge CIC Master Plan (which expressly states it is "SUBJECT TO DEVELOPMENT" and depicts residential lots on the Queensridge Design Guidelines). The "PR-OS" land use designation under the 2020 Master Plan is not only irrelevant because it is superseded by the underlying zoning under NRS 278.349(3)(e), but City Attorney Brad Jerbic admitted on the record that the City is unable to establish that the PR-OS land use designation was legally placed on the Property.

B. The Clark County Assessor Determined that the Residential Zoned Property is Residential rather than Open Space.

The Residential Zoned Property was leased to a golf course operator although the golf course land use on the Property was never legally approved by the City of Las Vegas under a required plat plan or site development review. On December 1, 2016, the golf course lease was terminated by the golf course operator, the golf course operator vacated the Residential Zoned Property, and the Residential Zoned Property ceased to be used as a golf course.

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[19] "When a land use change is requested within a special area plan, a Major Modification is required. A Major Modification is similar to a General Plan Amendment, but instead of amending a land use designation within a sector plan, the special land use designation of a parcel within a special area plan (Town Center, Lone Mountain, Grand Teton Village etc. is amended. A property owner must submit a Major Modification (MOD) application for review by city staff, Planning Commission, and approval by City Council. A Major Modification application is not bound by the same statutory requirements as General Plan Amendments. The procedure for application, review, and approval of modifications to special area plans should be similar to that for Rezoning applications." *See* Exhibit 8, 2020 Master Plan Land Use Element Page, pp. 52 & 53.

As a result of the Residential Zoned Property's cessation of use as a golf course, the *Clark County Assessor determined that the 35 Acre Property (1) no longer fell within the definition of open-space real property, as defined by NRS 361A.040; (2) no longer is deemed to be used as an open-space use under NRS 361A.050, in accordance with NRS 361A.230; (3) has been disqualified for open-space use assessment; and (4) has been converted to a higher use, in accordance with NRS 361A.031* (collectively, the "Clark County Assessor Determinations").[20] *On November 30, 2017, the State of Nevada State Board of Equalization approved, by unanimous vote, the Clark County Assessor Determinations that the taxes on the 35 Acre Property are assessed by the Clark County Assessor based on the Assessor Land Use Classification. "12.00 – Vacant – Single Family Residential."*[21] Thus, Clark County and the State of Nevada Board of Equalization have determined that the Residential Zoned Property is *not* open space and that *it is residential property and has been and continues to be taxed as such.*

As a result of the cessation of golf course operations on the Residential Zoned Property and the conversion to a higher use(s), meaning a use other than agricultural use or open-space use, Petitioner was required by Nevada law to pay property taxes for the tax years commencing in 2011 through the present based on the value of the higher use: "Vacant – Single Family Residential."[22] The Residential Zoned Property use is therefore neither golf course nor open space. The Landowner, per the Clark County Assessor determinations, pay property taxes assessed based on its zoning allowing residential use.

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[20] Clark County Assessor Determinations, dated September 21, 2017 (emphasis supplied). Judicial notice of this document was requested by Petitioner in its filed June 28, 2018 request.

[21] Notice of Decision from State Board of Equalization, dated November 30,2017; Clark County Assessor's Office "General Information" for the 35 Acre Property ("Land Use: 12.00 – Vacant – Single Family Residential") (emphasis supplied). Judicial notice of this document was requested by Petitioner in its filed June 28, 2018 request.

[22] Letter from Clark County Assessor to 180 Land Co LLC, dated February 22, 2017. Judicial notice of this document was requested by Petitioner in its filed June 28, 2018 request.

C. The City Planning Staff and the Planning Commission Both Determined That 180 Land's Applications Satisfied All Legal Requirements for Residential Development.

In December 2016, Petitioner submitted the Applications to the City (Tentative Map "TMP" 68482;[23] Site Development Review "SDR" 68481;[24] Waiver "WVR" 68480;[25] and General Plan Amendment "GPA" 68385[26]) to develop the 35 Acre Property. The Applications were for the approval of the 61 Large Lots with a density of 1.79 dwelling units per acre.[27] A rendering of the 61 Large Lots is shown at ROR024403-024404. City Planning Staff ("Staff") reviewed the Applications and issued a comprehensive Staff Report.[28] After review and analysis of the LVMC Title 19 and all other applicable standards of review, Staff recommended the approval of the Applications for the 61 Large Lots on the 35 Acre Property via a staff report detailing their findings.[29]

On February 14, 2017, the Planning Commission reviewed the Applications for the development of the 61 Large Lots on the 35 Acre Property and approved Petitioner's TMP 68482, SDR 68481, and WVR 68480 applications.[30] A majority of the Planning Commission

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[23] ROR024399-024401 (Statement of Financial Interest and Application for TMP 684482).
[24] ROR024391-024394 (Statement of Financial Interest and Application for SDR 68481).
[25] ROR020162-020164 (Statement of Financial Interest and Application for WVR 68480).
[26] ROR022172-022174 Statement of Financial Interest and Application for GPA 68385). Petitioner submitted GPA 68385 at the request of the City. The applications substantially complied with the Las Vegas 2020 Master Plan ("CLV Master Plan"). However, the CLV Master Plan designation for Petitioner's Parcels is PR-OS, which stands for "Parks, Recreation and Open Space." The Mechanism for matching the designation to the zoning is called a General Plan Amendment ("GPA"). Because the City prefers that the land use designation and the zoning match, the City requested that a GPA be submitted along with the development applications. ROR 24278. However, the GPA makes no difference in consideration of applications that comport with previously granted zoning. This is because neither the filing of a GPA by Petitioner, nor the approval of the GPA by the City, is legally required. NRS 278.349 provides, in pertinent part, "(3) The governing body, or planning commission if it is authorized to take final action on a tentative map, shall consider; (e) "Conformity with the zoning ordinances and master plan, except that if any existing zoning ordinance is inconsistent with the master plan, **the zoning ordinance takes precedence**." NRS 278.349(3)(e)(emphasis supplied). *See* ROR033987 (City Attorney Brad Jerbic "zoning trumps [general plan."]).
[27] ROR022145-022171 Conditions and Staff Report, ("The applicant is proposing a 61-lot gated single family residential development on a portion of a large lot currently developed as a golf course generally located at the southeast corner of Alta Drive and Hualapai Way....The proposed development would have a density of 1.79 dwelling units per acre, with an average lot size of 19,871 square feet.").
[28] *See* ROR022145-022171 (Conditions and Staff Report).
[29] *See id.* (Conditions and Staff Report at ROR022145, 022156-022159).
[30] ROR033924-034003 (Transcript of Planning Commission Hearing on Petitioner's applications, February 14, 2017, at lines 2112-13, 2225-26, 2233).

voted to approve GPA 68385, but the motion to approve failed because Title 19 requires a supermajority to approve a general plan amendment.[31] Thus, City Staff and the Planning Commission determined that the 35 Acre Property applications were consistent with the R-PD7 zoning and met all legal requirements for proposed residential development. This Court gave Staff's and the Planning Commission's recommendations no weight in issuing its Decision and disregarded the existing residential zoning on the Property, which has now been affirmed by the Nevada Supreme Court.

D. Contrary to Staff, Planning Commission, City Attorney, and Planning Director Evidence, the City Council Denied the Applications.

On June 21, 2017, the City Council held a hearing on the Applications. During that hearing, City Attorney Brad Jerbic acknowledged that the Applications were proper and could not be contingent upon a master development agreement on the entirety of the Residential Zoned Property.

> There happen to be four other items that are not related to the Development Agreement, they are standalone items: Items 131, 132, 133, and 134, that all relate to a request for 61 individual home sites on the property known as Badlands.
> . . . .
> But I don't want you to think those requests that accompany that Development Agreement in 2016 have any bearing, in my opinion, on these four requests today. *And I just want to make that part of the record.* [32]

Tom Perrigo, the City's Executive Director of Community Development, advised the City Council that Petitioner's proposed development on the 35 Acre Property

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[31] ROR033924-034003 (Transcript of Planning Commission Hearing on Petitioner's applications, February 14, 2017, at lines 2094-2106). Approval of the GPA was a ministerial act not required by law or code because NRS 278.349 (3)e provides "...the zoning ordinance takes precedence." Also, the GPA covered all of the Residential Zoned Property and the Planning Commission stated that the GPA should be for the 35 Acre Property only.

[32] ROR024466-024575 (Transcript of City Council Hearing, June 21, 2017, at lines 149-51, 1096-98) (emphasis supplied).

complied with the City's standards, and therefore Staff and the Planning Commission recommended approval.[33]

In addition to the lack of need for a master development agreement regarding the 35 Acre Property to approve the Applications discussed at the June 21, 2017 meeting, there also was discussion regarding whether a "major modification" of the Peccole Ranch Master Plan regarding the Residential Zoned Property was necessary to approve the Applications.[34] In response, Director Perrigo explained that no "major modification" was required.

> City Attorney Brad Jerbic: But let me ask a question of the Planning Director. Do you believe a major modification is required for this application, and if so, why and if not, why not?
>
> Planning Director Tom Perrigo: *Staff spent quite a bit of time looking at this, and we do not believe a major modification is required as part of this application.* First and foremost, the Master Plan adopted by City Council specifically calls out those master plan areas that are required to be changed through a major modification. *This Peccole Ranch is not one of those.* [35] Yes, some of the exhibits you've been shown discuss Peccole Ranch and a whole bunch of other areas as being master plan areas, but it also specifically calls out only those that require a major modification. So that's first. *Peccole Ranch is not one of them.* Second, there have been, and some of the exhibits you've seen have shown where parcels have been changed from commercial to multi-family, from multi-family to residential and so on. *There have been six actions on this property that were done without a major modification for that very reason that it's not required.* Those actions were done through a general plan amendment and a rezoning. What's before you now, that you're considering is a general plan amendment, and just like those other previous actions, they did not require a major modification. [36]

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[33] ROR024466-024575 (Transcript of City Council Hearing, June 21, 2017, at lines 566-87).
[34] ROR024222-ROR024241.
[35] "Special area plans in which a Major Modification is required to change a land use designation include the following: Grand Canyon Village, Grand Teton Village, Cliff's Edge (Providence), Lone Mountain, Town Center, Lone Mountain West, Las Vegas Medical District, Kyle Canyon Gateway, Summerlin)." *See* Exhibit 8, 2020 Master Plan Land Use Element, pg. 53.
[36] ROR024241 (June 21, 2017 Transcript)(emphasis supplied).

Despite Staff's and the Planning Commission's recommended approvals, the City Council denied the Applications on June 21, 2017 by a 4-3 vote.[37] The Court, in its Decision, similarly rejected the opinions of these land use experts and thereby committed clear error.

Following the City Council's vote of denial on June 21, 2017, Petitioner was informed by letters dated June 28, 2017, that the Applications were denied based upon the following three reasons:

> (1) Significant public opposition to the proposed development ("Public Opposition");
> (2) Concerns over the impact of the proposed development on surrounding residents ("Resident Impact"); and
> (3) Concerns on piecemeal development of the Master Development Plan area rather than a cohesive plan for the entire area ("Piecemeal Development").[38]

This petition for judicial review was thereafter filed timely on July 18, 2017. After briefing and oral arguments, this Court entered its Decision, relying heavily (and erroneously) on the Judge Crocket Decision wherein he held that a Title 19.10.040 "major modification" of the Peccole Ranch Master Development Plan was legally required before the City could approve the development applications for those 17 acres. Notwithstanding that the City Attorney opined that the Judge Crocket Decision is "legally improper," the Applications that are the subject of this petition are entirely and materially distinct from those in the Crockett case, as this petition is a review of Applications seeking approval of a Tentative Map utilizing its existing zoning (R-PD7) not a rezoning application (change in land use) as in the Crockett case. This Court's Decision failed to recognize the significant legal distinction that the Applications for the 35 Acre Property

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[37] ROR024303-024305.
[38] ROR035183-035186.

were not seeking a land use change and thereby rendering the Judge Crockett Decision inapplicable. The Affirmed Smith Orders (affirmed twice by the Nevada Supreme Court) ruled that the Property is R-PD7 zoned for residential use and *is* developable pursuant to NRS 278. The Affirmed Smith Orders govern the Applications over the inapplicable Judge Crocket Decision. Under NRS 278.349(3)(e) zoning supersedes an inconsistent master plan designation.[39]

E. Judge Smith's Rulings, Affirmed by the Nevada Supreme Court Twice, Negate the Judge Crockett Decision and this Court's Decision.

The recent Nevada Supreme Court opinions affirming Judge Smith's two decisions arises out of a lawsuit filed by an individual homeowner in the Queensridge Community (hereinafter "Queensridge Homeowner") to prevent the Landowners from developing any part of the Residential Zoned Property. Similar to the arguments made by the City in this case, the Queensridge Homeowner in that case alleged: (1) the Landowners had no vested right to develop the Residential Zoned Property; and (2) other land use plans or CC&Rs could be imposed to entirely prevent any and all development on the Landowners' Residential Zoned Property.

Judge Smith considered significant, extensive briefing and public documents, conducted lengthy hearings, and entertained significant oral argument on these two specific issues and rejected them both in two detailed orders (25 and 42 pages respectively)[40], holding that: (1) the Landowners' Residential Zoned Property had always been hard zoned residential; (2) the Developer always intended to leave the option for residential development; (3) the Landowners have the "right to develop" their Residential Zoned Property; and, (4) the adjoining property owners in the Queensridge Community had no right to prevent this development. Judge Smith found that the Landowners' vested rights to develop were so clear

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[39] ROR034775-ROR034816 at finding # 66.
[40] *See* Exhibits 2 and 3.

that any challenges to these rights were "frivolous" and "baseless" and thus, awarded the Landowners attorney fees in the amount of $128,131.22.[41]

Judge Smith's relevant specific findings in regard to the Landowners' vested right to develop the Residential Zoned Property are as follows:

- On March 26, 1986, a letter was submitted to the City Planning Commission requesting permission to use the Residential Zoned Property for a "golf course," however, the zoning that was sought was R-PD "as it allows the developer flexibility and the City design control." "Thus, keeping the golf course [Residential Zoned Property] for potential future development as residential was an intentional part of the plan."[42]

- Even though there is a 1986 map that shows a golf course around the location of the Landowners Residential Zoned Property, "the current Badlands Golf Course [Residential Zoned Property] is not the same as what is depicted on the map"[43] and the Landowners "have the right to close the golf course and not water it."[44]

- The Zoning Bill No. Z-2001, Ordinance 5353, "demonstrates that the R-PD7 Zoning was codified and incorporated into the Amended Atlas in 2001."[45]

- "[T]wo letters from the City of Las Vegas to Frank Pankratz dated December 20, 2014, ***confirm the R-PD7 zoning on all parcels held by Fore Stars, Ltd.***"[46]

- "The Court finds that the GC Land [Residential Zoned Property] owned by the Developer Defendants [Landowners] has 'hard zoning' of R-PD7. This allows up to 7.49 units per acre subject to City of Las Vegas requirements."[47]

- "Notwithstanding any alleged 'open space' land use designation, the zoning on the GC Land [Residential Zoned Property], as supported by the evidence, is R-PD7." The Court then rejected the argument that "suggests the land is 'zoned' as 'open space' and that they [Queensridge homeowners] have some right to prevent any modification of that alleged designation under NRS 278A."[48]

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[41] *Id.* at findings #95 and #102.
[42] ROR034710-ROR034734 at finding #59.
[43] *Id.* at finding #61.
[44] ROR034775-ROR034816 at finding #26.
[45] ROR034710-ROR034734 at finding #58; Ordinance 5353 provides "SECTION 4: All ordinances or parts of ordinances or sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the city of Las Vega, Nevada, 1983 Edition, in conflict herewith are hereby repealed."
[46] *Id.* at finding #60 (emphasis supplied).
[47] *Id.* at finding #82; ROR034775-ROR034816 at finding #130.
[48] ROR034775-ROR034816 at finding #64 and # 132.

- Judge Smith cited the NRS 278.349(3)(e) language that supports the Landowners' position that the hard residential zoning trumps any other land use designation – such as PR-OS or open space / golf course – that may have been applied at any time to the Residential Zoned Property.[49]

- Based upon all of these findings, Judge Smith held "***[t]he court finds that the Developer Defendants [Landowners] have the right to develop the GC Land [Residential Zoned Property].***"[50] This finding was repeated in the subsequent order *twice* as follows: "The zoning on the GC Land [Residential Zoned Property] dictates its use and ***Defendants rights to develop their land***"[51] and the Landowner has the ***"right to develop their land."***[52]

Judge Smith then held that neither the Queensridge Community nor the Queensridge Homeowner had the right to control or restrain the development of the Landowners' Residential Zoned Property:

- The Residential Zoned Property is not a part of the Queensridge Community and, therefore, is not subject to the Queensridge CC&Rs and "cannot be enforced against the GC Land [Residential Zoned Property]."[53]

- The Queensridge Community, the geographic area where the [Residential Zoned Property] is located "may, but is not required to, include ... a golf course."[54]

- The Queensridge homeowners transfer documents "evidence that no such guarantee [that the Residential Zoned Property would remain a golf course] was made and that Plaintiffs were advised ***that future development to the adjoining property [Residential Zoned Property] could occur, and could impair their views or lot advantages.***"[55]

Judge Smith considered public records, extensive briefing, conducted full hearings, and heard extensive oral argument on the central issue of whether the Landowners have the vested right to develop the Residential Zoned Property, and concluded in clear rulings that the Landowners have the "right" to develop their land and no other CC&Rs, land designations, or

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[49] *Id.* at finding # 66.
[50] *Id.* at finding #81 (emphasis supplied).
[51] *Id.* at finding #61 (emphasis supplied).
[52] *Id.* at finding #130 (emphasis supplied).
[53] ROR034710-ROR034734 at finding #51, #53-57, #62-79; ROR034775-ROR034816 at findings #5-7, #15-16, #24, #29, #31, #38-40, #64-65, #68-70, #88, #102, #120-124, and #135.
[54] ROR034710-ROR034734 at finding #70.
[55] ROR034775-ROR034816 at finding #13, #38, and #53 (emphasis supplied).

other impediments may prevent that development. The Court erroneously failed to consider these findings in the Affirmed Smith Orders in rendering its Decision.

In the Nevada Supreme Court's affirmance of Judge Smith's decisions, the Court held "[b]ecause the record supports the district court's determination that the golf course [Residential Zoned Property] was not part of the Queensridge community under the original CC&Rs and public map and records, regardless of the amendment, we conclude the district court did not abuse its discretion in denying appellants' motion for NRCP 60(b) relief."[56] The Court continued, "[a]ppellants filed a complaint alleging the golf course land [Residential Zoned Property] was subject to the CC&Rs when the CC&Rs and public maps of the property demonstrated that the golf course land [Residential Zoned Property] was not."[57] The Supreme Court also upheld the award of attorney fees in the Landowners' favor in the amount of $128,131.22.[58] Finally, the Supreme Court denied a request for rehearing further holding that the Queensridge CIC has no control over the Property as it "was never annexed into the Queensridge master community."[59] Likewise the 35 Acre Property was not a part of the Peccole Ranch Phase II Final Map, never annexed into the Peccole Ranch CIC, and is not governed by the Peccole Ranch Master Declaration. As is fully discussed below, this Court's Decision that the Landowners did not have the vested right to have their residential Applications approved violates the controlling these Nevada Supreme Court decisions specific to the Property.

4. Legal Standard.

NRCP 59(a) is the proper vehicle for seeking a new trial or for challenging a pretrial decision of a district court resolving an action pending before it. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010) (approving motion for a new

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[56] Exhibit 4, pg. 2.
[57] *Id.*, pg. 4.
[58] *Id.*
[59] See Exhibit 5 Order Denying Rehearing, pg. 2.

trial following dismissal of a complaint). "Among the basic grounds for a Rule 59(e) motion are correct[ing] manifest errors of law or fact, newly discovered or previously unavailable evidence, the need to prevent manifest injustice, or a change in controlling law." *AA Primo Builders*, 126 Nev. at 582, 245 P.3d at 1193.

EDCR 2.24 states, in pertinent part:

> A party seeking reconsideration of a ruling of the court...must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion.

The Supreme Court of Nevada has similarly stated, "A district court may reconsider a previously decided issue if [1] substantially different evidence is subsequently introduced or [2] the decision is clearly erroneous." *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.* 113 Nev. 737, 741 (Nev. 1997). A court may rehear a motion even if "the facts and the law [a]re unchanged" because "the judge i[s] more familiar with the case by the time the second motion [i]s heard[.]" *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218 (Nev. 1980). In this case, the Decision is both clearly erroneous and violates controlling Nevada Supreme Court precedent for this very Residential Zoned Property.

5. The Court Should Reconsider Its Decision Because it is Clearly Erroneous.

A. The Court's Reliance on the Judge Crockett Decision that is on Appeal to the Nevada Supreme Court was Clearly Erroneous.

The Judge Crockett Decision essentially changed the law in the State of Nevada by holding that a land use designation governs zoning while NRS 278.349 emphasizes that zoning takes precedence. *See* NRS 278.349(3)(e). The Judge Crockett Decision further held that a "conceptual" plan governed property that was not annexed into the master planned community CC&Rs and used the "conceptual" plan as a non-recorded encumbrance on the Property thereby invalidating the zoning and well-established law that any encumbrances on real

property must be recorded on that property. In furtherance of these findings, Judge Crockett erroneously held that the Property is governed by Planned Development or a "PD" District under Title 19.10.040 and thus subject to the procedural mechanism of a "major modification," which is identical to a rezoning. Rezoning is precisely what the City approved in the 17 acre applications at issue before Judge Crockett. The Judge Crockett Decision directly contradicts the Nevada Revised Statutes, Title 19 of the LVMC, and the Affirmed Smith Orders.[60]

The Affirmed Smith Orders correctly rely upon the hard R-PD7 residential zoning applicable to the Residential Zoned Property since 2001 instead of a "conceptual" plan and held that: (1) the Landowners have the vested "right to develop" the Residential Zoned Property (which includes the 35 Acre Property as well as the 17 acres addressed by the Judge Crockett Decision) with residential use, because the entirety of the Property has always been zoned residential since 2001, the developer's intent was always to develop the property residentially, and hard zoning trumps any other land use plan designation (such as the Peccole Ranch "conceptual" plan); (2) the Residential Zoned Property was never part of the Queensridge CIC or subject to any Queensridge CC&Rs; (3) the Queensridge homeowners have no legal rights whatsoever to the Residential Zoned Property; (4) no Queensridge CC&Rs or other City plan may be invoked to prevent this development; and (5) the Landowners properly proceeded with the residential development by filing the appropriate parcel maps.[61] Accordingly, consistent with the Affirmed Smith Orders, no Title 19 "major modification" application is necessary – the Residential Zoned Property is already zoned residential, its intended use has always been residential, and the Landowners have the "right to develop" the property for this residential use.

It is significant that Judge Smith found that the Property is zoned R-PD7. Therefore, there is nothing to "modify." Even if the defunct Peccole Ranch Master Plan did apply to the 35 Acre Property, it expressly designates the 35 Acre Property as "residential." The defunct Peccole Ranch Master Plan, repealed by Ordinance 5353, only contemplated an 18 hole golf

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[60] ROR034710-ROR034734 and ROR034775-ROR034816.
[61] *Id.*

course, and the 35 Acre Property was specifically designated as residential acreage on the "conceptual" plan. This Court's Decision contradicts the Affirmed Smith Orders.

It is impossible to reconcile the Judge Crockett Decision and the Affirmed Smith Orders. Just one example shows this. The Affirmed Smith Orders confirms the R-PD7 hard zoning applied by City ordinance to the Property and concludes that there is a "right to develop" the Residential Zoned Property with residential use.[62] On the other hand, the Judge Crockett Decision entirely ignores the R-PD7 hard zoning and, instead, concludes that the Residential Zoned Property is designated as open space in the City's Master Plan and thus no residential units are allowed as a result of the master plan land use designation, in conflict with NRS 278.349(3)(e).

The Affirmed Smith Orders govern the issue regarding the inapplicability of a "major modification," as the Property is zoned "R-PD7" not "PD," and under Nevada law zoning prevails over an inconsistent master plan designation. The Affirmed Smith Orders have been blessed by the Nevada Supreme Court.[63] The executive,[64] legislative,[65] and judicial[66] branches of Nevada government all support the Affirmed Smith Orders.

The Affirmed Smith Orders leads to the following inescapable conclusions: (1) the Landowners have the vested right to develop the Residential Zoned Property with a residential use because the property is zoned residential, the intent was always to develop the property residentially, and hard zoning trumps any other land use plan designation such as PR-OS (open space/golf course); (2) the Residential Zoned Property never became part of the Master Planned Community of Queensridge, Queensridge CIC, or subject to any Queensridge CC&Rs; (3) Queensridge homeowners have no legal rights whatsoever to the Residential Zoned

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[62] *Id.*
[63] *See* Exhibits 4 and 5.
[64] *See* 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.")
[65] *See* NRS 278.349(3)(e).
[66] *See* Exhibits 2, 3, 4, and 5.

Property; and (4) no Queensridge CC&Rs or other City plan may be invoked to prevent this development.

Because the Nevada Supreme Court issued its decision shortly before this Court entered its Decision, neither the parties nor this Court were provided an opportunity to substantively brief or review that decision or its implication on this case. Accordingly, and because this Court's Decision is directly contrary to the Affirmed Smith Orders, this Court must reconsider its Decision and grant the petition for judicial review.[67]

B. The Court's Decision Regarding "Public Opposition" Similarly is Clearly Erroneous.

The Court should also reconsider its Decision because public opposition is an insufficient basis for striking a land-use application that is *consistent* with current zoning, in *compliance* with all applicable land use laws and ordinances, and is *compatible* with surrounding property, particularly when the opposition is self-serving, not based on specific and substantiated objections, and not supported by evidence.[68] This principle is even more

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[67] For example, Finding of Facts #12 & 13 signed by this Court designates the 250 acre Residential Zoned Property as drainage and open space for Phase Two of the Master Plan while the Affirmed Smith Orders clearly holds that the Property is not part of the Queensridge CIC and the Peccole Ranch Phase II Final Map does not include the Residential Zoned Property, nor any property north of Charleston.

[68] *City of Henderson v. Henderson Auto Wrecking, Inc.*, 359 P2d 743, 743-45 (Nev. 1961); *Stratosphere Gaming Corp. v. City of Las Vegas,* 96 P.3d 756, 760-61 (Nev. 2004); *K.G.T. Holdings, LLC v. Parish of Jefferson,* 169 So.3d 628, 635 (La. App. 2015) (noting that the weight of public opposition is lessened if the application does not seek a zoning change, is supported by the planning commission, and complies with the governing development standard and criteria); *M.G. Oil Co. v. City of Rapid City*, 793 N.W. 2d 816, 823 (S.D. 2011). ("The opinions presented through public comment to the City Council do not satisfy the language in subsection C of the ordinance. The discussion leading up to the vote indicates that the decision by the City Council was not made based upon the criteria specified in the ordinance. The action by the City Council was factually unsupported. Vague reservations expressed by Council members and nearby landowners are not sufficient to provide factual support of a Board decision. We have also stated that predictions and prophecies by neighboring property owners that a building when completed will likely become a nuisance and annoyance cannot serve as a legal reason for local governments to deny a permit to persons otherwise entitled thereto."); *City of Lowell v. M & N Mobile Home Park, Inc.,* 916 S.W. 2d 95 (Ark. 1996) ("The opinion of local residents, when it reflects logical and reasonable concerns, is an appropriate factor for a planning commission or a city council to consider in zoning cases, and can help form a rational basis for a city's legislative decision-making. . . . However, the mere fact of public opposition to a zoning application will not supply a rational basis for denial of an application. The public opposition must reflect logical and reasonable concerns. If the rule were otherwise, public opinion *by itself* could justify the denial of constitutional rights and those rights would thus be meaningless.") (emphasis supplied); *Trisko v. City of White Park*, 566 N.W.2d 349, 355-57 (Minn. Ct. App. 1997) ("A municipality must base the denial of a conditional use permit on something more concrete than neighborhood opposition and expression of concern for public safety."); *Scott Cty. Lumber Co. v. City of Shakopee,* 417 N.W.2d 721,

applicable to this Petition, when the opposition raised no issues that were not fully addressed and fully rebutted by the long-time, experienced land-use professionals of the City Staff in analyzing the considerations under both NRS 278 and Title 19. The development applications for the 35 Acre Property were completely compatible and entirely consistent with the existing and abutting residential lots.

The "Public Opposition" in this case, in large part, concerned the entire Residential Zoned Property and the lack of a master development agreement (discussed *infra*), not the very specific 35 Acre Property at issue. "Public Opposition" was always present for every application filed for development of the Residential Zoned Property. The City Council arbitrarily chose to ignore Public Opposition at times and rely upon it for application denials at other times. Moreover, as known beyond doubt, what the "Public Opposition" wants in this case is no development whatsoever on any of the Residential Zoned Property, notwithstanding that the "Public Opposition" received disclosures at the time of the purchase of their residences, and the Queensridge CC&Rs stated that the Residential Zoned Property was subject to development and that views were not protected. In 2001, the 35 Acre Property (and the rest of Residential Zoned Property) was zoned, by City of Las Vegas Ordinance 5353, exclusively for single-family residential development. The 35 Acre Property is approved for single family residential with up to 7.49 units per acre as long as the proposed use is compatible and consistent with the surrounding area per Title 19. Thus, Title 19, not just "any perceived reason," should have been the City Council's standard. The Court clearly erred in not correcting that failure.

"Public Opposition" in this case was not supported by substantial evidence and was an arbitrary and capricious reason for denying the Applications. The City Council's limited discretion exercisable here for this single-use property and the Applications that are *consistent*

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728 (Minn. Ct. App. 1988); *Perschbacher v. Freeborn Cty. Bd. Of Comm'rs,* 883 N.W.2d 637, 645 (Minn. Ct. App. 2016) (finding unreliable public "testimony [that] was in the nature of vague, generalized concerns, rather than in the nature of actual facts or experience regarding the potential impact of the project on the neighborhood").

with permitted use under the existing zoning, in full *compliance* with applicable land-use law, and *compatible* with surrounding property simply does not permit denial on that basis.

C. The Court's Decision Regarding "Piecemeal Development" was Clearly Erroneous.

The Court should also reconsider its Decision related to piecemeal development because no such standard or criteria exists in Title 19 or NRS 278. By forcing the Landowner to enter into a master development agreement for the Residential Zoned Property and basing the denial of the Applications on this requirement, the City Council acted arbitrarily and capriciously.[69] The Court clearly erred in upholding the City Council's flawed decision.

The Affirmed Smith Orders confirm that the 35 Acre Property is zoned for residential use. The Applications provide for compatible development with the surrounding residential properties as City Staff and the Planning Commission determined. However, once certain Queensridge homeowners opposed the proposed development, the City Council's proffered piecemeal concern became the cloak for "special treatment" that was donned only after certain council members became more interested in playing "politics" than they did with properly adjudicating the Applications pursuant to the objective standards and criteria set forth in NRS 278 and Title 19 of the Development Code.

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[69] *Tinseltown Cinema, LLC v. City of Olive Branch*, 158 So.3d 367 (Miss. App. Ct. 2015); *Highway Oil, Inc. v. City of Lenexa*, 547 P.2d 330 (Kan. 1976). For the rule that the standards and criteria of the Development Code should provide the basis and confines for the City's adjudication of Petitioner's applications, none of which requested a zoning change, *see Nevada ex rel. Johns v. Gragson*, 515 P.2d 65, 67 (Nev. 1973) (stating that an adjudicative body's decision on a land use application must be "confined by the standards" governing the zoning and land use); *Nova Horizon, Inc. v. City Council of the City of Reno*, 769 P.2d 721, 724 (Nev. 1989) (providing that it is "inappropriate" for an adjudicative body to base its decision on a land use application on a "de facto" consideration that does not exist within the governing zoning and land use laws and ordinances); *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816 (S.D. 2011); *Rossow v. City of Lake Elmo*, 2017 WL 5661571 (Minn. Ct. App. Nov. 27, 2017); *Kling v. City Council of City of Newport Beach*, 317 P.2d 708 (Cal. App. 1957).

An adjudicative body acts arbitrarily and capriciously when it denies proposed development that complies with the existing zoning and is similar to surrounding uses.[70] In Nevada, the Supreme Court has held that a city's denial of a developer's application to use his parcel in a manner that complied with the parcel's zoning was arbitrary and capricious because, in large part, the city had permitted nearby parcels to be used for identical businesses.[71] In other words, the city had treated the developer's application differently without any legal basis.

Similarly, in *Nova Horizon, Inc. v. City Council of the City of Reno*, 769 P.2d 721 (Nev. 1989), the City of Reno denied the developer's application to develop his parcel with a hotel and casino in a district of Reno where other hotels and casinos were already located.[72] The planning commission recommended approval of the application, but the city council denied the application on the basis that the city council had made "campaign promises" not to put any more hotels and casinos is the subject district.[73] On appeal, the Nevada Supreme Court ruled that the denial was arbitrary and capricious because, in part, the proposed development was consistent with the surrounding uses.[74] Because the City of Reno based its decision on improper considerations, the Nevada Supreme Court reasoned that the city council failed to "adequately focus[] on the merits of the project."[75]

Developers and land owners regularly develop parcels in a phased, market-driven manner. It is financially infeasible for a developer to develop 250 acres at one time. Yet, in this case, the City Council has, without legal basis, mandated that the entire Residential Zoned Property be developed pursuant to a master development agreement for all 250 acres and thus prevented development in accordance with existing zoning.

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[70] *City of Henderson v. Henderson Auto Wrecking, Inc.*, 359 P.2d 743, 743-45 (Nev. 1961); *K.G.T. Holdings, LLC v. Parish of Jefferson*, 169 So.3d 628, 634-45 (La. App. 2015) ("Zoning regulations must be uniformly applied within each district or zone of the municipality. When applications are granted in similar situations and refused in others, the refusal to grant an application may constitute nonuniform application of zoning ordinances that is arbitrary and capricious.").

[71] *Id.*

[72] *Nova Horizon, Inc. v. City Council of the City of Reno*, 769 P.2d 721, 721-22 (Nev. 1989).

[73] *Id.* at 722-23.

[74] *Id.* at 723-24.

[75] *Id.* at 724.

The City has treated Petitioner's applications disparately to other similarly-situated applications because of the influence of the Queensridge homeowners. The Affirmed Smith Orders make clear that the Nevada Supreme Court has determined that the Queensridge CIC residents have no legal rights to the Residential Zoned Property. The City's denial of the Applications is arbitrary and capricious, oppressive, and a manifest abuse of discretion under the Affirmed Smith Orders. The Court's Decision approving the City's action is likewise in conflict with the Affirmed Smith Orders.

6. Conclusion.

For the foregoing reasons, the Court should order a new trial pursuant to NRCP 59(a), alter or amend judgment pursuant to NRCP 52(b), and/or reconsider its Decision and grant the petition for judicial review. Alternatively, the Court should vacate the Decision and stay this case until the Nevada Supreme Court renders a decision regarding the Judge Crockett Decision, which is currently pending before the Nevada Supreme Court.

DATED this 13th day of December, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Hutchison & Steffen, PLLC, and that on this 13th day of December, 2018, I caused the above and foregoing document entitled **MOTION FOR A NEW TRIAL PURSUANT TO NRCP 59(e) AND MOTION TO ALTER OR AMEND PURSUANT TO NRCP 52(b) AND/OR RECONSIDER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MOTION TO STAY PENDING NEVADA SUPREME COURT DIRECTIVES** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ pursuant to EDCR 7.26, to be sent via facsimile; and/or

XXX pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail;

and/or to the attorney(s) listed below at the address and/or facsimile number indicated below:

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