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. 21

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **OPPOSITION TO MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES** Hearing Date: February 16, 2021 Hearing Time: 9:00 a.m.

I. INTRODUCTION

The Developer's Motion seeks to compel legally improper and irrelevant discovery from the City by requesting the mental impressions and thought processes of a former City Councilmember with respect to his reasoning and state of mind in denying the Developer's application to develop the 35-Acre Property. As well-established law demonstrates, the Developer is not entitled to this type of discovery and simply arguing that the Developer is seeking "facts" as opposed to the Councilmember's thought processes does not circumvent legal precedent.

In contrast to the Developer's actual discovery request, the Developer's Motion also seeks to compel discovery of the types of funds the City may have to pay any monetary judgment it might be awarded. In addition to not being relevant or discoverable, even a cursory review of Interrogatory No. 6 belies the position taken in the Developer's motion. Interrogatory No. 6 does not request information related to funds the City may have to pay a judgment; rather, it specifically seeks information as to the type of funds the City held in *2017* to purchase land for parks and open space. The plain language, therefore, of Interrogatory No. 6 directly contradicts the Developer's requested relief in its Motion. Regardless, even at face value, Interrogatory No. 6 does not seek discoverable information. If the City seeks to acquire any property, it is authorized to draw from numerous existing and contingent sources, including its capital fund, general fund, taxing authority and bonding authority, all of which change daily. Thus, any response related to funds to which the City had access in 2017 has no bearing on the claims and defenses in this litigation. The City respectfully requests the Court deny the Developer's Motion in its entirety.

II. FACTUAL AND LEGAL ARGUMENT

A. The Developer Did Not Accurately Set Forth The City's Response To The At-Issue Interrogatories.

EDCR 2.40 required the Developer to set forth each disputed discovery request and response in full. *See* EDCR 2.40. The Developer's Motion does not accurately set forth the City's response to Interrogatory No. 2. Accordingly, the full request and accurate response is set forth below:

> **INTERROGATORY NO. 2:**
> State what City code, ordinance or regulation and/or Nevada statute required a "20 percent" open space dedication between 1985-2005 as referenced by Councilman Seroka in the following statement: "At that time, it was generally accepted accounting principals (sic) and generally accepted percentage of acreage that is open space/recreational. It is 20 percent. What we have up here is the agreed upon roughly 20 percent. It's in the ballpark." (Page 19 lines 10-14 of the June 21, 2018 meeting transcript). Also, state how Councilman Seroka came by this purported requirement, meaning who told him it was a "generally accepted" "open space/recreational" requirement "at that time."
>
> **ANSWER:**
> The City of Las Vegas objects to this interrogatory because it does not have the duty to perform legal research for Plaintiff. The City of Las Vegas objects to this interrogatory in its entirety because it seeks the mental impressions of former Las Vegas City Councilman Steven Seroka known only to him. Accordingly, the City lacks knowledge sufficient to answer this interrogatory. The City of Las Vegas

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> objects to this Interrogatory because it improperly comprises improper, multiple independent interrogatories. *See Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684, 685-86 (D. Nev. 1997). Specifically, the first interrogatory asks "what City code, ordinance or regulation and/or Nevada statute required a '20 percent' open space dedication between 1985-2005 . . . " and the second interrogatory inquires "how Councilman Seroka came by this purported requirement . . ." Accordingly, this interrogatory comprises two of Plaintiff's permissible interrogatories allowed pursuant to N.R.C.P. 33.

See Defendant City of Las Vegas' Second Supplement to Answers to Plaintiff 180 Land Co. LLC's First Set of Interrogatories ("Second Supp. Answers") at 4:15-17, attached as **Exhibit A**.[1]

B. The Developer Is Only Entitled To Discovery That Is Relevant To A Party's Claims Or Defenses And Is Proportional To The Needs Of the Case; It Is Not Entitled To Irrelevant And Overly Broad Discovery Or Discovery That Creates An Undue Burden To The City.

As a threshold matter, Rule 26(b)(1) of the Nevada Rules of Civil Procedure makes clear that a party is only entitled to discovery that is "relevant to any party's claims or defenses **and** proportional to the needs of the case, considering…the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *See* NRCP 26(b)(1) (emphasis added).

Here, the Developer attempts to simplify the issues to the Court by flatly asserting, but without demonstrating, that the discovery it seeks is relevant to one of the City's defenses. Specifically, it is the Developer's position that the Interrogatories relate to the "City's defense that the 35 Acre Property was the open space dedication (park set-aside) requirement imposed by the City on Mr. Peccole." Motion at 6:10-12 and 2:9-3:22. However, whether William Peccole "imposed" the open space designation on the City has no bearing on the claims and defenses in this case. *See generally* Second Amendment and First Supplement to Complaint for Severed Alternative Verified Claims in Inverse Condemnation; *see also* City of Las Vegas' Answer to Plaintiff 180 Land Company's Second Supplement to Complaint for Severed Alternative Verified

[1] The City attaches as Exhibit A its Second Supp. Answers as the Developer only attached the City's first supplemental answers to the interrogatories; thus, failing to use and reference the operative answers.

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Claims in Inverse Condemnation ("Answer"). Either the 35 Acre Property is designated as Parks, Recreation and Open Space ("PR-OS") or it is not and whether William Peccole "imposed" that designation on the City is wholly unrelated and irrelevant to the actual designation.

In addition, and contrary to the Developer's bald statement, former Councilman Seroka's recorded statements at a Homeowners' Association meeting is not representative, nor "similar to the City's litigation defense." Motion at 3:20-21. Instead, the questions of whether the property is designated PR-OS and how it became so designated *already has been adjudicated by this Court*. In its Findings of Fact and Conclusions of Law on Petition for Judicial Review, the Court specifically found:

> 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).
>
> * * *
>
> 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 course 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).

See Findings of Fact and Conclusions of Law on Petition for Judicial Review, ¶¶ 1, 3-7, entered on November 26, 2018 (emphasis added). Thus, no discovery need be conducted on whether or not William Peccole "imposed" the designation since it is wholly irrelevant to the claims and defenses and, importantly, the Court already has found that the 35-Acre Property was designated open space by the City's General Plan. Accordingly, the Developer's argument that the Interrogatories somehow relate to the City's defense is wholly belied by the substantive and procedural history of this case and, as discussed further, defeated by well-established law.

. . .

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C. Interrogatory Nos. 1, 2 And 3 Improperly Seek Discovery Related To The Statements And Actions Of A Former, Individual Council Member.

It is well-settled that the governing body of a public agency may not act except by vote of a majority of those elected officials: "A public body that is required to be composed of elected officials only may not take action by vote unless at least a majority of all the members of the public body vote in favor of the action." *See* NRS 241.0355(1). In other words, because regulatory action is taken by an agency as a whole and not by individual members of the governing body of the agency, statements and actions of individual members of the governing body – such as the type of discovery sought by the Developer – are neither discoverable nor relevant.

Although the Developer attempts to cast Interrogatory Nos. 1, 2 and 3 as seeking "facts;" a review of the Interrogatories belies the Developer's contention. *See* Second Supp. Answers at 3:2-7; 3:19-26 and 4:15-17, **Ex. A**. Specifically, Interrogatory No. 1 seeks information related to former Councilman Seroka's statement that he "went to school and I studied and studied the rules, and I learned as much as I could from the experts, and I did study and I learned a lot." *Id.* at 3:2-7. Interrogatory No. 2 seeks legal research from the City[2] based on a statement by former Councilman Seroka whereby he stated that "[a]t the time, it was generally accepted accounting principals (sic) and generally accepted percentage of acreage that is open space/recreational. It is 20 percent. What we have up here is the agreed upon roughly 20 percent. It's in the ballpark." *Id.* at 3:19-26. Based on the statement, the Developer wants to know what legal authority required "20 percent" and how former Councilman Seroka came up with the 20 percent. *Id.* Finally, Interrogatory No. 3 further expands the Developer's requests in Interrogatory No. 2 by seeking the "name and location of every development in the City of Las Vegas that had an approximately 20 percent open space dedication requirement…as referenced by Councilman Seroka in [the statement identified in Interrogatory No. 2]." *Id.* at 4:15-17. It is apparent, therefore, that contrary to the Developer's Motion, the

[2] As a separate basis to deny the Developer's Motion with respect to Interrogatory No. 2, the City is not required to conduct research on behalf of the Developer.

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Interrogatories request the mental impressions of former Councilmember Seroka and discovery on statements made by Councilmember Seroka, as opposed to specific facts relevant to this litigation.

Indeed, the Developer admits that Councilman Seroka "was recorded making statements *that indicate he may have facts* regarding this City defense." Motion at 6:13 (emphasis added). In other words, the Developer admits that it is engaging in a fishing expedition to determine if the mental impressions and personal statements of an individual former councilmember, which merely "indicated" but did not affirmatively show that he may have facts, leads to relevant discovery that may be related to a defense. This is simply not enough.

The City acts through the City Council as a whole, not through individual members of the City Council. *See* Las Vegas City Charter Sec. 1.040-050; Sec. 20.010. Accordingly, former Councilman Seroka's mental impressions and his reasons for voting a particular way or making certain statements at a Homeowners' Association meeting related to the Developer's development application are not discoverable. *See City of Las Vegas v. Foley*, 747 F.2d 1294, 1298-99 (9th Cir. 1984) (holding that there is no legal "basis for allowing the [Council] to be deposed to determine their individual motives for enacting [a] regulation"); *A-NLV-Cab Co. v. State, Taxicab Auth.*, 108 Nev. 92, 95, 825 P.2d 585, 587 (1992) (court may not consider a single legislators *statement of opinion or motives* to divine legislative intent); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1260 (4th Cir. 1989) ("The Supreme Court has counseled that placing decisionmakers on the stand in order to uncover the motivation behind an official action is 'usually to be avoided.'") (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268, n. 18) (1977)); *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 622, 6 P.3d 465, 469 (2000).

The case law cited by the Developer in its Motion does not disavow the above-cited authority; nor does it compel this Court to grant its Motion. *See* Motion at 7:9-18. Instead, the Developer cites *DR Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 6 P.3d 465 (2000) for the proposition that the deliberative process privilege does not protect "purely factual matters." *Id.* at 7:9-13. Again, as set forth above, a simple review of the Developer's Interrogatories proves that the Developer is not simply seeking "purely factual matters," but seeking discovery into the very mental impressions and motives underlying Councilman Seroka's

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statements and vote. *See* Second Supp. Answers at 3:2-7; 3:19-26 and 4:15-17, **Ex. A**. In sum, although the Developer attempts to couch its Interrogatories as seeking "facts," a review of the Interrogatories proves otherwise. Because the Interrogatories seek improper discovery, the Court should deny the Developers' request to compel responses.

In addition, former Councilman Seroka's mental impressions and reasons for his motive and vote while sitting as a member of the City Council are entirely irrelevant. Specifically, under the applicable tests for liability for a taking, the Developer has the burden to demonstrate that the City Council's action imposed an extreme economic burden on the property at issue. *Kelly v. Tahoe Reg'l Planning Agency*., 109 Nev. 638, 648, 855 P.2d 1027, 1033 (1993) (takings claimant must show that regulation "'den[ies] all economically beneficial or productive use of land.'") (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-25 (1994) (denial of a building permit was not an unconstitutional taking because it "did not destroy all viable economic value of the prospective development property"); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (adopting three-factor test for taking: (1) economic impact of the regulation on the claimant, (2) extent the regulation interfered with distinct investment backed expectations, and (3) whether action is physical taking); *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 420, 351 P.3d 736, 742 (2015) (relying on *Penn Central* test). The primary *Penn Central* factors are the regulation's economic impact on the property and its interference with the owner's distinct investment-backed expectations. *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 626 (9th Cir. 2020).

Here, the City Council merely denied the Developer's application to change the use of a portion of the entire 250 Badlands property from its historic use as a golf course to a residential use, and the Developer has the burden to show that the City Council's denial of its application to develop the 35-Acre Property had an extreme economic effect on the Badlands; *i.e.*, wiped out or virtually wiped out its value. The City Council's action on the Developer's application is a matter of public record and is undisputed. The permissible uses of the Badlands are likewise a matter of public record and are undisputed. In view of these undisputed facts, the City's action cannot have effected a taking as a matter of law. *See*, *e.g.*, *Penn Central*, 438 U.S. at 136 ("[T]he New York

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City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions.").

Moreover, the City permitted development of 435 luxury housing units on another portion of the Badlands, negating a wipeout or virtual wipeout of use or value. And former Councilman Seroka's statements or actions inside or outside a City Council public hearing, or the statements and actions of other persons, do not constitute actions of the City as a whole, have no effect whatsoever on the value of the Developer's property or its ability to use the property and, thus, cannot be challenged as or evidence of a taking. An individual Council Member's deliberative process is also privileged. *See DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 622, 6 P.3d 465, 469 (2000). For these reasons, who an individual City Councilmember spoke to and what they learned from outside sources is neither discoverable nor relevant to this case.

Finally, and importantly, the Developer has not demonstrated how these Interrogatories will advance this case and/or resolve the issues involved. *See generally* Motion; *see also* NRCP 26(b)(1). For example, should the Court order the City to provide former Councilmember Seroka's mental impressions regarding his studies, consultations with "experts" and the 20 percent open space dedication, those impressions (and even "facts" as alleged by the Developer) will have no bearing on the actual issues involved. By way of example only, regarding any "experts," either the City is going to use the "experts" referred to by Councilman Seroka or it will not. And, as the Developer has repeatedly maintained to this Court and the City, the time for disclosing experts has not yet passed, particularly because the Developer consistently requests the Court and the City to extend the expert discovery deadline dates. Regarding former Councilmember Seroka's "studies" and the 20 percent dedication, the Developer also failed to demonstrate how these statements will advance the issues in this litigation. *See generally* Motion. That is, what former Councilmember Seroka "studied" has no bearing on the ultimate vote the City Council took regarding the Developer's application. These examples underscore the reasoning for the above-cited authority concerning the inquiry into an individual councilmember's mental impressions and statements

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because to allow such broad discovery into unrelated and irrelevant inquiries would create an unwieldy discovery process the type of which this Court should respectfully decline to engage.

D. Contrary To The Developer's Spin On The Information Sought By Interrogatory No. 6, A Plain Reading Shows That The Developer Is Seeking Irrelevant Information Wholly Disproportional To The Needs Of The Case.

By its Motion, the Developer attempts to re-write its Interrogatory No. 6 to seek information not sought by the plain language of the Interrogatory. *See* Motion at 8:10-9:13. Specifically, in its Motion, the Developer claims that by Interrogatory No. 6 it is requesting discovery that will lead to evidence that will "counter a false defense [that taxpayers will have to pay any monetary judgment] utilized by the government." *Id.* at 9:8-10; *see also id.* at 8:13-15 ("While the source of funds is irrelevant to liability, meaning the government must pay for the verdict irrespective, often the government has alternative sources to pull funds from which run contrary to what may be considered 'taxpayers.'"). However, no matter how the Developer couches the Interrogatory in its Motion, the plain language belies the Developer's argument.

As drafted, Interrogatory No. 6 states:

> Please provide the amount of funds available as of July 18, 2017 and September 7, 2017, from all sources, which could be used for the acquisition of private land for parks and open space. This Interrogatory specifically includes, but is not limited, to all fund available through the Southern Nevada Public Lands Management Act (SNPLMA), the State of Nevada, and/or the City of Las Vegas for purposes of acquiring private property for parks and open space.

See Second Supp. Answers at 6:25-7:2, **Ex. A**. Nowhere does the Interrogatory request what funds the City has – outside of taxpayer funds – to pay any money judgment.[3] Instead, it asks for what funds the City had available "as of July 18, 2017 and September 7, 2017. . .which could be used for the acquisition of private land for parks and open space." *Id.* at 6:26-27. It does not request what funds the City may have to pay any potential monetary judgment in this case, but specifically addresses a period of time in the past and solely related to the purchase of land for parks and open

[3] By this Opposition and the Second Supp. Answers, the City is not waiving any objection and/or argument to any written discovery request and/or deposition question requesting the type of information as stated in the Developer's Motion. That is, what alternative or types of funds the City may have to pay any monetary judgment in this matter. However, because, at this time, the Developer has not made that inquiry, the City is not engaging in that analysis at this time.

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space. This is far from the representation by the Developer in its Motion as to what Interrogatory No. 6 is actually requesting. Accordingly, the Developer's entire argument in its Motion must be disregarded.

Moreover, nowhere in the City's Answer is the defense that the City will have to pay any potential monetary judgment with taxpayer funds such that it acts as an affirmative defense. *See* Answer at 9:3-10:23. Indeed, nowhere in the Answer does the City even reference taxpayer funds. *Id.* Instead, it has been the Developer who has consistently referenced the taxpayers in this litigation. *See e.g.* Plaintiffs' Opposition to Defendant City of Las Vegas' Motion to Compel and for an Order to Show Cause at fn. 1 ("City…filed a motion to compel at taxpayers' expense….") and 7:3-4 ("[City…instead filing a motion to compel at taxpayers' expense…."), relevant portions attached as **Exhibit B**; *see also* Plaintiffs' Opposition to Defendant City of Las Vegas' Motion to Compel Discovery Responses and Damage Calculations at 2:16 ("motions filed by the City costing the tax payers millions of dollars…."), relevant portions attached as part of **Ex. B**. There is no "false defense utilized by government" here, no matter how much the Developer misrepresents to the Court. Simply put, it is the Developer who has consistently raised taxpayer funds and the Developer's claim that the City is mounting such a defense is simply a straw man to obtain irrelevant and improper discovery.

Finally, the Developer's citation to footnote 88 in *McCarran Intern. Airport v. Sisolak*, 122 Nev. 645, 670, fn. 88, 137 P.3d 1110, 1127, fn. 88 (2006) further illustrates why the requested information is irrelevant in a regulatory takings case such as this one. The text in the body of *Sisolak* explains that the County's airspace ordinances were a "permanent physical invasion" of Sisolak's property, "thereby appropriating the airspace for the County's use." *McCarran Int'l Airport*, 122 Nev. at 670, 137 P.3d at 1127 (2006). Unlike the instant case, the County's ordinance in *Sisolak* was a physical taking because it denied the owner the right to exclude others (aircraft) from physically entering his property. In such a scenario where a public agency has *physically taken* part of a property, the Court noted that the agency's ability to pay for that property is *not* relevant to whether there was a physical taking. *Id.*, 122 Nev. at 670, fn. 88, 137 P.3d at 1127 fn. 88. Because this case involves the denial of a development application, not a physical invasion, *Sisolak* does not

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even apply. Regardless, even if *Sisolak* did apply, the source of funds to pay a judgment is *not* relevant to whether there was a taking in the first place because the City would simply be required to pay the judgment.

III. CONCLUSION

Based upon the foregoing, the City respectfully requests the Court deny the Developer's Motion to Compel in its entirety.

Respectfully submitted this 26th day of January, 2021.

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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 January, 2020, I caused a true and correct copy of the foregoing **OPPOSITION TO MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification, and as referenced below to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **DEFENDANT CITY OF LAS VEGAS' SECOND SUPPLEMENT TO ANSWERS TO PLAINTIFF 180 LAND CO. LLC'S FIRST SET OF INTERROGATORIES**

Defendant City of Las Vegas, by and through its attorneys, and pursuant to Rules 26 and 33 of the Nevada Rules of Civil Procedure, hereby supplements **in bold** its responses and objections to *Plaintiff 180 Land Co., LLC's First Set of Interrogatories to the City of Las Vegas* as follows:

PRELIMINARY STATEMENT

The following objections and answers are based upon information presently available to the City of Las Vegas, which it believes to be correct. These answers are made without prejudice to its

right to use subsequently discovered facts and documents. Answers may be supplemented upon the further analysis, investigation and acquisition of information. In particular, the City of Las Vegas makes answers with the intent of preserving:

1. Its rights to raise all questions of authenticity, relevancy, materiality, privilege and admissibility concerning the documents produced, the information provided and/or the responses and the subject matter thereof, for any purpose which may arise in any subsequent proceeding, in this action or any other action or matter;

2. Its rights to object to the use of the information provided on any ground in any further proceeding, in this action, and in any other action or matter;

3. Its rights to make any use of, or to introduce at any hearing or trial, information and/or documents discovered after the date of its initial responses, including but not limited to any information or documents obtained in discovery in this case; and

4. Its rights at any time to make further answers or production, to review, correct, add to, supplement or clarify any of the responses contained herein or to introduce or rely upon additional information and/or documents if subsequent discovery or inspection of its files uncovers additional information, as the city's investigations of the facts and the evidence pertinent to this action is ongoing.

This Preliminary Statement is incorporated in each of the responses set forth below as if fully set forth therein.

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ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1:

For every "expert" that Councilman Seroka "learned as much as [he] could from" as referenced in the following statement: "So I went to school and I studied and studied the rules, and I learned as much as I could from the experts, and I did study and I learned a lot" (Page 13 lines 6-12 of the June 21, 2018 meeting transcript attached hereto), state the expert's name, address, telephone number and a summary of what Councilman Seroka "learned" from the expert.

ANSWER:

The City of Las Vegas objects to this interrogatory in its entirety because it seeks the mental impressions of former Las Vegas City Councilman Steven Seroka that are known only to him. Accordingly, the City lacks knowledge sufficient to answer this interrogatory.

The City of Las Vegas objects to this interrogatory in its entirety because it seeks irrelevant information, the production of which is disproportionate to the needs of the case.

The City of Vegas objects to this Interrogatory in its entirety as unduly burdensome and oppressive, and meant only to harass, because it seeks an itemization of facts purportedly learned by Mr. Seroka. Moreover, interrogatories do not require the answering party to provide a narrative account of its case.

INTERROGATORY NO. 2:

State what City code, ordinance or regulation and/or Nevada statute required a "20 percent" open space dedication between 1985-2005 as referenced by Councilman Seroka in the following statement: "At that time, it was generally accepted accounting principals (sic) and generally accepted percentage of acreage that is open space/recreational. It is 20 percent. What we have up here is the agreed upon roughly 20 percent. It's in the ballpark." (Page 19 lines 10-14 of the June 21, 2018 meeting transcript). Also, state how Councilman Seroka came by this purported requirement, meaning who told him it was a "generally accepted" "open space/recreational" requirement "at that time."

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ANSWER:

The City of Las Vegas objects to this interrogatory because it does not have the duty to perform legal research for Plaintiff.

The City of Las Vegas objects to this interrogatory in its entirety because it seeks the mental impressions of former Las Vegas City Councilman Steven Seroka known only to him. Accordingly, the City lacks knowledge sufficient to answer this interrogatory.

The City of Las Vegas objects to this Interrogatory because it improperly comprises improper, multiple independent interrogatories. *See Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684, 685-86 (D. Nev. 1997). Specifically, the first interrogatory asks "what City code, ordinance or regulation and/or Nevada statute required a '20 percent' open space dedication between 1985-2005 . . . " and the second interrogatory inquires "how Councilman Seroka came by this purported requirement . . ." Accordingly, this interrogatory comprises two of Plaintiff's permissible interrogatories allowed pursuant to N.R.C.P. 33.

INTERROGATORY NO. 3:

Provide the name and location of every development in the City of Las Vegas that had an approximately 20 percent open space dedication requirement imposed on it by the City of Las Vegas between 1985 and 2005, as referenced by Councilman Seroka in the above provided statement.

ANSWER:

The City of Las Vegas objects to this interrogatory in its entirety because it seeks the mental impressions of former Las Vegas City Councilman Steven Seroka that are known only to him. Accordingly, the City lacks knowledge sufficient to answer this interrogatory.

The City of Las Vegas objects to this interrogatory because it seeks irrelevant information the production of which is disproportionate to the needs of the case.

The City of Las Vegas objects to this interrogatory because it is vague and ambiguous as to the "20 percent open space dedication requirement" to which it refers.

INTERROGATORY NO. 4:

Provide a detailed description of all City Council approved uses for the Subject Property prior to July 18, 2017 and prior to September 7, 2017.

ANSWER:

The City of Las Vegas objects to this interrogatory because it does not have the duty to perform legal research for Plaintiff.

The City of Las Vegas objects to the definition of the "Subject Property" as a 35-acre portion of the Badlands. The property at issue in this regulatory takings action is the 250-acre Badlands.

The City of Las Vegas objects to this interrogatory because it is vague and ambiguous as to the period of time of the City's approved uses of the Subject Property.

The City of Las Vegas objects to this interrogatory because it is vague and ambiguous as to the City's approved uses of the Subject Property.

To the extent this interrogatory seeks a list of the legal uses of the Badlands between March 2015 when Plaintiff acquired the Badlands and September 7, 2017, the City responds as follows:

The majority of the Badlands have been designated Parks/Recreation/Open Space (PR-OS) in the City's General Plan from April 1, 1992 through September 7, 2017. The Badlands in their entirety, including the 35-acre portion of the Badlands Plaintiff defines as the Subject Property, have been designated PR-OS in the General Plan from September 6, 2000 or earlier through September 7, 2017. PR-OS allows "large public parks and recreation areas such as public and private golf courses, trails, easements, drainage ways, detention basins, and any other large areas or permanent open land."

The Badlands have been zoned R-PD7 since 1992. The uses permitted in R-PD7 districts are set forth in City of Las Vegas Uniform Development Code Section 19.10.050C. Among other things, R-PD7 zoning "provide[s] for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space, the separation of pedestrian and vehicular traffic, and homogeneity of land use patterns." *Id*. 19.10.050A. Residential development is permitted in R-PD7 districts up to seven housing units per acre distributed over the land included in the project description.

The legal uses of the Badlands are also governed by other City Codes, Ordinances, and Resolutions approved by the City Council. These Codes, Ordinances, and Resolutions are equally accessible to Plaintiffs.

On February 15, 2017, the City approved the use of the Badlands for construction of 435 luxury housing units.

INTERROGATORY NO. 5:

Describe every instance where an individual living in or owning a home in Queensridge requested that the City of Las Vegas acquire the Subject Property or prevent development on the Subject Property. In describing these communications, state the date, the individuals involved and the medium (verbal, email, letter, text, facsimile, etc...).

ANSWER:

The City of Las Vegas objects to this Interrogatory in its entirety as vague and ambiguous as to whom the request was allegedly made.

The City of Las Vegas objects to this Interrogatory in its entirety because it seeks irrelevant information, the production of which is disproportionate to the needs of the case.

The City of Vegas objects to this Interrogatory in its entirety as unduly burdensome and oppressive, and meant only to harass, because it seeks a written description of documents that have already been produced to Plaintiff that speak for themselves.

The City of Las Vegas objects to this interrogatory to the extent that it seeks a description of communications to "the City of Las Vegas." The term "City of Las Vegas" is undefined, vague and ambiguous. As written, the term could reasonably refer to any of the approximate 3,000 employees of the City or to the official Planning Commission and City Council records relevant to this matter.

To the extent that the City only acquires property or acts on a development application through its City Council or Planning Commission, the City Council and Planning Commission records related to Plaintiffs' development applications for Badlands are publicly available.

See Exhibit A, attached hereto.

INTERROGATORY NO. 6:

Please provide the amount of funds available as of July 18, 2017 and September 7, 2017, from all sources, which could be used for the acquisition of private land for parks and open space. This Interrogatory specifically includes, but is not limited, to all funds available through the

Southern Nevada Public Lands Management Act (SNPLMA), the State of Nevada, and/or the City of Las Vegas for purposes of acquiring private property for parks and open space.

ANSWER:

The City of Las Vegas objects to this interrogatory in its entirety because it seeks irrelevant information the production of which is disproportionate to the needs of the case.

The City of Las Vegas also objects to this interrogatory because it is vague and ambiguous as to what is meant by "funds available." The City funds or finances public projects, including any purchase of real property, in a variety of ways based on its annual budget and pursuant to state law. The annual budget and related documents are publicly available at https://www.lasvegasnevada.gov/Government/Departments/Finance. SNPLMA is a federal grant program.

INTERROGATORY NO. 7:

Does the City intend to claim that any other party (plaintiffs and/or defendants) should be named in this cause of action, or does the City intend to claim that there are other necessary parties that need to be named in this case, or does the City intend to claim that there are other necessary and/or indispensable parties that should be named in this case. If so, please list in detail all parties you think should be named and each and every reason a specific party should be named.

ANSWER:

Not at this time. Discovery is currently on-going and the City may supplement this answer.

INTERROGATORY NO. 8:

Please list and describe each and every point of legal access to a public roadway you contend was available to the Subject Property as of July 18, 2017 and September 7, 2017. **You must provide a written answer that includes all information responsive to this interrogatory. In the event your answer to this interrogatory references a document by bates range, you must explain your interpretation of the document and how it is responsive to the interrogatory.**

ANSWER:

The City of Las Vegas objects to the definition of the "Subject Property" as a 35-acre portion of the Badlands. The property at issue in this regulatory takings action is the 250-acre Badlands.

The City of Las Vegas objects to this Interrogatory as vague and ambiguous because it is unclear what is meant by "point of legal access." The 35-acre portion of the Badlands Plaintiff as defined as the Subject Property had general legal access to public roadways along Hualapai Way and Alta Drive. The Badlands had general legal access to public roadways along Hualapai Way, Alta Drive, and Rampart Boulevard. However, the City does not review specific curb cuts to accomplish that access until there is an approved development project. This is because the proposed development type determines the access required and the City reviews such requests for their impacts on traffic, public infrastructure, etc.

INTERROGATORY NO. 9:

If the City is claiming that it notified the Landowners, or any prior owner of the Subject Property, that development on the Subject Property would not be permitted due to open space or drainage requirements, state in detail every instance of such notification, the substance of the notification, the means of the notification the date of such notification, the individual providing the notification, and the individual receiving the notification.

ANSWER:

Not applicable. **The City does not claim that it notified the Landowners or their predecessors that development of the Badlands would not be permitted or that it may not be developed residentially. Rather, the Badlands was restricted by a PR-OS General Plan designation to use for Park, Recreation, and Open Space – residential use was not allowed. A future use for residential requires a developer to apply to the City to change the PR-OS designation, which change is subject to the City's discretion. The City, therefore, required that each development application the Developer submitted for a different part of the Badlands (including the application the City approved for development of 435 housing units on a 17-acre portion of the Badlands) include a General Plan Amendment to change the PR-OS designation to a new General Plan category that permitted residential use at the density the Developer sought.**

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INTERROGATORY NO. 10:

If the City is claiming that the Subject Property may not be developed residentially due to open space and drainage requirements, state the metes and bounds and the exact square footage of the land allegedly required for open space and drainage, indicate each classification separately. As part of this interrogatory, please also detail the date of the classification and the mechanism which designated it as such.

ANSWER:

Not applicable. **The City does not claim that development of the Badlands is not permitted or that it may not be developed residentially. Rather, the Badlands was restricted by a PR-OS General Plan designation to use for Park, Recreation, and Open Space – residential use was not allowed. A future use for residential requires a developer to apply to the City to change the PR-OS designation, which change is subject to the City's discretion. The City, therefore, required that each development application the Developer submitted for a different part of the Badlands (including the application the City approved for development of 435 housing units on a 17-acre portion of the Badlands) include a General Plan Amendment to change the PR-OS designation to a new General Plan category that permitted residential use at the density the Developer sought.**

INTERROGATORY NO. 11:

If the City intends to argue that utilities were not available to the Subject Property for residential development, state which utility and the basis for the alleged lack of availability.

ANSWER:

The City of Las Vegas objects to the definition of the "Subject Property" as a 35-acre portion of the Badlands. The property at issue in this regulatory takings action is the 250-acre Badlands.

The City of Las Vegas objects to this interrogatory because the term "utilities" is vague, ambiguous and undefined. The term could refer to, among other things, water, gas, electric, sanitary sewer, or internet services. The only "utility" under the City of Las Vegas' jurisdiction is sewer services.

The City of Las Vegas objects to this interrogatory because it does not refer to a specific

time period for which it seeks information.

The City of Las Vegas objects to this interrogatory because the availability of utilities to a specific property is determined at the time of development in accordance with the developer's requests and the approval of third-party utilities.

The City of Las Vegas further answers as follows:

Public sewer easements were provided to connect the Badlands, including the 35-acre portion of the Badlands Plaintiffs have defined as the Subject Property, to the public sanitary sewer system.

INTERROGATORY NO. 12:

State the date in which you contend the City took formal legal action to adopt the General Plan land use designation of PR-OS on the Subject Property.

ANSWER:

See objections to and response to Interrogatory No. 4. **The City further responds that it incorporated the land use categories from the Peccole Ranch Master Plan in the General Plan in 1992, which designated the general area of the golf course for parks. The City applied the PR-OS designation to the entire Badlands property after the map that expanded the golf course to 27 holes was recorded. The City formally approved the current PR-OS designation as applied to the entire golf course with the adoption of the City's 2020 Master Plan (Ordinance No. 5250), and then readopted it with the 2005 Land Use Element (Ordinance No. 5787), the 2009 Land Use & Rural Neighborhoods Preservation Element (Ordinance No. 6152), the 2011 update to the Land Use & Rural Neighborhoods Preservation Element (Ordinance No. 6152), and the 2018 update to the Land Use & Rural Neighborhoods Preservation Element (Ordinance No. 6622)**.

INTERROGATORY NO. 13:

State the reasonable and necessary steps to development you allege the Landowner failed to follow in seeking approval for proposed development of the Subject Property.

ANSWER:

The City of Las Vegas objects to the definition of the "Subject Property" as a 35-

acre portion of the Badlands. The property at issue in this regulatory takings action is the 250-acre Badlands. The City of Las Vegas objects to this interrogatory to the extent that it seeks a legal conclusion.

The City of Las Vegas objects to this interrogatory as it is vague and ambiguous as to what "reasonable and necessary steps to development" means. "Reasonable" is subjective. To the extent the "steps to development" are the development application and submittal requirements, those are outlined in the City's Unified Development Code.

To the extent that this interrogatory requests information as additional steps to develop 435 units of luxury housing in the Badlands, the City notified Plaintiff by letter on March 26, 2020, that Plaintiff is not required to file any further applications subject to discretion by the City for approval of the 435-unit project and that Plaintiff may proceed with the approved 435-unit development by filing applications for ministerial permits; e.g., building permits.

INTERROGATORY NO. 14:

State the amount the City of Las Vegas receives annually from the property taxes assessed on the Subject Property by the Clark County Treasurers Office.

ANSWER:

The City of Las Vegas objects to this interrogatory in its entirety because it seeks irrelevant information the production of which is disproportionate to the needs of the case.

The City of Las Vegas objects to this interrogatory because Clark County, and not the City of Las Vegas, is the entity responsible for the collection of property taxes within the County. The City of Las Vegas does not have the duty to collect information not in the City's possession that is equally available to Plaintiff.

INTERROGATORY NO. 15:

State the Subject Property's present zoning classification and the date it was officially designated as such in the City of Las Vegas Official Zoning Map Atlas by the Las Vegas City Council.

ANSWER:

The City of Las Vegas objects to the definition of the "Subject Property" as a 35-acre

portion of the Badlands. The property at issue in this regulatory takings action is the 250-acre Badlands.

To the extent that this interrogatory requests the dates that the present zoning classification governing the Badlands was imposed, including the 35-acre portion of the Badlands Plaintiff defines as the Subject Property, the City responds that on April 4, 1990, the City adopted a resolution of intent to rezone 996.4 acres of Peccole Ranch Phase II in accordance with the amended PRMP. On August 15, 2001, the City amended the Zoning Map to formally rezone to R-PD7 the Phase II property previously approved for R-PD zoning under the resolution of intent.

DATED this 26th day of October 2020.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*

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VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Alan R. Riekki swears under penalty of perjury that the assertions of this verification are true:

I have read the foregoing **DEFENDANT CITY OF LAS VEGAS' SECOND SUPPLEMENT TO ANSWERS TO PLAINTIFF 180 LAND CO. LLC'S FIRST SET OF INTERROGATORIES,** know the contents thereof, and that the same are true except as to those matters therein stated on information and belief, and as to such matters, I believe them to be true. Further, I have been advised of my duty to supplement these responses to include information acquired hereafter and agree to that.

ALAN R. RIEKKI, City Surveyor,
City of Las Vegas, Department of
Public Works

SUBSCRIBED AND SWORN to before
me this 21st day of October 2020.

NOTARY PUBLIC

PEARL VU
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 17-2676-1
My Appt. Expires May 31, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 26th day of October, 2020, I caused a true and correct copy of the foregoing **DEFENDANT CITY OF LAS VEGAS' SECOND SUPPLEMENT TO ANSWERS TO PLAINTIFF 180 LAND CO. LLC'S FIRST SET OF INTERROGATORIES** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification:

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; FORE STARS, LTD., a Nevada limited-liability company; DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **PLAINTIFFS' OPPOSITION TO DEFENDANT CITY OF LAS VEGAS' MOTION TO COMPEL AND FOR AN ORDER TO SHOW CAUSE** **Hearing Date: September 1, 2020** **Hearing Time: 9:00 A.M.**

Plaintiffs 180 Land Co LLC (hereinafter "180 Land Company") and Fore Stars, LTD. (hereinafter "Fore Stars") (collectively "Landowners," "Plaintiffs," or "Plaintiff Landowners") hereby oppose Defendant City of Las Vegas' (hereinafter "City") Motion to Compel and For an Order to Show Cause (the "Motion"). This Opposition is made and based on the following

duces tecum on Peccole-Nevada on March 19, 2020. *See* CLV Mot., Ex. C. The following day, AO 20-09 was issued, stating that "no subpoena may be issued by an attorney under NRCP without advance approval of the discovery commissioner. Issues regarding currently outstanding subpoena requests will be considered on a case-by-case basis." *Id.* § II, p. 2-3. AO 20-09 acknowledged that it would be difficult to conduct discovery and obtain information for discovery responses during the outbreak of COVID-19, encouraging judges, attorneys, and parties "to take these difficult times into consideration and provide additional time for discovery . . . ." *Id.* at pp. 3-5. Importantly, AO 20-09 and subsequent administrative orders tolled all pending, unexpired discovery deadlines until July 1, 2020. *See id.* § V, p. 4*; see also* Admin. Order 20-11 (March 25, 2020); Admin. Order 20-13 (April 17, 2020); Admin. Order 20-17 (June 1, 2020).

Despite the outbreak of COVID-19, Peccole-Nevada made good faith efforts to gather and produce documents responsive to the City's subpoena this spring. In particular, Peccole-Nevada does not have a large in-house legal staff it can dedicate to gathering extensive documents. In any event, Peccole-Nevada did make good faith efforts to comply with the City's request, despite the pandemic and resulting administrative orders.

Likewise, the Landowners made good faith efforts to facilitate Peccole-Nevada's production of documents so long as any production was done pursuant to the Discovery Commissioner's decision regarding a stipulated protective order.[1] For example, on June 8, 2020,

[1] As the Court may recall, the City filed another motion to compel the Landowners' production of documents earlier this year. *See* Exhibit 3. Given that many of the documents sought by the City contained confidential and proprietary information, the Landowners requested that the parties enter into a stipulated protective order. *See id.* The City initially agreed but then insisted on an overly broad sharing provision so that it could use the Landowners' confidential information in any collateral litigation. *See id.* The discovery commissioner ultimately denied the City's motion and ordered the documents protected pursuant to NRCP 26(c) for this litigation only. Exhibit 1. The parties were to sign a stipulated protective order accordingly. Because many of the documents sought here were identical to the documents sought from the Landowners and thus likewise contain confidential and proprietary information, the Landowners simply requested that Peccole-Nevada's production be provided pursuant to the stipulated protective order. *See* Exhibit 2. Once again, the City refused by failing to even respond and instead filed a motion to compel at taxpayers' expense, mischaracterizing the facts in an effort to circumvent the discovery commissioner's order.

current pandemic. Lawyers are expected to be civil, professional, and understanding of their colleagues, parties and witnesses . . . ." *Id.* at p. 9 (emphasis added). By refusing to narrow its discovery requests or meet to reach a resolution, and instead filing a motion to compel at taxpayers' expense, the City's counsel has failed to cooperate with Peccole-Nevada or otherwise comply with these administrative orders and Nevada law. *See id.; see also* AO 20-09 at pp. 3-5 (acknowledging that it would be difficult to conduct discovery and obtain information for discovery responses during the outbreak of COVID-19 and encouraging judges, attorneys, and parties "to take these difficult times into consideration and provide additional time for discovery . . . ."). Instead of acknowledging the Administrative Orders, the City hoped to gain an "unwarranted tactical advantage"[3] from the fortunate service of the subpoena on Peccole-Nevada just one day before discovery commissioner approval became required to do so. Such conduct is egregious, particularly given that the City and its counsel represent and are supposed to act in the best interests of the public. The City's motion should be denied accordingly.

C. The City Has Not Made A Good Faith Effort To Confer Pursuant To EDCR 2.34.

"Discovery motions may not be filed unless an affidavit of moving counsel is attached thereto setting forth that after a discovery dispute conference or a good faith effort to confer, counsel have been unable to resolve the matter satisfactorily." EDCR 2.34(d). "*A conference requires either a personal or telephone conference between or among counsel*." *Id.* (emphasis added). Upon filing a motion, counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was resolved and what was not resolved, and the reasons therefor. *See id.* If a personal or telephone conference was not possible, the affidavit shall set forth the reasons. *See id.*

Here, all discovery deadlines were stayed until July 1, 2020 pursuant to AO-17. The affidavit of the City's counsel nevertheless states: "I have demanded Peccole-Nevada's document production in various emails and phone calls in the past four months. The documents should have

[3] The City also attempted to enforce an out of state issued subpoena duces tecum in the midst of the pandemic refusing to reschedule or vacate the subpoena of a former consultant to the Landowners until threatened with a motion for protective order. *See* Exhibit 4.

IV. CONCLUSION.

For the foregoing reasons, the City's motion should be denied in its entirety.

Dated this 14th day of August, 2020.

//ss// Elizabeth Ghanem Ham

ELIZABETH GHANEM HAM

In house counsel for the Landowners

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited-liability company; FORE STARS, LTD., a Nevada limited-liability company; DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **PLAINTIFFS' OPPOSITION TO DEFENDANT CITY OF LAS VEGAS' MOTION TO COMPEL DISCOVERY RESPONSES AND DAMAGE CALCULATIONS** **Hearing Date: November 17, 2020** **Hearing Time: 9:00 A.M.**

Plaintiffs 180 Land Co LLC (hereinafter "180 Land Company") and Fore Stars, LTD. (hereinafter "Fore Stars") (collectively "Landowners," "Plaintiffs," or "Plaintiff Landowners") hereby oppose Defendant City of Las Vegas' (hereinafter "City") Motion to Compel and For an Order to Show Cause (the "Motion"). This Opposition is made and based on the following

Memorandum of Points and Authorities, the papers and pleadings on file herein, and the oral argument this Honorable Court entertains at the hearing on the matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As the Court is aware, this case seeks to remedy the City's systematic, aggressive and outrageous actions[1] to prevent the Landowners from using approximately 35 acres of land (APN 138-31-201-005, hereinafter "35 Acre Property" or "Property") they own in Las Vegas, Nevada.

Specifically, the Landowners have brought claims against the City for the uncompensated taking by inverse condemnation of the 35 Acre Property. The Landowners were forced to initiate this lawsuit because the City's intentional and outrageous conduct has caused substantial harm to the Landowners and their livelihood and deprived them of all use of their land rendering the Property useless and valueless.

The City has continued its intentional harmful conduct by engaging in illicit litigation practices and predatory discovery only some of which this Court is aware.[2] It is the Landowners who are incurring exorbitant, unnecessary legal fees in opposing the numerous, virtually identical, and meritless motions filed by the City costing the tax payers millions of dollars in their attempt to keep the facts of the City's outrageous conduct of government abuse from being fully considered. This latest motion filed by the City is nothing more than a facade with the real intent of continued disparagement of the Landowners and more importantly it is a rearguing of legal positions already decided by this Court and others. The City has been using procedure to lay out its legal positions in every single court hearing regardless of what the issue is before the Court.

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[1] These City actions include everything from calling the principal landowners a "motherf----er" to seeking "intel" via a private investigator on individual principals because "dirt may be handy if I need to get rough" to enacting a law aimed at the entire 250 acres in the middle of attempted development to prevent development of this property all together. *See* Exhibit 1, 2, 3.

[2] This Court may recall that the City submitted an order after the PJR hearing dismissing the claims for inverse condemnation for lack of ripeness causing this Court to issue an order *nunc pro tunc* and exclaim "This issue was never vetted. It was never raised. It was never discussed; right? Exhibit 4, pg 6 (January 17, 2019)

to the "Amended Responses." An errata will be sent out shortly." *See* Exhibit 10. The City then feigns ignorance claiming they were unsure as to what was being supplemented "Due to this confusion, on July 15, 2020, 180 Land served an Errata . . ." City's Motion page 10 lines 1-2. This is just one example of the misleading statements the City has provided to this Court to support its frivolous motion. For these reasons, the City's request for attorney fees and costs should be denied, and the Landowners should be awarded reasonable expenses incurred in filing this opposition.

V. CONCLUSION.

For the foregoing reasons, the City's motion should be denied in its entirety.

Dated this 6th day of November, 2020.

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company, DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X, Plaintiff, *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 **REPLY IN SUPPORT OF PLAINTIFF LANDOWNERS' MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES** **Hearing Date: February 16, 2021** **Hearing Time: 9:00 a.m.**

Case Number: A-17-758528-J

Plaintiff Landowners ("Landowners") hereby reply in support of their Motion to Compel the City of Las Vegas ("City") to answer the Landowners' Interrogatories 1, 2, 3, and 6.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Discovery is a two-way street. The Landowners are entitled to probe the City's defenses just as much as the City is entitled to probe the Landowners' claims. The City cannot avoid discovery into its defenses by mischaracterizing the Landowners' claims, that is simply not how it works. It is the City's defenses that are the subject of the discovery the Landowners are seeking in the pending Motion to Compel, accordingly, the Landowners' claims are not the issue. If the City wants to abandon its defenses, then the parties can refocus on the Landowners' claims, but, until then, the Landowners have a right to discovery on the City's defenses. Nevertheless, to once again correct a repeated false assertion by the City, the Landowners have alleged, and are actively pursuing a Sisolak-type taking, accordingly, the City's repeated statements to the contrary and efforts to solely focus on a Penn Central claim are improper and misleading.

Additionally, despite this Court's holding that "it would be improper to apply the Court's ruling from the Landowners' petition for judicial review to the Landowners' inverse condemnation claims"[1] because, petitions for judicial review ("PJR") and inverse condemnation claims are different claims, governed by different standards of review and different legal precedent, the City continues to try and apply this Court's order denying the Landowners' PJR to the Landowners' inverse condemnation claims. In its Opposition, the City uses the Order from the PJR to try and skirt its discovery obligations here, instead of citing to this Court's inverse condemnation rulings

[1] May 15, 2019 Order Granting the Landowners' Countermotion to Amend/Supplement the Pleadings; Denying the City's Motion for Judgment on the Pleadings on Developers' Inverse Condemnation Claims at 21-23, § G

in this matter. (City Opp. at 4:22-25). The disturbing part about the City trying to evade discovery by citing the Order in the PJR (aside, of course, from it violating specific direction from this Court) is that discovery is not permitted in a PJR. So, the City wants to take advantage of a system that was set up by legislative grace (PJR) to benefit the City; where this Court's review is severely limited to the record which was before the City Council; and where the Landowners were deprived of any opportunity for discovery to probe that record. The City then wants to take the benefits it received from the PJR system and, in this inverse condemnation case, where constitutional rights hang in the balance, the City wants to prevent the Landowners' from probing the City's defenses by citing to the order it obtained in the PJR. This Court should not allow such gamesmanship and circular reasoning in this constitutional proceeding. Thus, it is requested that this Court grant the Landowners' Motion to Compel.

II. REBUTTAL OF THE CITY'S ARGUMENTS

A. The City's Second Supplemental Answers to Interrogatory No. 2

The City did supplement its answer to Interrogatory No. 2, and that was inadvertently not addressed in the Landowners' moving papers. However, the supplemental answer only provided more objections, not answers. Accordingly, the Landowners' Motion to Compel is still necessary to compel the City to answer Interrogatory No. 2.

B. The Landowners Are Entitled to Discovery on the City's Defenses and Its Arguments made in support of Its Defenses

1. The City Is Playing Word Games with Its Arguments and Defenses

As stated in the Landowners' moving papers, the City has repeatedly argued that the 35 Acre Property was the open space dedication requirement **imposed by the City on Mr. Peccole**. To avoid its discovery obligation, the City warps this into arguing that "whether William **Peccole 'imposed' the open space designation on the City** has no bearing on the claims and defenses in this case." (City Opp. at 3:21-23)(emphasis supplied). No party has ever suggested that Peccole

imposed anything on the City, nor could he. That is not the City's argument on which the Landowners are seeking discovery. And, such a suggestion is nonsensical and beyond reason as private citizens do not impose dedication requirements, the City does. Accordingly, the City's efforts to avoid discovery into its defense that the 35 Acre Property was allegedly the open space dedication requirement imposed by the City onto Mr. Peccole by playing word games and warping phrases should be rejected.

To the extent the City is claiming that this is not one of its arguments or defenses, then the same needs to be ordered by the Court, to prevent the City from making this argument in the future, as the City has made this argument repeatedly throughout this litigation. As just one example, the City argued in opposition to the Landowners' Motion to Determine Property Interest that:

> "In 1990, to obtain tentative zoning for Phase II, which included R-PD7 zoning for 614.24 acres in the PRMP, Peccole **had to** develop this Phase "in accordance with the [PRMP]," which included plans for **open space**. [internal citation omitted]. Peccole was **also required** to set aside 211.6 acres for a golf course and drainage." City's August 18,2020, Opposition to Landowner's Motion to Determine Property Interest at 23:24-28. (emphasis added)

Clearly, the City has used, as a defense against the Landowners' takings claims, the argument that the City's actions in reserving the 35 Acre Property as open space for the surrounding neighbors' use cannot amount to a taking because the 35 Acre Property was (according to the City) the open space dedication requirement the City imposed on Mr. Peccole. Unless the City is going to abandon this argument and the Court orders the same, then the Landowners' are entitled to test its veracity in discovery. Thus, the Landowners' are entitled to answers to their Interrogatories.

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2. The City's Shameless Effort to Use the Order from the PJR to Prevent Discovery in this Inverse Condemnation Action Must be Rejected

This Court has told the City that "it would be improper to apply the Court's ruling from the landowners' petition for judicial review to the Landowners' inverse condemnation claims"[2] in at least three different orders, yet the City tries to do just that to avoid its discovery obligations in this case. In its Opposition, the City uses the Order from the PJR to try and skirt its discovery obligations claiming:

> "no discovery need be conducted on whether or not William Peccole 'imposed' the designation [again this is the City's warped language discussed above] since it is wholly irrelevant to the claims and defenses and, importantly, the Court already has found that the 35 -Acre Property was designated open space by the City's General Plan."(City Opp. at 4:22-25).

The disturbing part about the City trying to evade discovery by citing the order in the PJR here (aside from it being a flagrant disregard of this Court's Order) is that discovery is not permitted in a PJR. So, the City wants to take advantage of the PJR system designed by legislative grace to benefit the City wherein the owner is not given any opportunity to conduct discovery and the Court's review is severally limited to the record before the City. The City then wants to take that great benefit from the PJR system and in this inverse condemnation case, where constitutional rights hang in the balance, the City wants to prevent the Landowners' from probing the City's defenses by citing to the order it obtained in the PJR. Under the City's circular reasoning, the City could present any false fact without challenge. This Court should not allow such gamesmanship in this constitutional proceeding.

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[2] May 15, 2019 Order Granting the Landowners' Countermotion to Amend/Supplement the Pleadings; Denying the City's Motion for Judgment on the Pleadings on Developers Inverse Condemnation Claims at 21-23, § G.

C. The Landowners Are Permitted Through Discovery to Seek Facts in Seroka's Possession

It is telling how far the City will go to avoid answering interrogatories regarding former Councilman Seroka. No reasonable reading of the Landowners' Interrogatories 1, 2 and 3 could be interpreted to seek the "mental impressions" of Seroka. What appears more likely is that Seroka made up these statements and the City is avoiding answering interrogatories admitting that these statements by Seroka were false, baseless, and there is no evidence to support these false statements. "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."[3]

1. Interrogatory No. 1

The Landowners have asked for the names, addresses, telephone numbers and a summary of the information that was allegedly provided by "experts" to Seroka.[4] It is unreasonable to argue that names, addresses, telephone numbers and a summary of the information provided somehow morphs into "mental impressions" when it comes from a former Councilman. (City Opp. at 5:12-6:2). And, the City's allegation that the Landowners are on a "fishing expedition" (City Opp. at 6:4-5) is laughable. The Landowners have recorded statements from Seroka that indicate he may have facts regarding the City's defense. The Landowners use the word *may* as it is possible that Seroka was not telling the truth, which is the point of discovery, to test veracity. If Seroka was not

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[3] Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468, 487 (Tx. 2012). *See also* City of Austin v. Teague, 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.).

[4] **INTERROGATORY NO. 1:** For every "expert" that Councilman Seroka "learned as much as [he] could from" as referenced in the following statement: "So I went to school and I studied and studied the rules, and I learned as much as I could from the experts, and I did study and I learned a lot" (Page 13 lines 6-12 of the June 21, 2018 meeting transcript attached hereto), state the expert's name, address, telephone number and a summary of what Councilman Seroka "learned" from the expert.

telling the truth, and did not have the information he claimed to have in this recorded statement, then the City is obligated to report the same in answering Interrogatories, not try and create a "mental impression" to avoid truthfully answering discovery. Furthermore, NRCP 33(a)(2) provides that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact…"

The City now claims in its opposition that it does not have to produce information regarding the "experts" Seroka referenced as the City may be using those same experts in this case or they may have been hired in anticipation of litigation is baseless. (City Opp. at 8:19-23). NRCP 26(b)(4)(D) provides that "[a party may not] discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." To utilize this protection, the City has to admit that it had retained experts in anticipation of litigation (i.e. retained by counsel) and that Seroka was privy to that information and that his public statements about the same did not waive that protection. The City has done none of these things, accordingly, the City cannot hide behind any NRCP 26(b)(4)(D) protection.

If the City is arguing that every single individual that Seroka referred to as "experts" he learned from are experts hired in anticipation of litigation or trial experts the City may use, then the Landowners request that this Court order the City to immediately provide those names, addresses, telephone numbers and a summary of what each and every one of those "experts" shared with Seroka to this Court *in camera* so this Court can determine if the City's claim that these experts were hired in anticipation of litigation is true or if this information is discoverable by the Landowners now.

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2. Interrogatory No. 2

Through Interrogatory No. 2, the Landowners have asked what code, ordinance or regulation Seroka was referencing when he stated that there was a "20 percent" open space dedication requirement and who told him this information.[5] This is not asking the City to do legal research, nor is it seeking the mental impression of Seroka. Now, if Seroka made the whole thing up, it is conceivable that the City may be inclined to do legal research to try and backfill in for Seroka's statements, however, the City's inclination to try and protect Seroka does not change the nature of the Interrogatory itself. The Landowners are entitled to this information through discovery and the City's objections have no merit. Accordingly, the Landowners' request that the City be compelled to answer Interrogatory No. 2.

3. Interrogatory No. 3

Through Interrogatory No. 3, the Landowners seek the names and locations of the developments in Las Vegas wherein the City imposed the alleged "20 percent" open space dedication requirement as referenced by Seroka.[6] Again, names and locations are not "mental impressions." If there was a "20 percent" open space dedication requirement, then the City should

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[5] **INTERROGATORY NO. 2:**
State what City code, ordinance or regulation and/or Nevada statute required a "20 percent" open space dedication between 1985-2005 as referenced by Councilman Seroka in the following statement: "At that time, it was generally accepted accounting principals [sp] and generally accepted percentage of acreage that is open space/recreational. It is 20 percent. What we have up here is the agreed upon roughly 20 percent. It's in the ballpark." (Page 19 lines 10-14 of the June 21, 2018 meeting transcript). Also, state how Councilman Seroka came by this purported requirement, meaning who told him it was a "generally accepted" "open space/recreational" requirement "at that time."

[6] **INTERROGATORY NO. 3:**
Provide the name and location of every development in the City of Las Vegas that had an approximately 20 percent open space dedication requirement imposed on it by the City of Las Vegas between 1985 and 2005, as referenced by Councilman Seroka in the above provided statement.

easily be able to provide this information. The Landowners are entitled to this information. If there was never a "20 percent" open space dedication requirement, then the Landowners are entitled to know that (as is this Court) as it disproves the City's arguments that the 35 Acre Property was the open space dedication requirement imposed by the City on Mr. Peccole. Accordingly, the Landowners request that the City be compelled to answer Interrogatory No. 3.

D. The Landowners Requested the Amount and Source of Funds Which Could Be Used by the City to Acquire Property for Parks and Open Space

Through Interrogatory No. 6,[7] the Landowners requested the amount and source of funds which could be used by the City to acquire property for parks and open space. The City has unsuccessfully tried to draw a distinction between funds available to pay an inverse condemnation judgment and funds available to acquire property for parks and open space. This is a distinction without a difference. As established in the Landowners' Motion, this type of information is discoverable in an inverse condemnation action, as it was in Sisolak and is necessary to counter a false defense utilized by the government, and one the City has already shown it intends to utilize here - that taxpayers shouldn't have to pay the Landowners.[8]

To counter this false City argument, the Landowners are entitled to know the source of funds available to the City. For example, available to the City is the option of a special improvement

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[7] **INTERROGATORY NO. 6:**
Please provide the amount of funds available as of July 18, 2017 and September 7, 2017, **from all sources**, which could be used for the acquisition of private land for parks and open space. This Interrogatory specifically includes, but is not limited, to all funds available through the Southern Nevada Public Lands Management Act (SNPLMA), the State of Nevada, and/or the City of Las Vegas for purposes of acquiring private property for parks and open space. (emphasis added).

[8] For example, in a recent hearing in the 65 Acre case in front of Judge Herndon the City made the following arguments: "So there's no way that the ***taxpayers*** should have to pay the developed -- this developer anything." ***Ex. 7*** at 27:13-15(emphasis added). "And for the developer here to be paid damages by the ***taxpayers***? I can't think of anything that would be more unjust." ***Ex.7*** at 70:11-13 (emphasis added).

district on the surrounding neighbors wherein they would pay for the acquisition of the Landowners' Property for parks and open space, an important detail the City fails to mention when it brings up "taxpayers." The same neighbors who lobbied the City to take the Landowners Property. But the City did not do that, instead it has forced the Landowners to bear the complete and total burden of providing the surrounding neighbors with the access to the Landowners' Property they want and the viewshed they want utilizing the Landowners' Property. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. U.S., 364 U.S. 40, 49(1960).

The Landowner are entitled to inquire into the amount **and** source of funds available to the City to acquire property for parks and open space. After all, the City has acquired the Landowners' Property for open space to be used by the surrounding neighbors for access and a viewshed.

III. CONCLUSION

For the foregoing reasons, and the reasons provided in the Landowners' moving papers, it is respectfully requested that the Court order the City to fully answer Interrogatories No 1, 2, 3, and 6.

DATED this 9th day of February, 2021

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Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 9th day of February, 2021 pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of **REPLY IN SUPPORT OF PLAINTIFF LANDOWNERS' MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES** was served on the below via the Court's electronic filing/service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to, the following:

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DISTRICT COURT
CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASIGOVERNMENTAL ENTITIES I-X, Defendants.	)	Case No. A-17-758528-J Dept No. XVI

HEARING DATE(S) ENTERED IN ODYSSEY

3RD AMENDED ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL/CALENDAR CALL

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set to be tried to a jury on a **five week stack,** to begin, **October 25, 2021 at 9:30 a.m.**

B. A Pre-Trial/Calendar Call with the designated attorney and/or parties in proper person will be held on **October 14, 2021 at 10:30 a.m.**

C. Parties are to appear on **August 12, 2021 at 9:00a.m.,** for a Status Check re Trial Readiness.

D. The Pre-Trial Memorandum must be filed no later than **October 22, 2021**, with a courtesy copy delivered to Department XVI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69. Counsel should

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

Case Number: A-17-758528-J

include the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

E. All motions in limine to exclude or admit evidence must be in writing and filed no later than **September 7, 2021.** Orders shortening time will not be signed except in **extreme emergencies**.

F. Unless otherwise directed by the court, all pretrial disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at least 30 days before trial.

G. Discovery disputes that do not affect the Trial setting will be handled by the Discovery Commissioner. A request for an extension of the discovery deadline, if needed, must be submitted to this department in compliance with EDCR 2.35. Stipulations to continue trial will be allowed ONLY for cases that are less than three years old. All cases three years or older must file a motion and have it set for hearing before the Court.

H. All discovery deadlines, deadlines for filing dispositive motions and motions to amend the pleadings or add parties are controlled by the previously issued Scheduling Order and/or any amendments or subsequent orders.

I. All original depositions anticipated to be used in any manner during the trial must be delivered to the clerk prior to the firm trial date given at Calendar Call. If deposition testimony is anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the portions of the testimony to be offered must be filed and served by facsimile or hand, two (2) judicial days prior to the firm trial date given at Calendar Call.. Any objections or counterdesignations (by page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the firm trial date. Counsel shall advise the clerk prior to publication.

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

J. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits. All exhibits must comply with EDCR 2.27. Two (2) sets must be three-hole punched placed in three ring binders along with the exhibit list. The sets must be delivered to the clerk two days prior to the firm trial date given at Calendar Call. Any demonstrative exhibits including exemplars anticipated to be used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, counsel shall be prepared to stipulate or make specific objections to individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence.

K. In accordance with EDCR 2.67, counsel shall meet, review, and discuss items to be included in the Jury Notebook. Pursuant to EDCR 2.68, counsel shall be prepared to stipulate or make specific objections to items to be included in the Jury Notebook.

L. In accordance with EDCR 2.67, counsel shall meet and discuss preinstructions to the jury, jury instructions, special interrogatories, if requested, and verdict forms. Each side shall provide the Court, two (2) judicial days prior to the firm trial date given at Calendar Call, an agreed set of jury instructions and proposed form of verdict along with any additional proposed jury instructions with an electronic copy in Word format.

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel is asked to notify the Court Reporter at least two (2) weeks in advance if they are going to require daily copies of the transcripts of this trial or real time court reporting. Failure to do so may result in a delay in the production of the transcripts or the availability of real time court reporting.

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

Counsel is required to advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be given to Chambers.

DATED: February 10, 2021

Timothy C. Williams, District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served 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 fax to all registered service contacts on Odyssey File and Serve for Case No. A758528.

/s/ Lynn Berkheimer
Lynn Berkheimer, Judicial Executive Assistant

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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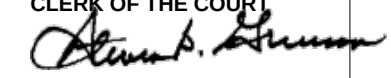

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Attorneys for Plaintiff Landowners

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO. LLC, a Nevada limited liability company, et al., Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada, et al., Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFF LANDOWNERS' MOTION TO STRIKE ONE SENTENCE RELATED TO THE LANDOWNERS' PROTECTIVE ORDER FROM ORDER GRANTING THE CITY OF LAS VEGAS' MOTION TO COMPEL AND FOR AN ORDER TO SHOW CAUSE, FILED OCTOBER 12, 2020**

PLEASE TAKE NOTICE that on the 12th day of February, 2021, an Order Granting Plaintiff Landowners' Motion to Strike One Sentence Related to the Landowners' Protective Order from Order Granting the City of Las Vegas' Motion to Compel and for an Order to Show Cause, filed October 12, 2020, was entered in the above-captioned case, a copy of which is attached hereto.

Dated this 16th day of February, 2021.

LAW OFFICES OF KERMITT L. WATERS

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 16th day of February, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the ORDER GRANTING PLAINTIFF LANDOWNERS' MOTION TO STRIKE ONE SENTENCE RELATED TO THE LANDOWNERS' PROTECTIVE ORDER FROM ORDER GRANTING THE CITY OF LAS VEGAS' MOTION TO COMPEL AND FOR AN ORDER TO SHOW CAUSE, FILED OCTOBER 12, 2020, was served on the below via Court's electronic filing service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to the following:

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By: /s/ *Evelyn Washington*
An Employee of the Law Offices of
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ELECTRONICALLY SERVED
2/12/2021 11:53 AM

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02/12/2021 11:52 AM
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ORDR

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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, Plaintiff, 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 **ORDER GRANTING** **PLAINTIFF LANDOWNERS' MOTION TO STRIKE ONE SENTENCE RELATED TO THE LANDOWNERS' PROTECTIVE ORDER FROM ORDER GRANTING THE CITY OF LAS VEGAS' MOTION TO COMPEL AND FOR AN ORDER TO SHOW CAUSE, FILED ON OCTOBER 12, 2020**

This matter having come before the Court for hearing on December 8, 2020, with the Landowners requesting that the following language be stricken from paragraph 8 of an order entered in this matter on October 12, 2020: "However, there did not, and does not, exist any protective order." *See Exhibit 1, October 12, 2020, Order, p. 3:8.* The Court having considered the Points and Authorities on file and oral arguments presented by the Parties, hereby **GRANTS** Plaintiff Landowners' Motion to Strike One Sentence Related to the Landowners' Protective Order from Order Granting the City of Las Vegas' Motion to Compel and For an Order to Show Cause, filed on October 12, 2020. Accordingly, the following sentence shall be stricken from paragraph 8 of the Order Granting the City of Las Vegas' Motion to Compel and For an Order to Show Cause, filed on October 12, 2020: "However, there did not, and does not, exist any protective order." *See Exhibit 1, October 12, 2020, Order, p. 3:8.*

Dated this _____ day of February, 2021.

Dated this 12th day of February, 2021

District Judge Timothy C. Williams

359 F5E EF58 3C09
Timothy C. Williams
District Court Judge

Submitted by: LAW OFFICES OF KERMITT L. WATERS */s/ James J. Leavitt* _____ Kermitt L. Waters, Esq. (NSB 2571) James J. Leavitt, Esq. (NSB 6032) Michael A. Schneider, Esq. (NSB 8887) Autumn L. Waters, Esq. (NSB 8917) 704 South Ninth Street Las Vegas, Nevada 89101 Telephone: (702) 733-8877 Facsimile: (702) 731-1964 180 Land Co LLC Elizabeth Ghanem Ham, Esq. (NSB 6987) 1215 S. Fort Apache Road, Suite 120 Las Vegas, NV 89117 *Attorneys for Plaintiff Landowners*	Content Reviewed and Approved By: McDONALD CARANO LLP By: */s/ George F. Ogilvie* _____ George F. Ogilvie III (NV Bar No. 3552) Amanda C. Yen (NV Bar No. 9726) Christopher Molina (NV Bar No. 14092) 2300 W. Sahara Avenue, Suite 1200 Las Vegas, Nevada 89102 LAS VEGAS CITY ATTORNEY'S OFFICE Bryan K. Scott (NV Bar No. 4381) Philip R. Byrnes (NV Bar No. 166) Seth T. Floyd (NV Bar No. 11959) 495 South Main Street, 6th Floor Las Vegas, Nevada 89101 SHUTE, MIHALY & WEINBERGER, LLP Andrew W. Schwartz (CA Bar No. 87699) (Admitted *pro hac vice*) Lauren M. Tarpey (CA Bar No. 321775) (Admitted *pro hac vice*) 396 Hayes Street San Francisco, California 94102 *Attorneys for City of Las Vegas*

Exhibit 1

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(Additional Counsel Identified on Signature Page)

Attorneys for City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD., a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X, Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X, Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **ORDER GRANTING THE CITY OF LAS VEGAS' MOTION TO COMPEL AND FOR AN ORDER TO SHOW CAUSE**

On September 9, 2020, the Court held a hearing on the Motion to Compel and For An Order To Show Cause (the "Motion") filed by Defendant City of Las Vegas ("City") against third-party Peccole-Nevada Corporation ("Peccole-Nevada"). George F. Ogilvie III, Esq., Seth T. Floyd, Esq., Andrew W. Schwartz, Esq. and Lauren Tarpey, Esq. appeared on behalf of the City; and James J. Leavitt, Esq. and Elizabeth Ghanem Ham, Esq. appeared on behalf of Plaintiffs 180 Land Co., LLC

. . .

("180 Land") and Fore Stars, Ltd. ("Fore Stars") (collectively "Plaintiff"). No appearance was made on behalf of Peccole-Nevada.

Having considered (i) the Motion and exhibits attached thereto, including the Declaration of George F. Ogilvie III, Esq., (ii) the Plaintiff's Opposition to Defendant City of Las Vegas' Motion to Compel and for an Order to Show Cause ("Opposition"), (iii) Supplement to Plaintiffs' Opposition to Defendant City of Las Vegas' Motion to Compel and for Order to Show Cause ("Supplement"), (iv) the City's Reply in Support of Its Motion to Compel and For An Order to Show Cause ("Reply"), and (v) the oral arguments of counsel, and good cause appearing, the Court finds, concludes and orders as follows:

FINDINGS

1. On March 6, 2020, the City served a Notice of Taking the Deposition of the Custodian of Records for Peccole-Nevada Corporation and Notice of Issuance of Subpoena Duces Tecum ("Peccole COR Notice") on the Plaintiff to allow the Plaintiff to object to and seek the issuance of a protective order against the Subpoena should it want to do so.

2. On March 9, 2020, the City also served a Notice of Taking the Deposition of NRCP 30(b)(6) Designee of Peccole-Nevada Corporation and Notice of Issuance of Subpoena Duces Tecum ("Peccole 30(b)(6) Notice") on the Plaintiff.

3. The Plaintiff did not object to either the Peccole COR Notice or the Peccole 30(b)(6) Notice. And the Plaintiff also chose not to file any motion for a protective order.

4. On March 18, 2020, the City served the Peccole-Nevada NRCP 30(b)(6) Subpoena Duces Tecum ("30(b)(6) Subpoena") on Peccole-Nevada and on March 19, 2020, the City served the COR Subpoena, which was the subject of the City's Motion, on Peccole-Nevada.

5. The City effectuated service on Peccole-Nevada prior to the issuance of Administrative Order 20-09 ("AO 20-09"), which precluded the service of subpoenas for 30 days starting from March 20, 2020.

6. On March 18, 2020, Peccole-Nevada contacted the City regarding compliance with the 30(b)(6) Subpoena. The City agreed to work with Peccole-Nevada regarding the timing of the 30(b)(6) deposition, noting that the City also served the COR Subpoena on Peccole-Nevada and

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further stating that once Peccole-Nevada produced the documents in response to the COR Subpoena, then the parties could discuss the 30(b)(6) deposition.

7. Peccole-Nevada did not file any motion to quash or motion for a protective order.

8. On June 8, 2020, in-house counsel for EHB Companies, the Plaintiff's parent company, sent an email to Peccole-Nevada and copied the City. Counsel represented that there existed a protective order over the requested documents based on a minute order by the Discovery Commissioner and that the Plaintiff absolutely objects to the disclosure of any responsive documents. However, there did not, and does not, exist any protective order.

9. On July 22, 2020, the Plaintiff's counsel again emailed Peccole-Nevada and told Peccole-Nevada to hold off on producing any responsive documents.

10. Between March 2020 and July 2020, Peccole-Nevada represented to the City, on at least three separate occasions, that Peccole-Nevada had responsive documents in its possession that it would be producing in response to the COR Subpoena.

11. The City and Peccole-Nevada engaged in multiple discussions both through email and/or telephone on April 27; April 28; May 27; June 2; June 9; and July 19-21, 2020.

12. On or about July 24, 2020, Plaintiff's counsel spoke with the City's counsel and proposed that the documents requested be subject to a protective order and, if agreed, would be produced. The City did not accept Plaintiff's offer.

13. On July 27, Plaintiff's counsel sent an email to the City's counsel and requested a response to the July 24, 2020 proposal. The City did not respond.

14. Because Peccole-Nevada only produced one document on June 10, 2020 that was responsive to the COR Subpoena, the City filed its Motion on July 31, 2020.

15. On August 14, 2020, the Plaintiff filed its Opposition and, on August 24, 2020, the Plaintiff filed a Supplement to its Opposition.

16. Peccole-Nevada did not file an Opposition to the Motion. Instead, according to Peccole-Nevada's counsel's declaration attached to the Supplement, the Plaintiff informed Peccole-Nevada that the Plaintiff would provide defense and indemnification to Peccole-Nevada.

17. On September 2, 2020, the City filed its Reply.

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18. On September 9, 2020, the Court held a hearing on the Motion.

19. If any of these findings of fact should more properly be identified as a conclusion of law, it shall be deemed a conclusion of law.

CONCLUSIONS

1. Pursuant to Rule 45(a)(1)(D) of the Nevada Rules of Civil Procedure, a party may command any third party to "produce documents, electronically stored information, or tangible things," which "requires the responding person to permit inspection, copying, testing, or sampling of the materials." *See* NRCP 45(a)(1)(D).

2. "To invoke the protections of [Rule 45], the objecting party must file and serve written objections to the subpoena and a motion for protective order under Rule 26(c) within 7 days after being served with notice and a copy of the subpoena under Rule 45(a)(4)(A)." *See* NRCP 45(a)(4)(B)(ii).

3. The responding third party may also serve objections to the subpoena; however, Rule 45 mandates that the "person making the objection must serve it before the earlier of the time specified for compliance or 14 days after the subpoena is served." *See* NRCP 45(c)(2)(B).

4. Rule 45 further allows a third party to file a motion to quash or modify a subpoena, but the motion must be "timely." *See* NRCP 45(c)(3).

5. The Plaintiff did not object to the notice of the COR Subpoena, nor did it file a motion for a protective order.

6. Peccole-Nevada did not object to the COR Subpoena, nor did it file a motion to quash or modify the COR Subpoena.

7. Rule 37(a)(1) of the Nevada Rules of Civil Procedure provides that "[o]n notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery."

8. Rule 45(c)(2)(B)(ii) of the Nevada Rules of Civil Procedure also allows a party who issued a subpoena to move for an order compelling production.

9. The City properly noticed and served the COR Subpoena, and Peccole-Nevada must be compelled to provide all responsive documents to the City.

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10. If any of these conclusions of law should more properly be identified as a finding of fact, then it shall be deemed a finding of fact.

ORDER

IT IS HEREBY ORDERED that the City's Motion is **GRANTED.**

IT IS HEREBY FURTHER ORDERED that Peccole-Nevada is compelled to produce the documents and information requested under the COR Subpoena within seven (7) calendar days from the notice of entry of this Order.

IT IS HEREBY FURTHER ORDERED that the City's request for sanctions is **DENIED**.

Dated this 9th day of October, 2020.

DISTRICT COURT JUDGE ZJ

Submitted By:

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Evelyn Washington

From: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Sent: Monday, February 08, 2021 9:41 AM
To: James Leavitt
Cc: Autumn Waters
Subject: RE: Order - related to striking one sentence

This is fine, Jim. You may submit it with my electronic signature.

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | **E:** gogilvie@mcdonaldcarano.com

From: James Leavitt [mailto:jim@kermittwaters.com]
Sent: Saturday, February 6, 2021 12:47 PM
To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Cc: Autumn Waters <autumn@kermittwaters.com>
Subject: Order - related to striking one sentence

George:

Attached is an order granting the Landowners motion to strike one sentence related to paragraph 8 of the October 10, 2020, Order. Please review and let me know if I have your authority to affix your signature.

Thanks,

Jim

Jim Leavitt, Esq.
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DISTRICT COURT
CLARK COUNTY, NEVADA

180 Land Company LLC, Petitioner(s) vs. Las Vegas City of, Respondent(s)	CASE NO: A-17-758528-J DEPT. NO. Department 16

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO. LLC, a Nevada limited liability company, et al., Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada, et al., Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CITY OF LAS VEGAS' MOTION TO COMPEL DISCOVERY RESPONSES, DOCUMENTS AND DAMAGES CALCULATIONS AND RELATED DOCUMENTS**

PLEASE TAKE NOTICE that on the 24th day of February, 2021, an Order Granting In Part and Denying In Part Defendant City of Las Vegas' Motion to Compel Discovery Responses, Documents and Damages Calculations and Related Documents was entered in the above-captioned case, a copy of which is attached hereto.

Dated this 25th day of February, 2021.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
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MICHAEL SCHNIEDER, ESQ., NBN 8887
AUTUMN WATERS, ESQ., NBN 8917

Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 25th day of February, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the NOTICE OF ENTERY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CITY OF LAS VEGAS' MOTION TO COMPEL DISCOVERY RESPONSES, DOCUMENTS AND DAMAGES CALCULATIONS AND RELATED DOCUMENTS, was served on the below via Court's electronic filing service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to the following:

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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, Plaintiff, 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 **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CITY OF LAS VEGAS' MOTION TO COMPEL DISCOVERY RESPONSES, DOCUMENTS AND DAMAGES CALCULATIONS AND RELATED DOCUMENTS**

This matter having come before the Court for hearing on November 17 and 18, 2020, the Court having considered the Points and Authorities on file and oral arguments presented by the Parties,

hereby enters its Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part The City of Las Vegas' Motion to Compel Discovery Responses, Documents and Damages Calculation and Related Documents on Order Shortening Time ("Motion") and Plaintiffs' Request for Attorney's Fees and Cost.

FINDINGS OF FACT

1. The City filed its Motion on October 22, 2020. As part of its Motion, the City requested all documents related to 180 Land's discovery response that it paid an aggregate of consideration for the entire Badlands Property, which includes the 35 Acre Property, for $45 million (the "Transaction").

2. Plaintiff filed an Opposition on November 6, 2020 and requested attorneys' fee and costs.

3. During the hearing on the Motion, Plaintiffs' offered to allow the City to depose Yohan Lowie, a principal of Plaintiffs, related solely to the documents supporting Plaintiffs' contention that it paid $45 million for the Badlands Property and to reserve all other issues for a subsequent deposition of Mr. Lowie.

4. In response to Plaintiffs 'offer, the Court determined that, as a baseline, the City has a right to conduct and receive all documents relied upon by 180 Land to support its contention that it paid $45 million for the Badlands Property prior to taking Mr. Lowie's deposition.

5. Plaintiffs represented that several documents were subject to confidentiality agreements and requested the documents only be produced pursuant to a protective order.

6. Computation of damages in this case are based upon expert testimony and analysis, which is scheduled to be disclosed pursuant to the Court's scheduling order.

7. 180 Land has no ownership interest in the entity that operated the Badlands golf course and therefore does not have any maintenance records to produce.

8. In relation to communications with counsel, 180 Land produced 57 pages of Documents in conjunction with a privilege log.

CONCLUSIONS

1. Although NRCP 16.1 requires a plaintiff to prepare and submit a damage calculation in the NRCP 16.1 early case conference, this case involves more than a simple computation of past and future expenses in a tort case or cost of repair in a construction defect case as it relies heavily on expert opinion. Thus, 180 Land's computation of damages may be produced in conjunction with its expert witness disclosures.

2. 180 Land cannot be required to produced maintenance records for an entity in which it does not have or maintain an ownership interest.

3. NRCP 26 provides that parties may obtain discovery regarding any non-privileged matter. Communications between a client and the client's lawyer are privileged unless an exception can be shown. NRS Chapter 49.

4. 180 Land has complied with NRCP 34 in relation to the request to produce communication with counsel by producing 57 pages of documents along with a privilege log.

5. Pursuant to NRCP 26 (c) (1)(B) and (G) a Court may, for good cause, issue an order specifying terms for the disclosure of discovery and requiring that confidential information be revealed only in a specified way.

6. The City is entitled receive all documents relied upon by 180 Land to support its contention that it paid $45 million for the Badlands Property prior to taking Mr. Lowie's deposition.

ORDER

IT IS HEREBY ORDERED that the City's Motion is **GRANTED IN PART AND DENIED IN PART.** The City's Motion is **GRANTED** as it seeks to compel all documents related to its contention that it paid $45 million for the Badlands Property.

IT IS FURTHER ORDERED that Plaintiffs and the City are to negotiate and agree upon a Stipulated Protective Order, which shall govern the protection over those documents to be produced by Plaintiffs and which relate to the Transaction and/or were relied upon by Plaintiffs to support its contention that it paid $45 million for the Badlands Property.

IT IS HEREBY FURTHER ORDERED that the remaining relief sought by the City's Motion is DENIED**.**

IT IS HEREBY FURTHER ORDERED that the Plaintiff's Request for Attorney's Fees and Costs is **DENIED**.

Dated this _____ day of _____, 2021.

Dated this 24th day of February, 2021

District Judge Timothy C. Williams

FFA 29A 2C8B 0356
Timothy C. Williams
District Court Judge

ZJ

Submitted by:

LAW OFFICES OF KERMITT L. WATERS

/s/ James J. Leavitt

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Content Reviewed and Approved By:

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By: /s/ George F. Ogilvie

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Evelyn Washington

From: Autumn Waters
Sent: Monday, February 22, 2021 7:43 AM
To: Evelyn Washington
Subject: FW: Orders

From: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Sent: Monday, February 22, 2021 7:26 AM
To: Elizabeth Ham (EHB Companies) <EHam@ehbcompanies.com>
Cc: Jennifer Knighton (EHB Companies) <jknighton@ehbcompanies.com>; Autumn Waters <autumn@kermittwaters.com>
Subject: RE: Orders

These are acceptable. You may affix my electronic signature and submit.

George F. Ogilvie III | Partner

McDONALD CARANO

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From: Elizabeth Ham (EHB Companies) [mailto:EHam@ehbcompanies.com]
Sent: Friday, February 12, 2021 4:27 PM
To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Cc: Jennifer Knighton (EHB Companies) <jknighton@ehbcompanies.com>; Autumn Waters <autumn@kermittwaters.com>
Subject: Orders

Dear Mr. Ogilvie,

Attached are the finals in pdf – I believe they are correctly formatted and all agreed upon changes made.

Please let me know if you are good on signature and we can submit to the Court.

Best,

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

180 Land Company LLC, Petitioner(s) vs. Las Vegas City of, Respondent(s)	CASE NO: A-17-758528-J DEPT. NO. Department 16

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT
CLARK COUNTY, NEVADA

Condemnation/Eminent Domain | **COURT MINUTES** | **March 11, 2021**

A-18-780184-C 180 Land Company, LLC, Plaintiff(s)
vs.
Las Vegas City of, Defendant(s)

March 11, 2021 02:00 PM **Plaintiff Landowners' Motion for a New Trial and to Amend Related to: Judge Herndon's Findings of Fact and Conclusions of Law Granting City of Las Vegas' Motion for Summary Judgment, Entered on December 30, 2020**

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jacobson, Alice

RECORDER: Gomez, Rebeca

REPORTER:

PARTIES PRESENT:

Andrew W Schwartz	**Attorney for Defendant**
Autumn L. Waters	**Attorney for Plaintiff**
Elizabeth M. Ghanem	**Attorney for Plaintiff**
George F. Ogilvie, III	**Attorney for Defendant**
James J Leavitt	**Attorney for Plaintiff**

JOURNAL ENTRIES

Court advised it finds jurisdiction over this matter. Colloquy between the Court and counsel regarding Judge Herndon's findings entered December 30, 2020.

Mr. Leavitt argued that a categorical taking and regulatory per se taking did not need a physical taking. That the ripeness analysis did not apply and the claims were inappropriately dismissed. Request for the case to move forward on the merits and to determine the rights prior to the City's interference and to determine if the property rights were taken thereafter.

Opposition by Mr. Schwartz and Mr. Ogilvie. Argument there was no evidence of a physical taking and to uphold Judge Herndon's ruling. Further argument that if the Court granted the motion the City would file a Writ of Mandate with the Supreme Court and request a Stay.

Mr. Leavitt objected to a Stay as it was not economically fair to his client.

Court finds that Judge Herndon focused on the ripeness analysis that only applied to Penn Central regulatory taking claims. Court further finds an error in law and the three claims were not properly adjudicated. Therefore, COURT ORDERED, motion GRANTED. Matter SET for Evidentiary Hearing, May 27 at 9:00am.

Mr. Leavitt advised pursuant to the Nevada Supreme Court labels the claims to be addressed at the Evidentiary Hearing were: per se regulatory taking, non regulatory taking and categorical taking.

Court advised it would allow each side to submit opening briefs, oppositions and replies and to work together on a briefing schedule.

Mr. Leavitt to prepare the order.

NOE
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Attorneys for Plaintiff Landowners

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO. LLC, a Nevada limited liability company, et al., Plaintiffs, v. CITY OF LAS VEGAS, a political subdivision of the State of Nevada, et al., Defendants.	CASE NO.: A-17-758528-J DEPT. NO.: XVI **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF LANDOWNERS' MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES**

PLEASE TAKE NOTICE that on the 25th day of March, 2021, an Order Granting In Part and Denying In Part Plaintiff Landowners' Motion to Compel the City to Answer Interrogatories was entered in the above-captioned case, a copy of which is attached hereto.

Dated this 25th day of March, 2021.

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James J. Leavitt*
KERMITT L. WATERS, ESQ., NBN 2571
JAMES J. LEAVITT, ESQ., NBN 6032
MICHAEL SCHNIEDER, ESQ., NBN 8887
AUTUMN WATERS, ESQ., NBN 8917

Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 25th day of March, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the NOTICE OF ENTERY OF ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF LANDOWNERS' MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES was served on the below via Court's electronic filing service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to the following:

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Lauren M. Tarpey (admitted *pro hac vice*)
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By: */s/ Evelyn Washington*
An Employee of the Law Offices of
Kermitt L. Waters

ORD

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Attorneys for Plaintiff Landowners

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, Plaintiff, 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 **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF LANDOWNERS' MOTION TO COMPEL THE CITY TO ANSWER INTERROGATORIES** Date of Hearing: February 16, 2021 Time of Hearing: 9:00 a.m.

Plaintiff Landowners' Motion to Compel the City to Answer Interrogatories, filed January 8, 2021, having come before the Court for hearing on February 16, 2021, James J. Leavitt, Esq. and Elizabeth Ghanem Ham, Esq. appeared on behalf of Plaintiff Landowners 180 Land Co. ("Landowners"), George F. Ogilvie III, Esq. and Andrew W. Schwartz, Esq. appeared on behalf of the City of Las Vegas ("City").

The Court having reviewed the papers and pleadings on file, heard argument of counsel, and for good cause appearing hereby finds and orders as follows:

FINDINGS REGARDING INFORMATION REQUESTED FROM SEROKA

1. The Landowners sought information related to public statements made by former Councilman Seroka in Interrogatories 1, 2 and 3 which provide as follows:

> **INTERROGATORY NO. 1:**
> For every "expert" that Councilman Seroka "learned as much as [he] could from" as referenced in the following statement: "So I went to school and I studied and studied the rules, and I learned as much as I could from the experts, and I did study and I learned a lot" (Page 13 lines 6-12 of the June 21, 2018 meeting transcript attached hereto), state the expert's name, address, telephone number and a summary of what Councilman Seroka "learned" from the expert.
>
> **INTERROGATORY NO. 2**:
> State what City code, ordinance or regulation and/or Nevada statute required a "20 percent" open space dedication between 1985-2005 as referenced by Councilman Seroka in the following statement: "At that time, it was generally accepted accounting principals [sp] and generally accepted percentage of acreage that is open space/recreational. It is 20 percent. What we have up here is the agreed upon roughly 20 percent. It's in the ballpark." (Page 19 lines 10-14 of the June 21, 2018 meeting transcript). Also, state how Councilman Seroka came by this purported requirement, meaning who told him it was a "generally accepted" "open space/recreational" requirement "at that time."
>
> **INTERROGATORY NO. 3:**
> Provide the name and location of every development in the City of Las Vegas that had an approximately 20 percent open space dedication requirement imposed on it by the City of Las Vegas between 1985 and 2005, as referenced by Councilman Seroka in the above provided statement.

2. The City objected to these interrogatories arguing, inter alia, that this information sought was the mental impressions of the councilman, that the City can only act by way of its entire City Council and that the information sought was not relevant to the Landowners' claims or the City's defenses.

3. The Landowners countered that the information sought is relevant to one of the City's defenses and that if Seroka had no information to support his claims, yet made public statements to the contrary, then that could be relevant to the Landowners' claims.

CONCLUSION REGARDING INFORMATION SOUGHT FROM SEROKA

1. The information sought in Interrogatories 1, 2 and 3 is discoverable. While official City acts requires a vote of the City Council, statements made by and information in the possession of individual councilmember could certainly be relevant and is discoverable.

FINDING REGARDING SOURCE OF FUNDS TO ACQUIRE THE SUBJECT PROPERTY

1. The Landowners sought the amount and source of funds available to the City to acquire the Landowners' Property for parks as open space in the following interrogatory.

> INTERROGATORY NO. 6:
> Please provide the amount of funds available as of July 18, 2017 and September 7, 2017, from all sources, which could be used for the acquisition of private land for parks and open space. This Interrogatory specifically includes, but is not limited, to all funds available through the Southern Nevada Public Lands Management Act (SNPLMA), the State of Nevada, and/or the City of Las Vegas for purposes of acquiring private property for parks and open space.

2. The City objected arguing, inter alia, that the source of funds to acquire the Subject Property is not admissible in this matter and has no relevance to the Landowners claims or the City's defenses.

3. The Landowners countered that while they agreed that it was not relevant to the Landowners' claims it was relevant to defend against the City's statements that tax payers should not have to pay the Landowner.

CONCLUSION REGARDING SOURCE OF FUNDS

1. The amount and source of funds previously available for the acquisition of private land for parks is not relevant in this action.

IT IS HEREBY ORDERED that Plaintiff Landowners' Motion to Compel is GRANTED IN PART and DENIED IN PART:

1. GRANTED as to Interrogatories 1, 2, and 3;

2. DENIED as to Interrogatory 6.

3. The City shall have 2 weeks to answer interrogatories 1, 2 and 3.

Dated this 25th day of March, 2021

ZJ

B4A 6C0 DCE1 8C33
Timothy C. Williams
District Court Judge

Respectfully Submitted By:

LAW OFFICES OF KERMITT L. WATERS

By: /s/ *James Jack Leavitt*
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James Jack Leavitt, ESQ., NBN 6032
Michael A. Schneider. ESQ., NBN 8887
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704 S. 9th Street
Las Vegas, NV 89101
Attorneys for Plaintiff Landowners

Reviewed as to Content and Form By:

MCDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
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AMANDA C. YEN, ESQ.
Nevada Bar No. 9726
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Attorneys for City of Las Vegas

Evelyn Washington

From: Autumn Waters
Sent: Monday, March 22, 2021 4:46 PM
To: Evelyn Washington
Subject: FW: 35 Acre Order on Landowners' Motion to Compel

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From: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Sent: Monday, March 22, 2021 4:16 PM
To: Autumn Waters <autumn@kermittwaters.com>; James Leavitt <jim@kermittwaters.com>
Cc: Elizabeth Ham (EHB Companies) <EHam@ehbcompanies.com>
Subject: RE: 35 Acre Order on Landowners' Motion to Compel

Thank you, Autumn. Yes, you may affix my electronic signature.

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | **E:** gogilvie@mcdonaldcarano.com

From: Autumn Waters [mailto:autumn@kermittwaters.com]
Sent: Monday, March 22, 2021 6:08 AM
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Cc: Elizabeth Ham (EHB Companies) <EHam@ehbcompanies.com>
Subject: RE: 35 Acre Order on Landowners' Motion to Compel

Hi George,

Please let me know this morning by 10:00 if I have your permission to affix your signature to this order. Thank you

Autumn Waters, Esq.
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From: Autumn Waters
Sent: Wednesday, March 17, 2021 12:37 PM
To: George F. Ogilvie III <gogilvie@mcdonaldcarano.com>; James Leavitt <jim@kermittwaters.com>
Cc: Elizabeth Ham (EHB Companies) <EHam@ehbcompanies.com>
Subject: 35 Acre Order on Landowners' Motion to Compel

Hi George,

I incorporated all of the City's changes. Do I have your permission to affix your signature to the order under reviewed as to content and form?

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

180 Land Company LLC, Petitioner(s) vs. Las Vegas City of, Respondent(s)	CASE NO: A-17-758528-J DEPT. NO. Department 16

AUTOMATED CERTIFICATE OF SERVICE

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Attorneys for Plaintiff Landowner

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability company, FORE STARS, LTD., DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X,

Plaintiff,

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

EX PARTE APPLICATION AND MOTION TO FILE LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF THAT EXCEEDS THE EDCR 2.20(a) PAGE LIMIT

Plaintiffs, 180 LAND CO., LLC and FORE STARS, LTD (collectively the "Landowners") respectfully submit this Ex Parte Application to File Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief that Exceeds the EDCR 2.20(a) Page Limit. This Ex Parte Application is made to permit the Landowners additional pages to fully detail the uncontested facts (including 150 Exhibits) and law for three separate claims for relief.

Several of the Landowners' claims for relief involve a complex factual assessment of *the City's action*. The United States Supreme Court has held that 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."[1] In this connection, the United States Supreme Court has held that these inverse condemnation cases are "ad hoc" proceedings that require "complex factual assessments."[2]

It is impossible to fully address these complex factual issues in this particular case in just 30 pages. First, the Landowners' Fourth Claim for Relief is based on the "aggregate" of City actions impacting the Landowners' property, therefore, these City actions must be set forth in detail.[3]

---

[1] 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)).

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

[3] 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).

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 Nevada Constitution and, therefore, should be fully and fairly presented to the Court.[4]

The facts in this matter are extensive and involve numerous applications over several years, City Council hearings, the City's adoption of legislation that only targets the Landowners' property, a Councilmember instructing the public that the Landowners' private property belongs to the public, a Councilmember hiring a consultants to repurpose the Landowners' private property, and other interactions by and between the parties which require a detailed presentation as it relates to the legal requirements to establish a taking.

Without this detailed analysis, it will be impossible for the Court to fully understand and address the taking issues. This "complex factual assessment" and the legal arguments require detailed factual and legal analysis and briefing to address. Accordingly, the Landowners respectfully request leave to file their Motion in excess of thirty (30) pages.

The undersigned counsel has worked diligently to limit the number of pages, but given the detailed factual nature of this matter (150 Exhibits) and the necessary legal issues, the memorandum of points and authorities in the Motion will total 44 pages.

[4]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)).

The Landowners' Motion will include a table of contents and table of authorities per EDCR 2.20(a) and an exhibit list. The Landowners' Motion and Appendix of Exhibits are being filed concurrently herewith.

DATED this 26th of March, 2021.

LAW OFFICES OF KERMITT L. WATERS

BY: /s/ *Autumn Waters*
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Attorneys for Plaintiff Landowners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 26th day of March, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of **EX PARTE APPLICATION AND MOTION TO FILE PLAINTIFF LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGEMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF** was served on the below via the Court's electronic filing/service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to, the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability company, FORE STARS, LTD., DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X,

Plaintiff,

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

(PROPOSED)

ORDER GRANTING EX PARTE APPLICATION AND MOTION TO FILE LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF THAT EXCEEDS THE EDCR 2.20(a) PAGE LIMIT

ORDER

IT IS HEREBY ORDERED that Plaintiffs 180 LAND CO., LLC and FORE STARS, LTD. (collectively the "Landowners"), may file their Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief.

Respectfully submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability company, FORE STARS Ltd., DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X, Plaintiff, *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 TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF** ***Hearing Requested***

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I. INTRODUCTION

This is an inverse condemnation case brought by the Plaintiff landowners ("Landowners") against the City of Las Vegas ("City"). This is one of four cases which seeks to remedy the illegal and unjust actions of the City to preserve the Landowners 250 acres of residentially zoned land (hereinafter the "Land" or "250 Acre Residential Zoned Land" or "250 Acres") for the use and enjoyment of the surrounding neighbors.

In Nevada, if the Government preserves private property to be utilized for public use, it is a taking mandating payment of just compensation. McCarran v. Sisolak, 122 Nev. 645 (2006) (a County Ordinance that preserved portions of the airspace above private property to be utilized by aircraft was a taking, whether the aircraft ever entered the space or not). However, the facts of this case go far beyond simply preserving land for public use and refusing to pay just compensation. As detailed below, the City engaged in aggressive, systematic and outrageous government actions to take the Landowners' 35 acre property located near the intersection of Hualapai Way and Alta Drive in Las Vegas, Nevada (the "35 Acre Property" and/or "Landowners' Property" and/or "Subject Property") to *preserve* the Landowners' Property for the surrounding neighbors' use and enjoyment. Thus, the Landowners were forced to initiate this lawsuit.

Once litigation ensued the City created a justification for its outrageous conduct by arguing for the first time that the Landowners' Property was dedicated to the City many years ago.[1] Yet, there is no document memorializing such a land dedication.[2] This Court has held that the

[1] At no time during the development attempts did the City ever claim that the Land was dedicated to the City. This "litigation defense" was created by counsel to try and avoid liability for a clear taking.

[2] In Nevada, when any interest in land is transferred it must be in writing and signed by the grantor. NRS 111.210. Here, the City has no such writing reflecting any dedication of any portion of the Landowners' Property to the City.

Landowners had the "right" to develop the 35 Acre Property residentially. *Landowners' Appendix ("LO Appx.") Ex. 1, October 12, 2020 FFCL Regarding Property Interest.*

The 35 Acre Property that is the subject of this case is one parcel of land adjoining other parcels that make up the 250 Acres. This Land was acquired by the Landowners via a purchase of the membership interest in Fore Stars Ltd which owned 5 parcels of land comprising the 250 Acres. *LO Appx., Ex. 140, Deed*. The 250 Acres is prime real estate located within the boundaries of the City of Las Vegas, adjacent to Summerlin, between Hualapai Way to the West, Alta Drive to the North, Charleston to the South and Rampart to the East, and was utilized for golf course operations formerly known as the Badlands Golf Course. *LO Appx., Ex. 2, Map 1 of 250 Acre Land, Ex. 3, Map 2 of 250 Acre Land.*

Due to time limitations subscribed by NRS 278.3195,[3] the Landowners were required to file 4 separate inverse condemnation cases for the various parcels which are now pending in the Eighth Judicial District Court. *Id.* Specifically:

- 17 Acre Case – pending before senior Judge Bixler;
- **35 Acre Case – pending before this Court;**
- 65 Acre Case – pending before Judge Trujillo (previously Judge Herndon); and
- 133 Acre Case – pending before Judge Sturman.

Although the City has asserted that these four cases involve "common plaintiffs, a common defendant, a common property, common causes of action and common questions of law and fact," (*LO Appx., Ex. 4*) the land comprising the 35 Acre Property is one independent parcel, recognized by the Clark County Tax Assessor as such.[4] Thus, for purposes of this inverse condemnation proceeding, the 35 Acre Property must be considered by the Court as one property separate from

[3] NRS 278.3195 4(b) provides in pertinent part "Any person who: Is aggrieved by a governing body, may appeal that decision to the district court . . . by filing a petition for judicial review within 25 days after the date of filing of notice of the decision . . ."

[4] The 35 Acre Property is legally identified by the Tax Assessor as APN 138-31-201-005.

the 17, 65, and 133 Acre properties:

> "A question often arises as to how to determine what areas are portions of the parcel being condemned, and what areas constitute separate and independent parcels? Typically, the legal units into which land has been legally divided control the issue. That is, each legal unit (typically a tax parcel) is treated as a separate parcel...." City of North Las Vegas v. Eighth Judicial Dist. Court, 133 Nev. 995, *2, 401 P.3d 211 (table)(May 17, 2017) 2017 WL 2210130 (unpublished disposition), *citing* 4A Julius L. Sackman, *Nichols on Eminent Domain* § 14B.01 (3d ed. 2016).

In this motion, the Landowners are requesting that the Court enter summary judgment in this 35 Acre Case on three of their claims for relief – First (Categorical Taking), Third (Regulatory Per Se Taking), and Fourth (Nonregulatory Taking) Claims for Relief.

II. PROCEDURE AND RESOLVED ISSUES

A. The Required Two Sub-Inquiries in Nevada Inverse Condemnation Proceedings

The Nevada Supreme Court has held that in every inverse condemnation action like this, the District Court Judge is required to make two distinct "sub inquiries" and that these sub inquiries must be made in the proper order. In McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006), the Nevada Supreme Court held "the court ***must first*** *determine 'whether the plaintiff [landowner] possesses a valid interest in the property* affected by the government action, [that is] whether the plaintiff [landowner] possessed a 'stick in the bundle of property rights,' ***before*** *proceeding to determine whether the government action at issue constituted a taking*." Emphasis added. *See also* ASAP Storage, Inc., v. City of Sparks, 123 Nev. 639 (2008) ("[i]n analyzing [the landowners] taking claim, we undertake **two distinct sub-inquiries**: (a) whether appellants' real and personal property constitutes 'private property' under the Nevada Constitution, and (b) whether the City's actions that denied appellants access to their business constituted a taking under the terms of the Nevada Constitution." ASAP Storage, at 736. Emphasis added. Whether a taking has occurred is a question of law. *See* Moldon v. County of Clark, 124 Nev. 507 (2008) *citing* Sisolak at 658, 1119).

B. Resolution of the First Sub-Inquiry

The first sub-inquiry was presented to this Court on September 17, 2020. This Court reviewed significant briefing and heard extensive argument (over two hours) and entered findings of fact and conclusions of law, holding that ***before*** the City engaged in actions to interfere with the use of the 35 Acre Property:

> 1) the 35 Acre Property is hard zoned R-PD7 at all relevant times herein; and,
> 2) the permitted uses by right of the 35 Acre Property are single-family and multi-family residential.

LO Appx., Ex. 1, October 12, 2020 FFCL Granting Property Interest, p. 3:3. By these findings, this Court rejected the City's argument, specifically the "PR-OS argument" (discussed below) and determined that "Nevada eminent domain law provides that zoning must be relied upon to determine a landowners' property interest in an eminent domain case." *Id., at p. 4:20-21*.[5]

C. Other Resolved Issues

This Court has also resolved two other important issues.

1. Inverse Condemnation/Eminent Domain Law Applies, Not Law Pertinent to Petitions for Judicial Review

Without any citation to authority, the City has repeatedly argued that the law pertinent to petitions for judicial review/land use should apply in this inverse condemnation case to give the City "discretion" to deny land uses, thereby shielding it from takings liability. Such immunity does not exist in an inverse condemnation case and thus, this Court must apply eminent domain/inverse condemnation law. "**Inverse condemnation proceedings are the constitutional equivalent to eminent domain actions** and are governed by the same rules and principles that are

[5] City documents show the 250 Acre Residential Zoned Land had a residential zoning designation on the City's Zoning Atlas Maps and a residential land use designation on the City's General Plan as early as 1981. *LO Appx. Ex. 5, at CLV034089, CLV034414-415, CLV033780-781; LO Appx. Ex. 6, at CLV033295.*

applied to formal condemnation proceedings." Clark County v. Alper, 100 Nev. 382, 391 (1984). Emphasis added. This Court has entertained extensive briefing and extensive oral argument on this issue resolving the issue ***three times*** as follows:

> "[T]he Court concludes that its conclusions of law regarding the ***petition for judicial review do not control its consideration of the Developer's [Landowner's] inverse condemnation claims***." *LO Appx., Ex 7, May 7, 2019 Order at 11:20-22*. Emphasis added.
>
> "[B]oth ***the facts and the law are different*** between the petition for judicial review and the inverse condemnation claims." *LO Appx., Ex. 8, May 15, 2019 Order at 21:15-20*. Emphasis added.
>
> "***The evidence and burden of proof are significantly different*** in a petition for judicial review than in civil litigation. *Id., at 22:1-11*. Emphasis added.
>
> "A petition for judicial review is ***one of legislative grace*** and limits a court's review to the record before the administrative body, ***unlike an inverse condemnation***, which is ***of constitutional magnitude*** and requires all government actions against the property at issue to be considered." *Id., at 8:25 – 9:2*. Emphasis added.
>
> "Furthermore, the ***law is also very different in an inverse condemnation case than in a petition for judicial review***. Under inverse condemnation law, if the City exercises discretion to render a property valueless or useless, there is a taking. Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007), McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (Nev. 2006), City of Monterey v. Del Monte Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999), Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). ***In an inverse condemnation case, every landowner in the state of Nevada has the vested right to possess, use, and enjoy their property and if this right is taken, just compensation must be paid***. Sisolak. **And, the Court must consider the "aggregate" of all government action and the evidence considered is not limited to the record before the City Council**. Merkur v. City of Detroit, 680 N.W.2d 485 (Mich.Ct.App. 2004), State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015), Arkansas Game & Fish Comm's v. United States, 568 U.S. 23, 133 S.Ct. 511 (2012). ***On the other hand, in petitions for judicial review, the City has discretion to deny a land use application as long as valid zoning laws are applied, there is no vested right to have a land use application granted, and the record is limited to the record before the City Council***. Stratosphere Gaming Corp., v. City of Las Vegas, 120 Nev. 523, 96 P.3d 756 (2004). *Id., at 22:13-27*. Emphasis added.
>
> Therefore, all City arguments based on petition for judicial review law must be rejected.

2. Zoning Governs the Use of the Property and There is No PR-OS

The City has argued in litigation that the R-PD7 residential zoning that has existed on the property for over 30 years is *irrelevant* and, instead, the entire 250 Acre Land must remain park, recreation, open space (PR-OS), because, according to the City, this is what the City's General Plan and the Peccole Ranch (Concept) Master Plan (PRMP) designates the 35 Acre Property, meaning any action the City has taken to preserve the Landowners' Property for the surrounding neighbors' use, including precluding development, cannot result in a taking. The City has repeatedly lost this PR-OS argument.

In opposition to the Landowners' Motion to Determine Property Interest *in this very case*, the City specifically argued, "[t]he City adopted the PR-OS General Plan designation through duly enacted legislation," the PR-OS "has the force of law," and "the PR-OS designation prevails" over the "irrelevant" R-PD7 zoning ("the City's PR-OS argument"). *LO Appx, Ex. 9, August 18, 2020 City's Opp. to Mot. to Determ. Prop. Interest - see highlighted portions.* This Court expressly rejected the City's PR-OS argument, holding: 1) "Nevada eminent domain law provides that zoning must be relied upon to determine a landowners' property interest in an eminent domain case;" 2) "the 35 Acre Property has been hard zoned R-PD7 since at least 1990;" and, 3) "the permitted uses ***by right*** of the 35 Acre Property are single-family and multi-family residential." *LO Appx., Ex. 1, October 12, 2020 FFCL Regarding Property Interest at 4-5.* Emphasis added.

At least ***ten other orders*** have been entered also rejecting or disregarding the City PR-OS argument as entirely baseless:

- The City made the PR-OS argument early in this case as a basis for its motion for judgment on the pleadings. *LO Appx., Ex 10, February 13, 2019 City Mot. for Judg. on the Pldgs.; see highlighted portions.* In detailed findings, this Court rejected the City's PR-OS argument and denied the City's motion. *LO Appx., Ex. 8, May 15, 2019 Order.*

- The City filed a Writ Petition with the Nevada Supreme Court on this Court's denial of its motion for judgment on the pleadings, again presenting the PR-OS argument. *LO Appx., Ex. 11, May 17, 2019 City Pet. For Writ - see highlighted portions.* The Supreme Court

gave zero credence to the City's PR-OS argument and upheld this Court's denial of the City's motion for judgment on the pleadings. *LO Appx., Ex. 12, Order Denying Pet. for Writ of Mandamus or Prohibition, Case No. 78792 (May 24, 2019)*. The City filed a petition for rehearing and a request for en banc reconsideration and the Court, again, disregarded the PR-OS argument. *LO Appx., Ex. 13 Order Denying Rehearing (July 24, 2019; Ex. 14, Order Denying En Banc Reconsideration (September 6, 2019).*

- The City extensively argued the PR-OS issue before Senior Judge Bixler as grounds to dismiss the 17 Acre Case. *LO Appx, Ex. 15, City Mot. to Dismiss (October 23, 2020) – see highlighted portions; Ex. 16, City Sur-Reply to Mot. to Dismiss (December 4, 2020) – see highlighted portions.* Following the hearing, the City proposed extensive findings stating, in part, "Here, most of the Badlands [250 Acre Residential Zoned Land] has been designated PR-OS since 1992 (including the 17 Acre Property), and all of it has been designated PR-OS since at least 2002 long before the Developer purchased the Badlands in 2015. Residential use is not permitted on property designated PR-OS." *LO Appx, Ex. 17, City Proposed FFCL at p. 9, proposed finding #12.* Emphasis added. ***Senior Judge Bixler rejected the City's PR-OS argument*** and adopted the Landowners' proposed order. *LO Appx., Ex. 18, Judge Bixler Order Denying City Mot. to Dismiss (December 9, 2020).*

- The City also presented the PR-OS argument to Judge Sturman as grounds to dismiss the 133 Acre Case. *LO Appx., Ex. 19, City Mot. to Dismiss (August 27, 20189); see highlighted portions.* ***Judge Sturman rejected the PR-OS argument*** and denied the City's Motion to Dismiss. *LO Appx, Ex. 20, Judge Sturman Minute Order*[6] *Denying CLV Mot. to Dismiss (February 15, 2019).*

- The PR-OS argument was also pointedly before the Nevada Supreme Court in a petition for judicial review case related to the 17 Acre property, with the precise argument the City repeatedly presents in these inverse condemnation cases. *LO Appx., Ex 21, Respondents' Answering Brief – see pages 8-10, highlighted portions.*[7] ***The Nevada Supreme Court rejected the PR-OS argument***, reversed the "Crockett Order" and held "the parcel carries a zoning designation of residential planned development district [R-PD7]" and that all that was needed to develop was a "site development plan" and the process to develop "does not require [the Landowners] to obtain a major modification of the Peccole Ranch Master Plan [PRMP] [to change the PR-OS] prior to submitting the at-issue applications" *LO Appx., Ex 23, Supreme Court Order of Reversal of Crockett Order, filed March 5, 2020, Case No. 75481, unpublished disposition, p. 4.*[8] The Court rejected the PR-OS argument twice more in denying a petition for rehearing and a request for en banc reconsideration. *LO Appx.,*

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[6] Only a minute order is available as the City filed an untimely removal to federal court before a formal order could be entered.

[7] This Court may recall that Judge Crockett accepted the PR-OS argument and held that the entire 250 Acres had been designated PR-OS and PR-OS does not allow residential development, resulting in the "*Crockett Order*." *LO Appx., Ex. 22, Crockett Order (overturned) at p. 5, finding 13.* At this stage of the litigation, the City itself rejected the PR-OS argument representing to the Crockett Court that "the land use designation is subordinate to the zoning designation . . ." LO Appx., Ex. 139, City brief page 2 lines 8-9.

[8] Seventy Acres, LLC., v. Binion, 458 P.3d 1071*2 (Table) 2020 WL 1076065 (March 05, 2020).

Ex. 24 Order Denying Rehearing – 17 Acre PJR Matter; Ex. 25 Order Denying En Banc Reconsideration – 17 Acre PJR Matter.

- In a case involving the entire 250 Acre Residential Zoned Land, a homeowner in the Queensridge Community argued the 250 Acre Land could not be developed because it was "open space" and the District Court rejected the argument, entering two very extensive findings of fact and conclusions of law, reading in part, as follows: 1) Peccole always intended to keep the property available for "future development as residential;" 2) the 250 Acre Property is zoned R-PD7; 3) R-PD7 zoning "dictates" the use; 4) the R-PD7 zoning gives the Landowners the "right to develop" the 250 Acre Property; and, 5) rejected the argument that there is a requirement the property remain "open space" or "golf course." *LO Appx., Ex. 26, FFCL and Judgment, November 20, 2016 - 250 Acres, pp. 14, 16, 18; LO Appx., Ex 27, FFCL, Final Order, and Judgment, January 31, 2017 – 250 Acres, p. 17 – see highlighted portions.* The Supreme Court affirmed and denied reconsideration. *LO Appx., Ex. 28, Supreme Court Order of Affirmance, October 17, 2018 – 250 Acres; LO Appx., Ex. 29, Supreme Court Order Denying Rehearing, November 27, 2018 – 250 Acres.*

Also, the ***City*** itself through the highest-ranking Planner and the City Attorney - rejected the City's newly concocted PR-OS argument, confirming on the record that the PR-OS argument is baseless:

- "The Peccole Ranch Phase II plan (PRMP) was a very, very, very general plan. I have read every bit of it. If you look at the original plan and look what's out there today, it's different. . . . So the plan - - the master plan that we talk about, ***the Peccole Phase 2 master plan (PRMP) is not a 278A agreement, it never was, never has been, not a word of that language was in it. We never followed it***." Statement by long time City Attorney Brad Jerbic. *LO Appx., Ex. 30, Transcr. of Badlands Homeowners Meeting, November 1, 2016 at pp. 60 and 117.*

- "If I can jump in too and just say that everything Tom [Tom Perrigo – Director of City Planning] 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." Statement by long time City Attorney Brad Jerbic confirming the research by City Planning Director, Tom Perrigo. *LO Appx., Ex. 31, Transcr. Of Planning Commission Meeting, June 13, 2017 at 72 of 83.*

In all there have been ten orders entered between the Nevada Supreme Court and the District Court that have rejected or lent no credence to the City's PR-OS argument, there have been multiple statements on the record at City Hall and in Court by the City itself rejecting the PR-OS argument. Given that ***the Nevada Supreme Court*** has expressly rejected the PR-OS argument when it ***overturned the Crockett Order that adopted the PR-OS argument*** and, that the City's own

position through its Planning Department and City Attorney's Office has been that PR-OS was of no effect, the argument is without merit.

Given the extensive precedent rejecting the City's PR-OS argument, this Court's holding that: 1) zoning must be relied upon to determine the property interest; 2) the 35 Acre Property has been zoned R-PD7 since at least 1990; and, 3) the permitted uses ***by right*** of the 35 Acre Property are single-family and multi-family residential, the City should be precluded from once again re-raising the argument here. *LO Appx., Ex. 1, October 12, 2020 FFCL Regarding Property Interest entered October 12, 2020, pp. 4-5.*

III. THE SECOND SUB-INQUIRY – HAS A TAKING OCCURRED

As this Court has already resolved the first sub-inquiry – the property interest – this motion addresses the second sub inquiry – whether that property interest has been taken. Further, this motion is limited to the Landowners' First, Third and Fourth Claims for Relief. Accordingly, the only issue before this Court is whether there is a taking of the 35 Acre Property when:

1) The City has denied all use of the Landowners' Property so that the Property is preserved in an undeveloped state for the surrounding owners' use (viewshed, open space, recreation) and the City adopted two Bills to implement the preservation of the Landowners' Property for this public use.

2) The City adopted a Bill that forces the Landowners to acquiesce to a physical occupation of their Property by forcing the Landowners to allow "***ongoing public access***" onto their Property or be subjected to criminal charges.

IV. STATEMENT OF UNCONTESTED FACTS RELEVANT TO THE LANDOWNERS' ACQUISITON OF THE 35 ACRE PROPERTY

The Landowners are accomplished and professional developers that have constructed more homes and commercial development in the vicinity of the 35 Acre Property than any other person or entity and, through this work, gained significant information about the 250 Acre Residential

Zoned Land (which includes the 35 Acre Property).[9] *LO Appx., Ex. 34, Decl. Lowie (1); Ex. 35 Decl. Lowie (2).* They have extensive experience developing luxurious and distinctive commercial and residential projects in Las Vegas, including but not limited to: (1) One Queensridge Place, which consists of two 20-story luxury residential high rises; (2) Tivoli Village at Queensridge, an Old World styled mixed-used retail, restaurant, and office space shopping center; (3) over 300 customs homes, and (4) multiple commercial shopping centers. *LO Appx., Ex. 34, Decl. Lowie (1), at p. 1, para. 2.* The Landowners' principles live in the Queensridge Common Interest Community and One Queensridge Place (which is adjacent to the 250 Acre Residential Zoned Land) and are the single largest owners within both developments having built over 40% of the custom homes within Queensridge. Id. At all times Queensridge was and is governed by the Master Declaration of Covenants, Conditions, Restrictions and Easements recorded in 1996 ("CC&Rs"). For years, the Land was leased to a third-party golf course operator for the operation of a golf course. The homeowners in the Queensridge Community have never owned any interest in the Land and have never paid for the maintenance, upkeep, taxes or any costs associated with the Land.

The Peccole family was the original owner of the 250 Acre Residential Zoned Land and the adjacent community commonly referred to as the "Queensridge Community." *See LO Appx., Exs. 2 and 3, Map 1 and Map 2 of 250 Acres of Land.* In 1996, the principals of the Landowners began working with William Peccole and the Peccole family (referred to as "Peccole") to develop lots adjacent to the 250 Acre Residential Zoned Land within the Queensridge Community and consistently worked together with them in the area on property transactions thereafter. *LO Appx., Ex. 34, Decl. Lowie (1), p. 1, para. 3.*

In 2001, the principals of the Landowners learned from Peccole that the Badlands Golf Course was zoned R-PD7 and intended for residential development. *LO Appx., Ex 34, Decl. Lowie (1), p. 2, para. 4.* They further learned that Peccole had never imposed any restrictions on the use of the Land and that the Land would eventually be developed. *Id.* Peccole further informed the Landowners that the Land is "developable at any time." *Id.*

[9] Yohan Lowie, one of the Landowners' principles, has been described as the best architect in the Las Vegas valley. *LO Appx., Ex. 33, June 21, 2017 Transcr. City Council at 64 of 128.*

In or about 2001, the principals of the Landowners retained legal counsel to confirm Peccole's assertions and counsel advised that the 250 Acre Residential Zoned Land is "Not A Part" of the Queensridge Community, the Land was residentially zoned, there existed rights to develop the Land, the Land was intended for residential development and that as homeowners within the Queensridge Community, according to the Queensridge CC&Rs they had no right to interfere with the development of the 250 Acre Residential Zoned Land. *LO Appx., Ex. 34, Decl. Lowie (1), p. 2, para. 5.* See also *LO Appx., Ex. 36 at 000762, 000875, 000879.*

Peccole always maintained and disclosed the developability of the entire 250 Acre Residential Zoned Land. "**The existing 18-hole golf course commonly known as the "Badlands Golf Course" [250 Acre Property] is not a part of the Property** or the Annexable Property [Queensridge Community] and the Queensridge Community "**is not required to[] include … a golf course, parks, recreational areas, open space**." *LO Appx., Ex. 36, p. 1-2, Queensridge Community CC&Rs.* Emphasis added. The Custom Lot Design Guidelines also informed that the interim golf course on the 250 Acre Land was available for "future development." *LO Appx., Ex. 37, QR Custom Lot Design.* The CC&Rs further disclosed to every purchaser of property within the Queensridge Community that the 250 Acre Land was "not a part" of the Queensridge Community, that purchasers in the community "shall not acquire any rights, privileges, interest, or membership" in the 250 Acre Land, there are no representations or warranties "concerning the preservation or permanence of any view," and lists the "Special Benefits Area Amenities" for the surrounding Queensridge Community, ***which does not include a golf course or open space or any other reference to the 250 Acre Land***. *LO Appx., Ex. 38, LO 4471, Lot Purchase Agreement for Queensridge; LO Appx., Ex. 39, LO 4453-4454, 4456, Public Offering Statement.* Emphasis added.

The Landowners were also developing and selling land in the Queensridge Community and likewise disclosed that the Land was available for development. *LO Appx., Ex. 40, Lowie Depo., Binion v. Fore Star, p.47:16-19.*

In 2006, in furtherance of acquiring the 250 Acre Residential Zoned Land, Yohan Lowie, a Landowner principal, met with the highest-ranking City planning official, Robert Ginzer, and

was advised that: 1) the entire 250 Acres is zoned R-PD7; and, 2) there is nothing that can stop development of the property. *LO Appx., Ex. 34, Decl. Lowie, p. 2, para. 6.*

With this knowledge and understanding, the principals of the Landowners then obtained the right to purchase all five parcels that made up the 250 Acre Residential Zoned Land. *LO Appx., Ex. 34*, Decl. Lowie, p. 2, para. 6.

In November 2014, the Landowners were given six months to exercise their right to acquire the 250 Acre Residential Zoned Land and conducted their final due diligence prior to closing on the acquisition of the Land. *LO Appx., Ex. 34*, Decl. Lowie, p. 2-3, para. 6. The Landowners met with the two highest-ranking City Planning officials at the time, Tom Perrigo and Peter Lowenstein, and asked them to confirm that the entire 250 Acre Residential Zoned Land is developable and if there was "anything" that would otherwise prevent development. The City Planning Department agreed to do a study that took approximately three weeks. Id.*; LO Appx., Ex. 40 pp. 66-67; 69:15-16; 70:13-16 (Lowie Depo, Binion v. Fore Star).* The City Planning Department reported that: 1) the 250 Acre Residential Zoned Land was hard zoned and had "vested rights" to develop up to 7 units an acre; 2) "the zoning trumps everything;" and, 3) any owner of the 250 Acre Residential Zoned Land can develop the property. *LO Appx., Ex. 34, Decl. Lowie, p. 3, para. 8; Ex. 40, pp. 74-75, specifically, 75:13; 74:22-23; 75:12 (Lowie Depo, Binion v. Fore Star).*

The City provided its official position through a "Zoning Verification Letter" issued by the City Planning & Development Department on December 30, 2014, stating: 1) "The subject properties are zoned R-PD7 (Residential Planned Development District – 7 units per acre;" 2) "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.);" and, 3) "A detailed listing of the permissible uses and all applicable requirements for the R-PD Zone are located in Title 19 ("Las Vegas Zoning Code") of the Las Vegas Municipal Code." *LO Appx., 134, City Zoning Verification Letter; Ex. 40, pp. 77:24-25, 80:20-21*.

With this due diligence complete, the Landowners closed on the acquisition of the entire 250 Acre Residential Zoned Land by acquiring the membership interest of Fore Stars Ltd. *LO Appx., Ex. 34, Decl. Lowie, p. 4, para. 12*. The City will argue that the terms of the acquisition

and price paid are a relevant question of fact, however, that is only considered (if at all) in analyzing the Landowners 2nd Claim for Relief (Penn Central claim), which is ***not*** the subject of this motion.

At the time of acquisition, the entire 250 Acre Residential Zoned Land consisted of five separate parcels. *LO Appx. Ex. 34, Decl. Lowie, p. 4, para. 12; Ex. 44, Deed*. After acquisition, the Landowners moved forward with developing the Land and, at the direction of the City, re-drew the boundaries of various parcels creating a total of ten parcels of residentially zoned land. *LO Appx. Ex. 34*, Decl. Lowie, p. 4, para. 12-13. The 35 Acre Property is one Assessor Parcel, APN 138-31-201-005.

After the acquisition, the golf course operator terminated operations due to an inability to be profitable (*LO Appx., Ex. 45, Golf Course Closure, September, 2015 & May, 2016, Par 4 Letter to Fore Star; Ex. 46, Golf Course Closure, December 1, 2016, Elite Golf Letter to Yohan Lowie; Ex. 47, Golf Course Closure, Keith Flatt Depo, Fore Stars v. Nel).*

The Landowners hired well known land use attorney, Christopher L. Kaempfer, to assist with submitting the applications to the City of Las Vegas to develop the Land. *LO Appx. Ex. 48*, Decl. Kaempfer. Attorney Kaempfer lives in the adjoining Queensridge Community and testified "it was important for [him] to ascertain what development rights, if any, actually existed on the Badlands [250 Acres]." *LO Appx. Ex. 48*, para. 7, Decl. Kaempfer. Attorney Kaempfer checked the zoning website and was provided the Zoning Verification Letter, both of which proved the residential zoning. *Id.* Attorney Kaempfer then checked with the City's Planning Section Manager, Peter Lowenstein, and was advised the Land could be developed in accordance with the R-PD7 zoning. *Id.* Attorney Kaempfer also checked with then City Attorney, Brad Jerbic, who said the City will "honor the zoning letter" provided to the Landowners during their due diligence. Id. With this information, Attorney Kaempfer agreed to represent the Landowners in developing the Land and moved forward accordingly. *Id*.

The extensive due diligence, the representations by the City's highest-ranking officials, and the City documents are all consistent with this Court's findings of fact and conclusions of law on the property interest sub-inquiry, that: 1) zoning must be relied upon to determine the property interest; 2) the 35 Acre Property has been zoned R-PD7 since at least 1990; and, 3) the permitted

used ***by right*** of the 35 Acre Property are single-family and multi-family residential. *LO Appx., Ex. 1, October 12, 2020 FFCL Regarding Property Interest, pp. 4-5.*

V. THE CITY'S TAKING ACTIONS RELEVANT TO THE LANDOWNERS' FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF

A. This Court Held that "All" City Actions in the Aggregate Must Be Considered When Deciding the Pending Taking Issue

This Court previously held that when deciding the second sub-inquiry Nevada inverse condemnation law requires the Court to consider all government action in the aggregate, regardless of when these actions occurred:

> In determining whether a taking has occurred, Courts must look at the ***aggregate of all of the government actions*** 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." Merkur v. City of Detroit, 680 N.W.2d 485, 496 (Mich.Ct.App. 2004). *See also* 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).
>
> The City has argued that the Court is limited to the record before the City Council in considering the Landowners' applications and cannot consider all the other City action towards the Subject Property, however, the City cites the standard for petitions for judicial review, not inverse condemnation claims. A petition for judicial review is one of legislative grace and limits a court's review to the record before the administrative body, ***unlike an inverse condemnation, which is of constitutional magnitude and requires all government actions against the property at issue to be considered***.

LO Appx., Ex. 8, May 15, 2019 Order Denying City's Motion for Judgment on the Pleadings, pp. 8-9. Emphasis added.

This Court further held, based on the Sisolak case, "[t]he City can apply 'valid' zoning regulations to the property to regulate the use of the property, but ***if those zoning regulations 'rise to a taking,' Sisolak at fn 25, then the City is liable for the taking and must pay just compensation***." *LO Appx., Ex. 8, May 15, 2019 Order Denying City's Motion for Judgment on the Pleadings pp. 8:3-4.* Emphasis added. This holding is based on hornbook inverse condemnation law that the Takings Clause "is designed not to limit governmental interference with property rights *per se,* but rather to secure compensation in the event of otherwise proper interference amounting to a taking."[10] For example, the Clark County height restrictions imposed in the Sisolak and Hsu cases, the State of Nevada regulation to change access in the Schwartz case, the City of Monterey action to protect the habitat of an endangered butterfly and provide dune viewshed in the Del Monte Dunes case,[11] and the South Carolina Coastal Commission's Beachfront Management Act to protect inland flooding in the Lucas case, **were all "valid" government actions, but not a defense to a taking**.[12] Therefore, any argument that taking actions are based on "valid" zoning laws or "valid" government action is not a defense to the taking.

B. The City Engages in Extreme Conduct to Take the Land for the Surrounding Neighbors.

As discussed above, all homeowners of the adjacent Queensridge Community have had actual notice of the developability of the 250 Acre Residential Zoned Land as the CC&R's, the Custom Lot Design Guidelines, the Lot Purchase Agreements, and the Public Offering Statements

[10] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).

[11] "As a result of the City's action, the entire subject property was burdened by a public use for beach dedication, dune viewshed, and habitat preservation." *LO Appx., Ex. 138, Del Monte Dunes v. City of Monterey, 1995 WL 17070330 (C.A.9)(Appellate Brief 9th Cir.) Appellees' Opposition Brief and Cross-Brief *14.*

[12] McCarran Int'l Airport v. Sisolak, 122 Nev. 645 (2006); Hsu v. County of Clark, 123 Nev. 625 (2007); Schwartz v. State, 111 Nev. 998 (1995); City of Monterey v.Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

specifically disclose that the Land is "not a part" of the Queensridge Community and does not include a golf course or open space.

Yet, a small group of the surrounding neighbors objected to development and demanded the Land for themselves. On or about December 29, 2015, a surrounding neighbor, met with the Landowners, bragged that his Queensridge Community is "politically connected," they could stop all development, and that they wanted 180 acres of the 250 Acre Residential Zoned Land, including water rights, handed over for free. *LO Appx. Ex. 94, Decl. DeHart, at 002836* ¶2. The Landowners refused to comply with this demand for the Land they worked over 20 years to acquire and reported this extortion attempt to the F.B.I. Id. The surrounding neighbors vowed to continue to file lawsuits until they got their way. *LO Appx. Ex. 149 LV*RJ article ("This is the first lawsuit to bring an end to that process, I don't know whether it will be the last one."). In an email to a Queensridge homeowner that supported development, one of the surrounding neighbors boasted [w]e have done a pretty good job of prolonging the developer's agony from Sept 2015 to now." *LO Appx Ex. 143, email regarding prolonging developer's agony.* From 2015 forward, a small group of the surrounding neighbors relentlessly opposed any and all development of the 250 Acres.

During this time, another surrounding neighbor enlisted his longtime friend Las Vegas City Council Member Bob Coffin to stop the Landowners' development of the Land. *LO Appx. Ex. 147*. Coffin evidently agreed to take direction with the specific intention and plan to deny the Landowners their vested property and constitutional rights. *LO Appx. Ex 122 at 004230,* ("do they know I am voting against the whole thing?"); *LO Appx., Ex 126 at 004244 ("**a majority [of the City Council] is standing in his [Landowners] path [to development]")*. It did not take long for Council Member Coffin to make clear he was working *NOT* for the public benefit, but for his "longtime friend." Within months of the Landowners' acquisition of the 250 Acres, Coffin told Mr. Lowie that no development was to occur on 180 acres of the Land, but that Coffin would

"allow" Mr. Lowie to build "anything he wanted" on the remaining 70 acres if the Landowners handed over the 180 acres to the neighbors along with the water rights. *LO Appx. Ex 35 Decl. Lowie (2) at 000741 ¶5* This was again repeated several months later, in April 2016, when Councilman Coffin told the Landowners that to allow any development at all on the 70 acres, the Landowners would have to "hand over" the 180 acres, and associated water rights, in perpetuity. *Id at ¶ 6.*

As time went on, and the Landowners refused to "hand over" the Land, Coffin intensified his position calling the Landowners' representative a "sonofab[…]," "A[…]hole," "scum," "motherf[…]er," "greedy developer," "dirtball," "clown," and Narciss[ist]" with a "mental disorder," and sought "intel" against the Landowners through a private investigator as "dirt may be handy" in case he needs to "get rough" with the Landowners. *LO Appx. Exs. 121, 127, and 130*.

Likewise, one of the surrounding neighbors "suggested" to then Councilman Bob Beers, who held the seat for Ward 2, which included Queensridge, it would do his political career well to hold up development.

> Q. You also indicated that the homeowners were suing to slow it down so that there wouldn't be any development in their lifetime? A. Yes, sir.
>
> Q. And where did you get that understanding? A. Mr. Binion told me that.
>
> Q. He [Binion] was asking you to break the law? A. He was asking to have the City get in the way of the of the landowner's rights, yes.
>
> Q. And that's what he was asking you to do was to cause delay as you say?
> A. Yes. . . . A. I attempted to kindly reject his offer. . . .
> A. I think he was discussing the potential for –for a political campaign against me."

LO Appx., Ex. 142, Deposition of Councilman Bob Beers pages 31-36.

The surrounding neighbors then campaigned against Councilman Beers who was up for reelection in July 2017 and successfully removed him from office replacing him with their candidate Steve Seroka who had vowed to stop all development during his campaign and willingly

followed the direction of these individuals by working behind the scene and delaying hearings, instructing staff to legislate against development and denying or striking applications for development. *See LO Appx., Ex. 146, Schreck -Seroka email (directing Seroka on an upcoming City Council hearing, and Seroka informing Schreck 133 Acre coming up for hearing and suggesting "may be delayed . . ."); Ex. 148, Transcr. Sept. 6, 2016 City Council Meeting; Ex. 54, Denial of MDA, Ex. 114, Transcr. of 5.16.18 City Council Meeting (Bill 2018-5).* As is more fully discussed below, the City through its representatives conducted their duties - under the direction of the surrounding neighbors - with the intention of denying the constitutional property rights of the Landowners in order to take their Land and give it to the surrounding neighbors.

Seroka, as a Councilman, at a public meeting on June 21, 2018, even told all of the Landowners' neighbors that the Landowners' Property belonged to the neighbors and the neighbors had the right to use the Landowners' Property as recreation and open space.

> "So when they built over there off of Hualapai and Sierra –Sahara –this land [250 Acres] is the open space. Every time that was built along Hualapai and Sahara, this [250 Acres] is the open space. Every community that was built around here, that [250 Acres] is the open space. The development across the street, across Rampart, that [250 Acres] is the open space….it is also documented as part recreation, open space…That is part recreation and open space…" *LO Appx., Ex. 136*, 17:23-18:15, HOA meeting page

> "Now that we have the documentation clear, ***that is open space for this part of our community. It is the recreation space for this part of it***. It is not me, it is what the law says. ***It is what the contracts say between the city and the community, and that is what you all are living on right now***." *LO Appx., Ex. 136*, 20:23-21:3, HOA meeting (emphasis added).

And, in accordance with Councilman Seroka's direction, ***the neighbors are using the Landowners' Property***. *See LO Appx., Ex. 150, Affidavit of Donald Richards and pictures attached thereto wherein Mr. Richards attests that the neighbors are using the Landowners property and that they have told him "it is our open space." Id. at §6 & 7.* The neighbors are using the Landowners' Property for a viewshed, for recreation, for open space and for access as

the legislation Seroka sponsored and passed provided. (*LO Appx., Ex. 136, 137, 48, 89, 92, 108, 150).*

C. In the Aggregate, the City Engaged in Aggressive and Systematic Actions to Prohibit *all* use of the 35 Acre Property to Preserve it for "Ongoing Public Access" and for the Surrounding Property Owners Use

Immediately after purchasing the 250 Acre Residential Zoned Land in early 2015, the Landowners and Attorney Kaempfer met with the City of Las Vegas Planning Department to begin development of the individual 17, 35, 65, and 133 Acre parcels as the residential real estate market was increasing in early 2015 and the carrying costs for this vacant property are significant.[13] Accordingly, the Landowners wanted to quickly develop the properties and development of the parcels one at a time was the most financially feasible way to commence development. While the Landowners had a vision of how to develop the Land, the City directed the type of applications necessary for approval of development. *LO Appx,. Ex. 34, Decl. Lowie (1), para. 11.*

The City adamantly insisted that **the *only* application it would accept to develop any part of the Land was a Master Development Agreement to develop the entire 250 Acre Residential Zoned Land under one development plan**; the City repeatedly refused to accept individual applications to develop each parcel. *LO Appx., Ex. 34, Decl. Lowie (1); Ex. 48 Decl. Kaempfer.* "Mayor Goodman informed [the Landowners during a December 16, 2015, meeting] that due to neighbors' concerns the City would not allow 'piecemeal development' of the Land and that one application for the entirety of the 250 Acre Residential Zoned Land was necessary by way of a Master Development Agreement ("MDA")" and that during the MDA process, "the City continued to make it clear to [the Landowners] that it would not allow development of individual

[13] For example, the Clark County Tax Assessor valued the entire 250 Acre Residential Zoned Land at about $88 million and, based on this residential land value, the Landowners were paying (and continue to pay) about $1 million per year in real estate taxes alone without deriving any residential income from the property. *LO Appx., Exs, 49, 50, 51, 52, Tax Assessors' valuations and taxes.*

parcels, but demanded that development only occur by way of the MDA." *LO Appx. Ex. 34*, Decl. Lowie, at 00538, para. 19, at 00539, para. 24:25-27. The Landowners' land use attorney, Chris Kaempfer, states: 1) that he had "no less than seventeen (17) meetings with the [City] Planning Department" regarding the "creation of a Development Agreement" which were necessitated by "public and private comments made to me by both elected and non-elected officials that they wanted to see a plan – via a Development Agreement – for the development of the entire Badlands and not just portions of it;" and, 2) the City advised him that "[the Landowners] either get an approved Development Agreement for the entirety of the Badlands ***or we get nothing***." *LO Appx., Ex 48, Decl. Kaempfer, paras 11-13.* Emphasis Added.

The Landowners opposed the City mandated MDA, because it is not required by law or code and more importantly, it would significantly increase the time and cost to develop. *LO Appx., Ex 34, Decl. Lowie (1), para. 20.* Nevertheless, the City left the Landowners no choice, so they moved forward with the City's proposed MDA concept, that included development of the 35 Acre Property, along with the 17, 65, and 133 Acre properties. *Id.*

The MDA process started in or about Spring of 2015 and through this process the City dictated to the Landowners exactly how the City wanted the Land developed, which included how the 35 Acre Property would be developed, and the precise information and documents the City wanted as part of the MDA application process. L*O Appx., Ex 34, Decl. Lowie (1), paras. 20-21.* The City's demands were oppressive, unreasonable, and overburdensome, with the City Planning Department and City Attorney's Office drafting the MDA almost entirely.[14] The Mayor indicated that City Staff had dedicated "an excess of hundreds of hours beyond the full day" working on the MDA. *LO Appx., Ex. 54, lines 697-701.*

[14] *LO Appx., Ex. 53, June 21, 2017 Transcr. City Council Meeting, LO 00000367 lines 333-335; 446 lines 2471-2472; 447 lines 2479-2480; 465 lines 2964-2965; Ex. 54, August 2, 2017 Transcr. City Council Meeting, p. 26 lines 691-692.*

The uncontested evidence shows that these City demands, which were part of the MDA, ***cost the Landowners more than $1 million over and above the normal costs for a development application*** of this type, further demonstrating the City's oppressive demands. *LO Appx. Ex. 34, Decl. Lowie (1), para. 21:4-6.* In an effort to comply, so that development could occur, the Landowners agreed to <u>every single</u> City demand and paid over $1 million in *extra* application costs. *LO Appx. Ex. 34, Decl. Lowie (1), para. 20:26-27. See also e.g. LO Appx. Ex. 55, City required MDA concessions signed by Landowners and Ex. 56, MDA memos and emails regarding MDA changes.* The Mayor acknowledged as much, stating, "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." *LO Appx., Ex. 53 lines 2462-2465.* Councilwoman Tarkanian commented that she had never seen anybody give as many concessions as the Landowners as part of the MDA stating, "I've never seen that much given before." *LO Appx., Ex. 53 lines 2785-2787; 2810-2811.*

The City demands, <u>prior to</u> the MDA being submitted for approval included, without limitation, detailed architectural drawings including 3D digital models for topography, elevations, etc., regional traffic studies, complete civil engineering packages, master detailed sewer studies, drainage studies, school district studies. *LO Appx. Ex. 34, Decl. Lowie (1), p. 6, para. 21.* Mr. Lowie's Declaration provides, "[i]n all my years of development and experience such costly and timely requirements **are never required prior to the application approval** because no developer would make such an extraordinary investment prior to entitlements, ie. approval of the application by the City." *LO Appx. Ex. 34, Decl. Lowie (1), p. 6, para. 21:6-10.* Emphasis added.

The City also demanded onerous concessions as part of 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.[15] Additional, non-exhaustive City demands / concessions made of the Landowners, as part of the MDA, included: 1) donation of approximately 100 acres as landscape, park equestrian facility, and recreation areas; 2) building brand new driveways and security gates and gate houses for Queensridge; 3) building two new parks, one with a vineyard; and, 4) reducing the number of units, increasing the minimum acreage lot size, and reducing the number and height of the towers.[16] During the process the City required at least 700 changes and 16 new and revised versions of the MDA.[17]

After a year and half of the City's MDA demands, 16 re-drafts, and no end in sight, it became clear the City was intent on engaging in a never-ending process that was imposing unreasonable burdens on the Landowners over and above the normal application process. The Landowners communicated their frustration, stating the unreasonable changes to the MDA were 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

[15] As just one example of this, *see LO Appx., Ex. 57, LO 00001838-1845.* Another example of the significant changes requested and made over time can be seen in a redline comparison of just two of the MDAs – the MDA dated July 12, 2016 and the MDA dated May 22, 2017. *LO Appx., Ex 58.* During just this eight-month period there were 544 total changes to the MDA. *Id.* These changes can also be seen in a redline comparison of the "Design Guidelines" that were part of the MDA. *LO Appx., Ex. 59.* 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.*

[16] *LO Appx., Ex. 60, LO 00001836; Ex. 54, lines 599-601; Ex. 60, LO 00001837*; *LO Appx., Ex. 53, lines 2060-2070; Ex. 60 and Exhibit 55*.

[17] *LO Appx,. Exs. 58 and 59,* final page of exhibits show the over 700 changes. *LO Appx., Ex. 61* consists of 16 versions of the MDA generated from January, 2016 to July, 2017. *LO Appx. Ex 61, LO 00001188 - 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. *LO Appx. Ex. 53, LO 00000447-450.*

and/or through homeowners [surrounding neighbors] to the City."[18] The City Attorney also recognized the "frustration" of the Landowners due to the length of time negotiating the MDA.[19]

Seeing no end whatsoever to the City-mandated MDA process, the Landowners approached the City Planning Department to develop the 35 Acre Property as a stand-alone development, rather than as part of the MDA, and asked the Planning Department to set forth all requirements the City could possibly impose on the Landowners to develop the 35 Acre Property by itself. *LO Appx. Ex. 34, Decl. Lowie, p. 6, para 23.* The City Planning Department worked with the Landowners to prepare the residential development applications for the 35 Acre Property. *LO Appx. Ex. 34, Decl. Lowie, p. 6, para. 24.* The applications were completed and properly submitted to develop the 35 Acre Property as a stand-alone property. *Id.; LO Appx, Exs. 62-72, 35 Acre Applications.* The City Planning Department issued Staff Reports stating that the applications the Planning Department and the Landowners jointly prepared were consistent with the R-PD7 hard zoning, met all requirements in the Nevada Revised Statutes and the City's Unified Development Code (Title 19), and recommended approval to allow the Landowners to develop the 35 Acre Property. *LO Appx., Ex. 73, City Planning Department Staff Report to Planning Commission; Ex. 74, City Planning Department Staff Report to City Council; Ex. 75, Transcript, February 14, 2017, Planning Commission, 35 Acre Applications.*

The 35 Acre Property as a stand-alone development was presented to the City Council for approval on June 21, 2017. Tom Perrigo, the City's Planning Director stated at the hearing on the Landowners' applications that the proposed development met all City requirements and should be

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[18] *LO Appx., Ex. 54, Transcr. August 2, 2017 City Council Meeting, lines 378-380.*

[19] "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. 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." City Attorney Brad Jerbic. *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council Meeting, lines 2990-2993.*

approved. *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council meeting, 35 Acre Applications, pp. 22-23, lines 566-587.* One City Council members acknowledged at the hearing that the 35 Acre Property applications met all City requirements, stating the proposed development was "so far inside the existing lines [the Las Vegas Code requirements]." *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council meeting, 35 Acre Applications, p. 97, lines 2588-2590.* The City Council, however, re-stated its firm position that it opposed individual development applications and insisted on the MDA for the entire 250 Acre Residential Zoned Land: 1) "I have to oppose this, because it's piecemeal approach (Councilman Coffin);" 2) "I don't like this piecemeal stuff. I don't think it works (Councilwoman Tarkanian); and, 3) "I made a commitment that I didn't want piecemeal," there is a need to move forward, "but not on a piecemeal level. I said that from the onset," "Out of total respect, I did say that I did not want to move forward piecemeal." (Mayor Goodman). *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council meeting, 35 Acre Applications, p. 98:2618; 104:2781-2782; 118:3161; 49:1304-1305; 92:2460-2461.* This confirmed that the City would not accept any application other than the MDA.

The City Council, contrary to the City's own Planning Department, Planning Commission, the City Code, and the Nevada Revised Statutes, denied the 35 Acre Property applications altogether. *LO Appx. Ex. 93, 35 Acre Application Denial Letter; see also Ex. 53, Transcr. June 21, 2017, City Council meeting, 35 Acre Applications, p. 109:2906-2911*; *Ex. 76, 35 Acre Applications City Council Minutes.* The City's official position at the hearing was: 1) the 35 Acre Property applications were consistent with zoning and met all requirements in the Nevada Revised Statutes and City Unified Development Code (Title 19); and, 2) the sole reason for denying the applications was the City wanted one MDA for the entire 250 Acres, not "piecemeal" development. "The City continued to make it clear to [the Landowners] that it would not allow

development of individual parcels but demanded that development only occur by way of the MDA." *LO Appx. Ex. 34, Decl. Lowie, p. 6, para. 24:25-27.*

Intent on developing the 35 Acre Property, the Landowners turned their attention back to the unreasonable and oppressive MDA. In total, the Landowners worked with the City for 2 ½ years on the MDA (between Spring, 2015, and August 2, 2017) and accepted all 700 changes and at least 16 different City re-drafts of the MDA. During this time, the entire property sat idle with the Landowners paying all carrying costs (including over $1 million per year in real property taxes) while the City delayed development with its 700 changes and 16 do-overs.

On August 2, 2017, (approximately 40 days after the City denied the applications to develop the 35 Acre Property as a stand-alone project on the sole basis it wanted the MDA) the MDA application,[20] along with the MDA,[21] was presented to the City Council for approval - a day that will live in infamy forever for the Landowners. The City Planning Department issued a Staff Report, stating the MDA met all requirements in the Nevada Revised Statutes and the City's Unified Development Code (Title 19), and that the MDA should be approved to allow the Landowners to develop the entire 250 Acres. *LO Appx., Ex. 77, MDA City Staff Report to City Council.* Despite offering the MDA as the only application the City would accept to develop any part of the 250 Acres (including the 35 Acre Property); repeated assurances from the City that it would approve the MDA after denying the 35 Acre Property stand-alone applications; the fact that the City itself drafted the MDA; and the City's own Planning Department recommending approval, **the City denied the MDA** altogether on August 2, 2017. *LO Appx. Ex. 78, MDA- Denial Minutes; Ex 54, Transcr. August 2, 2017, City Council meeting (MDA), pp. 149:4154-4156; 153:4273-4275.*

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[20] *LO Appx., Ex. 79, MDA Application; Ex. 80, MDA Application, Bill No. 2017-17.*

[21] *LO Appx., Ex., 81, Master Development Agreement; Ex. 82, MDA Addendum; Ex. 83, MDA Design Guidelines; Ex. 84, MDA Justification Letter; Ex. 85, MDA Location and Aerial Maps; Ex. 86, MDA Supporting Documents (1); Ex. 87, MDA Supporting Documents (2).*

The City did not ask the Landowners to make more concessions, like increasing setbacks or reducing units per acre, it simply denied the MDA which denied the development of the entire 250 Acre Property, including the 35 Acre Property. *LO Appx. Ex. 34, Decl. Lowie, p. 7, para. 26. LO Appx. Ex. 78, MDA- Denial Minutes; Ex. 54, Transcript, August 2, 2017, City Council (MDA), pp. 149:4154-4156; 153:4273-4275.*

The City denied the individual 35 Acre Property applications because it demanded an MDA, then the City denied the MDA. This establishes that the City's assertion that it wanted to see the entire 250 Acres developed under the MDA as one unit was nothing more than a farce. Regardless of whether the Landowners submit individual applications (35 Acre Property applications) or one omnibus plan for the entire 250 Acres (the MDA), the City denied any and all uses of the 35 Acre Property.

C. Further Takings Actions by the City

As will be explained in the Legal Argument below, the City's above-described actions alone meet Nevada's taking standard for the Landowners' First, Third and Fourth Claims for Relief. However, the following shows additional actions the City engaged in to further preclude all use of the 35 Acre Property.

The City denied the Landowners routine over-the-counter request for access. 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. *LO Appx., Ex. 88, Access Application*. This was a routine over the counter request and is specifically excluded from City Council review. *LO Appx., Ex. 90 at 002818*, LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii). Moreover, the Nevada Supreme Court has held that a landowner cannot be denied access to abutting roadways, because all property that abuts the roadway has a special right of easement for access purposes and this is a recognized property right in Nevada. Schwartz v. State, 111 Nev. 998

(1995). The Court held that this right exists "despite the fact that the Landowner had not yet developed access." Id., at 1003. Contrary to this Nevada law and its own City Code, the City denied the access application citing as the sole basis for the denial, the potential impact to "***surrounding properties***." *LO Appx., Ex 89, Access Denial Letter, LO 00002365.* Emphasis added. In violation of its own City Code, the City required that the matter be presented to the City Council through a "Major Review" process pursuant to LVMC 19.16.100(G)(1)(b), which is substantial. *LO Appx., Ex. 90, LVMC 19.16.100.* It requires a pre-application conference, plan submittal, circulation to interested City departments for comments, recommendation, requirements, and publicly noticed Planning Commission and City Council hearings. The City placed this extraordinary barrier to access, because the City is preserving the property for the use of the owners of the "***surrounding properties***."

The City also denied the Landowners routine over-the-counter fence request. In August 2017, after the MDA denial, the Landowners filed a routine request to install chain link fencing with the City to enclose two water features/ponds that are located on the 250 Acres. *LO Appx., Ex. 91, Fence Application.* 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. *LO Appx., Ex. 90,* LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii). The City denied the application, again stating its consideration for the "***surrounding properties***." *LO Appx., Ex 92, Fence Denial.* Emphasis added. The City improperly required that this routine fence matter also go through the Major Review Process because the City is preserving the Landowners' property for the use of the owners of the "***surrounding properties***."

The City denied the Landowners' request to develop the 133 Acre Property. As part of the numerous development applications filed by the Landowners between 2015 and 2018 to develop all or portions of the 250 Acre Residential Zoned Land, in October and November 2017,

after the MDA denial, the Landowners filed detailed applications to develop the 133 Acre Property with residential units, consistent with the R-PD7 hard zoning. *LO Appx., Ex. 97, 133 Acre Applications, Combined; Ex. 98, 133 Acre Applications, Justification Letter.* The City Planning Staff thoroughly reviewed the applications and provided a detailed analysis recommending approval, because the proposed residential development was consistent with the R-PD7 hard zoning and it met all requirements in the Nevada Revised Statutes and the Unified Development Code (Title 19). *LO Appx., Ex. 99, Ex. 100, Ex. 101, Ex. 102 and Ex. 103, City Planning Staff Reports for all 133 Acre Applications.* None of this mattered to the City Council. **It first unnecessarily delayed the matter for *three months***[22] and then refused to grant or deny the applications, and instead **struck the applications** at the hearing.[23] *LO Appx., Ex. 105, 133 Acre Application, May 17, 2018, Notice Letters Striking Applications; LO Appx., Ex. 106, Transcr. May 5, 2018 City Council meeting (133 Acre Strike Applications), p. 74:2082-84.* This illustrates the length to which the City was working to preserve the entire 250 Acres for the surrounding properties.

After denial of the MDA, **the City raced to adopt two City Bills that solely target the 250 Acre Residential Zoned Land in order to prevent all use of the Land – <u>Bill No. 2018-5</u>**

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[22] *LO Appx., Ex. 104, Transcr. February 21, 2018, City Council meeting (133 Acre App. Abeyance), pp. 13-14.*

[23] For these applications, the City forced the Landowner to file a GPA or else it would not "consider the applications." *LO Appx., Ex. 129, letter to City Planning Department*. The Landowners complied but filed under protest. *LO Appx., Ex. 129*. Remarkably, the City struck the applications on the basis that the GPA, the very application the City forced the Landowners to file, *was untimely pursuant to the City Code*. The City thus, required the Landowner to file the application for a GPA that it would later use as a reason for denial claiming it "violated the code we have in place for a 12-month cooling off period" [application for a general plan amendment [GPA]. 2018 – May 16, 227-232. Again, implementing a catch-22 barrier to development of this Land. The City Planning Department objected and testified that this application was filed at their "request" and not required when there is no change in zoning. City 1029-1035. Yet the City struck all of the applications and refused to consider development of the 133 Acre Property. *See LO Appx., Ex. 135, Transcript at 40 lines 1114-1115.*

and Bill No. 2018-24.[24] *LO Appx., Ex. 107, Bill No. 2018-5; LO Appx., Ex. 108, Bill No. 2018-24; Ex. 109, Transcr. November 7, 2018 City Council meeting (Adopt Bill No. 2018-24), p. 146.* The sole and undisputed analysis performed to determine the properties impacted by these two Bills concluded the Bills targeted only the Landowners' 250 Acres.[25] The City's own councilperson acknowledged as much, stating "**I call it the Yohan Lowie [a principle with the Landowners] Bill**."[26] And, the uncontested evidence verifies that these Bills authorize the public, including the surrounding property owners, to physically enter the Landowners' Property – a text book per se regulatory taking - by requiring the Landowners to provide for "***ongoing public access*** ….[and to] ensure that such access is maintained." *LO Appx., Ex. 108, Bill No. 2018-24, p. 11, section G.2.d.*

In addition, the uncontested evidence shows these two Bills impose impossible to overcome barriers to develop the 250 Acre Residential Zoned Land. For example, on August 13, 2018, the City advised the Landowners' engineer company that "zoning/planning approval of the entitlements on a property are required to be approved prior to conditional approval being given on a TDS [technical drainage study]." *LO Appx., Ex. 117, GCW Meeting Minutes, highlighted.* Yet, Bill No. 2018-24, that was signed by the City attorney on June 27, 2018, and adopted on November 7, 2018, states as a requirement to submit an application to develop, approval of a "conceptual master drainage study." *LO Appx., Ex. 108, Bill No. 2018-24, section (e)(1).* Thus, a

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[24] It is no coincidence that the 133 Acre Property applications were delayed until the day of the hearing on the adoption of these Bills. Notably, the Bills were adopted and less than 2 hours later 133 Acre applications were stricken from the agenda forcing the Landowner to "start over". *See LO Appx., Ex. 135, Transcript 5/15/18 Agenda items 71 & 74-83, page 26 line 740.*

[25] *LO Appx., Ex. 10, Transcript, October 15, 2018, Recommending Committee (Bill No. 2018-24), p. 7:169-191; Ex. 111, Bill No. 2018-24, Kaempfer Opposition, October 15, 2018, Part 1; Ex. 112, Bill No. 2018-24, Kaempfer Opposition, October 15, 2018, Part 2. See also Ex. 113, Bill No. 2018-24, Hutchison Opposition Letter, July 17, 2018.*

[26] *LO Appx., Ex. 114, Transcript, May 16, 2018, City Council (Bill No. 2018-5), p. 17:487 and p. 1:57-58. See also LO Appx., Ex. 115, Bill No. 2018-5, Fiore Opening Statement, p. 1; LO Appx., Ex. 116, Transcript, May 14, 2018 Recommending Committee (Bill No. 2018-5), p. 6:149-50.*

development application could not be submitted without a drainage study and a drainage study could not be conducted without approval of a development application. This is the proverbial catch-22.

Just some of the additional (impossible to meet) barriers included in the Bills which must be satisfied ***before*** a development application can even be submitted are the following: a master plan (showing areas proposed to remain open space, recreational amenities, wildlife habitat, areas proposed for residential use, including acreage, density, unit numbers and type, areas proposed for commercial, including acreage, density and type, a density or intensity), a full and complete development agreement, an environmental assessment (showing the project's impact on wildlife, water, drainage, and ecology), a phase I environmental assessment report, a master drainage study, a master traffic study, a master sanitary sewer study with total land uses proposes, connecting points, identification of all connection points, a 3D model of the project with accurate topography to show visual impacts as well as an edge condition cross section with improvements callouts and maintenance responsibility, analysis and report of alternatives for development, rationale for development, a mitigation report, CC&Rs for the development area, *a closure maintenance plan showing how the property will continue to be maintained as it has in the past* (providing security and monitoring), development review to assure the development complies with "other" City policies and standards, and ***anything else*** "the [City Planning] Department may determine are necessary." *LO Appx., Ex. 107, Bill No. 2018-5 and Ex. 108, Bill No. 2018-24, ad passim.* No developer would engage in these outrageous costs ***before*** submitting an application. The City knew this, which is why it imposed the same solely on the Landowners' Property, as the City did not want development on the Landowners' Property because the City is preserving the property for the surrounding neighbors' use and enjoyment.

Bill 2018-24 also makes it a misdemeanor subject to a $1,000 a day fine or "imprisonment for a term of not more than six months" if the Landowners do not comply with the Bills outrageous requirements, including maintaining the golf course, even if it is losing money and ongoing public access. *LO Appx., Ex. 108, Bill No. 2018-24, p. 12.* At the September 4, and November 7, 2018, meetings the City Staff confirmed that the Closure Maintenance Plan part of the Bill (which is where the authorization for public access is found) ***would be applied retroactively***. *LO Appx., Ex. 118, Transcr. November 7, 2018 at 03487-03488, 03607, 03616-03617, City Council minutes for Bill 2018-24; LO Appx., Ex. 119, Transcr. September 4, 2018 at 3710 lines 255-261.* In other words, the City adopted a Bill that forces the Landowners to acquiesce to a physical occupation of their Property by forcing the Landowners to allow "***ongoing public access***" onto their Property or be subjected to criminal charges.[27]

D. Further Evidence of the City's Public Purpose in Taking the Landowners' Property

While the Landowners do not need to establish *why* the City has taken their property, it does put into context to all of the City's actions. Accordingly, the following is further evidence of the "public purpose" for the City's taking of the 250 Acre Residential Zoned Land:

- The City repeatedly stated the intent to prohibit any development on any part of the 250 Acre Residential Zoned Land was so it could purchase the entire property as follows: 1) identifying $15 million of potential City funds to purchase the 250 Acres (notwithstanding the Land was not for sale)[28]; 2) advancing a City "proposal regarding the **acquisition and**

[27] The City's counsel must have finally convinced the City that these Bills subjected the City to inverse condemnation liability and to help in their defense against the Landowners' inverse condemnation claims the City should repeal these Bills. The City did so on January 15, 2020. However, once government's actions have worked a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 33 (2012). "A bank robber might give the loot back, but he still robbed the bank." Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162, 2170, 2172 (2019). Therefore, any repeal does not negate the taking. Moreover, this repeal was only of the Yohan Lowie Bills; it was not a repeal of all other City action against the Landowners' Property.

[28] *LO Appx Ex. 144, Seroka email regarding December 15, 2017 Opioid Lawsuit allocation of funds.*

re-zoning of green space land [250 Acre Property];"[29] proposing a Bill to force the 250 Acres to remain "Open Space," contrary to its legal zoning;[30] and, telling the surrounding neighbors the solution is to "Sell off the balance to be a golf course with water rights (key). Keep the bulk of Queensridge green." *LO Appx., Ex. 122, at LO 00002344.* Engaging a golf course architect to "repurpose" the Landowners' Property. *LO Appx., Ex. 145, email and proposal of Golf Course Architects.*

- One Councilman referred to the Landowners proposal to build large estate homes on his residentially zoned land as the same as "Bibi Netanyahu's insertion of the concreted settlements in the West Bank neighborhoods." *LO Appx., Ex. 123, March 27, 2017 Letter from Coffin to Polikoff.*

- Then-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,[31] and 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," and in an interview with KNPR stated that he would "turn [the Landowners' private property] over to the City." *LO Appx., Ex. 125, Seroka Campaign Literature and KNPR Interview.*

- In reference to development on the Landowners' Property, then-Councilman Coffin stated firmly "I am voting against the whole thing," and "a majority is standing in his [Landowners] path [to development],[32] **before** the applications were even finalized and presented to the City Council,[33] the councilman refers to the Landowners' representative as a "sonofab[…]," "A[…]hole," "scum," "motherf[…]er," "greedy developer," "dirtball," "clown," and Narciss[ist]" with a "mental disorder,"[34] and seeks "intel" against the Landowner through a PI in case he needs to "get rough" with the Landowners.[35]

- Then-Councilmen Coffin and Seroka also exchanged emails wherein they stated they will not compromise one inch and that they "need an approach to accomplish the desired outcome," - prevent all development on the Landowners' Property. *LO Appx., Ex. 122, Coffin Email at LO 00002340*.

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[29] *LO Appx., Ex. 128, September 26, 2018 email to then-councilman Seroka.* Emphasis supplied.

[30] *LO Appx., Ex. 121, August 29, 2018 email from then-councilman Bob Coffin.*

[31] *LO Appx., 124, Transc. February 14, 2017 Planning Commission Meeting, with Still Image*

[32] *LO Appx., Ex. 122, Coffin Email at 00002341*; *LO Appx., Ex. 126, Bob Coffin Facebook post.*

[33] This statement was made by email on April 6, 2017, and the applications were not even presented to the City Council until June 21 and August 2 of 2017.

[34] *LO Appx., Ex. 121, August 29, 2018 email by then-councilman Bob Coffin.*

[35] In a text message to an unknown recipient, Councilman Coffin stated: "Any word on your PI enquiry about badlands [250 Acre Residential Zoned Land] guy? While you are waiting to hear **is there a fair amount of intel on the scum** behind [sic] the badlands [250 Acre Residential Zoned Land] takeover? **Dirt will be handy if I need to get rough.** *LO Appx., Ex. 127, Coffin Text messages, LO 00002969.* (emphasis supplied)*; see also LO Appx., Ex. 126, Bob Coffin Facebook Post.*

- The City further singled out the Landowners' Property stating "If any one sees a permit for a grading or clear and grub at the ***Badlands*** Golf Course [250 Acre Residential Zoned Land], please see Kevin, Rod, or me. **Do Not Permit without approval from one of these three**." *LO Appx., Ex. 130, June 27, 2017, City email.* Italics in original.

- City Council members even sought to hide information related to actions toward the Landowners' Property after being issued a documents subpoena,[36] with instruction given, in violation of the Nevada Public Records Act,[37] on how to avoid 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).*

The City acknowledged that it was denying the Landowners' use of the 35 Are Property so it could be preserved for the adjoining Queensridge Community. The City sent the Landowners letters after the denial of the 35 Acre stand-alone applications, which stated that, in addition to not wanting piecemeal development, the applications were denied due to "public opposition," and "concerns over the impact to proposed development on ***surrounding residents***." *LO Appx., Ex 93, 35 Acre Application, Denial Letters.*

As the Queensridge residents are the only "surrounding residents" it is clear the denials were to preserve the property for them. This was confirmed by Attorney Kaempfer wherein he testifies that, "despite our best efforts, and despite the merits of our application(s)" no development was going to be allowed unless the Queensridge Community agreed and the leader of that group firmly stated they would not agree - "I would rather see the golf course [250 Acres] a desert than a single home built on it." *LO Appx., Ex. 48, Declaration of Attorney Chris Kaempfer, p. 2, para. 12.* This was also confirmed by documents obtained as part of a FOIA request, which show the

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[36] *LO Appx., Ex. 122, Coffin Email at LO 00002343. (Emphasis added).* Email stating, "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 but call or write to our 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."

[37] *See NRS 239.001(4)* (use of private entities 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)

City wanted the 35 Acre Property "turned over to the City" for a for $15 Million to preserve the Property for the surrounding neighbors use as a viewshed. *LO Appx., Ex 144, City Memorandum – Thoughts on EP Opioid Lawsuit, p. 3.* And all the City Council meetings are replete with the neighbors demanding the City preserve the Landowners' Property for their own use.

E. The Tax Assessor

In their attempts to develop, the Landowners even presented to the City Council, the Notice of Decision[38] by the City's own tax assessor[39] that the lawful use of the 133 Acre Property is "residential,"[40] that the tax assessor valued the 250 Acres at approximately $88 million[41] based on this "residential" use, and that the City was collecting real estate taxes from the Landowners that amounted to ***over $1 million per year*** ($205,227.22 on the 35 Acre Property, alone[42]) based on this lawful residential use and, accordingly, this lawful use should be permitted. As explained, none of this mattered to the City as it was preserving the Property for the surrounding owners. And, the City's scheme to prevent development so that it could "Purchase Badlands and operate"

[38] *LO Appx., Ex. 120, Tax Assessor Notice of Decision, submitted with 133 Acre Applications.*

[39] *See* City Charter, Sec. 3.120 (1) ("The County Assessor of the County is, ex officio, the City Assessor of the City.")

[40] NRS 361.227(1) mandates that the Tax Assessor determine the taxable value of real property based on the "lawful" use to which property may be put and the Tax Assessor determined the "lawful" use of all parts of the 250 Acres to be "residential." *LO Appx., Ex. 120, Tax Assessor Notice of Decision, Submitted with the 133 Acre Applications; Ex. 49, Tax Assessor Values, $88 Million; Ex. 51, Tax Assessor Valuation for 35 Acre Property.*

[41] *LO Appx., Ex. 49, Tax Assessor Values, $88 million (the $88 million is the composite value by the Assessor of all parts of the 250 Acre Land).*

[42] *LO Appx., Ex. 50, Tax Assessor, Taxes as Assessed for 35 Acre Property.*

for "$15 Million," (which equates to less than 6% of the tax assessed value ($88 million) and likely less than 1% of the fair market value[43]) **shocks the conscience**.[44]

VI. LEGAL ARGUMENT

Summary judgment is warranted now under three of the Landowners' taking claims - First Claim for Relief (Categorical Taking), Third Claim for Relief (Regulatory Per Se Taking), Fourth Claim for Relief (Nonregulatory Taking / De Facto taking).

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

[43] The Tax Assessor value of $88 million is recognized as an extremely low value for the entire 250 Acre Land. **Error! Main Document Only.**"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." Nichols on Eminent Domain, at § 22.1, 22-6

[44] 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.

party " 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'"[45] Summary judgment is appropriately sought here.

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. 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).[46] 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. The Landowners are Entitled to Summary Judgment on the First, Third, And Fourth Claims for Relief

It has been the City's tactic in the 17, 35, 65, and 133 Acre Cases to string together non-inverse condemnation law addressing separation of powers and land use law from petitions for judicial review to argue for an impossible to meet taking standard. However, this Court must ignore this tactic and, instead, focus on the four seminal Nevada Supreme Court inverse condemnation cases that pointedly set forth Nevada's inverse condemnation taking standards - State v. Eighth Judicial District Court, 131 Nev. 411 (2015), Tien Fu Hsu v. County of Clark, 173

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

[46] *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).

P.3d 724 (Nev. 2007), McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (Nev. 2006), and Sloat v. Turner, 93 Nev. 263, 269 (1977). Nichols on Eminent Domain (Nichols) should also be considered as the Nevada Supreme Court has relied upon Nichols in at least 12 eminent domain and inverse condemnation cases.[47]

1. First Claim for Relief – Categorical Taking

The Landowners first claim for relief is a categorical taking. The Nevada Supreme Court holds that a categorical taking occurs where government action "completely deprives an owner of all economical beneficial use of her property," and, in these circumstances, just compensation is automatically warranted, meaning there is no defenses to the taking. Sisolak, supra, at 662. A categorical taking does **not** require a physical invasion. This Court has previously held this claim is a "valid claim in the State of Nevada" and has been properly pled. *LO Appx., Ex. 8, May 15, 2019 Order Denying the City's Motion for Judgment on the Pleadings, pp. 4-5.*

Nevada's categorical taking standard is met here. As detailed above, the City has **denied 100%** of the Landowners' repeated attempts to use the 35 Acre Property - the City denied the 35 Acre stand-alone applications, denied the MDA application, denied the access application, and denied the fence application. The City then adopted Bills to make it impossible to use the Property for any purpose for the benefit of the surrounding neighbors. *LO Appx., Ex. 107, 108, 48, 136, 150*. As a result, the property lies vacant and useless,[48] all while the Landowners are paying

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[47] *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 (2004); County of Clark v. Sun State Properties Ltd., 119 Nev. 329, 336 (2003); City of Las Vegas v. Bustos, 119 Nev. 360, 362 (2003); City of Las Vegas v. Pappas, 119 Nev. 429, 441 (2003); National Advertising Co. v. State, Dept. of Transp., 116 Nev. 107, 113 (2000); Argier v. Nevada Power Co., 114 Nev. 137, 139 (1998); Schwartz v. State, 111 Nev. 998, 1002 (1995); Stagecoach Utilities Inc. v. Stagecoach General Imp. Dist., 102 Nev. 363, 365 (1986); Manke v. Airport Authority of Washoe County, 101 Nev. 755, 759 (1985); Sloat v. Turner, 93 Nev. 263, 268 (1977); State v. Olsen, 76 Nev. 176, 187 (1960).

[48] In addition to the golf course operations being a financial loss, the golf course was not a legal or economic use. A golf course use is one "that is not allowed," in any residential zoned land, such as the 250 Acre Residential Zoned Land. *See LVMC 19.12.010 (showing a golf course use*

$205,227.22 per year in real estate taxes and significant other carrying costs. Not only has the City actions "completely deprive[d] [the Landowners] of all economical beneficial use of [their] property," the actions have caused a negative value. Therefore, summary judgment should be granted on the Landowners' First Claim for Relief – Categorical Taking.

2. Third Claim for Relief - Per Se Regulatory Taking

The Landowners' third claim for relief is a per se regulatory taking. The Nevada Supreme Court holds that a per se regulatory taking occurs where government action "authorizes" the public to use private property or "preserves" private property for public use. Sisolak, supra, at 1124-25 and Hsu, supra, at 634-635. When this occurs, just compensation is automatically warranted, meaning there is no defenses to the taking. Sisolak, supra, at 662. For example, in the Sisolak and Hsu cases there was a taking, because the County of Clark adopted Ordinance 1221 that preserved Mr. Sisolak and Mr. Hsu's airspace for aircrafts to use. In Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162 (2019), there was a taking, because the Township of Scott adopted an ordinance requiring that "[a]ll cemeteries … be kept open and accessible to the general public during daylight hours." Ms. Knick owned a property with several grave markers, meaning the public was authorized to enter her property. This Court has previously held this claim is a "valid claim in the State of Nevada" and has been properly pled. *LO Appx., Ex. 8, May 15, 2019 Order Denying the City's Motion for Judgment on the Pleadings, pp. 4-5.*

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prohibited on any residential zoned land). The City Assessor issued a "Notice of Decision" that as of December 1, 2016, prior to the filing of this case, the golf course was not the "lawful" use of the property. *LO Appx., Ex. 120, Tax Assessor Notice of Decision, submitted with 133 Acre Applications.* While only an interim use, the golf course was shuttered over four years ago, because it was a financial failure, even when the Landowners leased the land for ***free*** to the operator. *LO Appx., Ex. 45, Golf Course Closure, September, 2015 & May, 2016, Par 4 Letter to Fore Star; Ex. 46, Golf Course Closure, December 1, 2016, Elite Golf Letter to Yohan Lowie; Ex. 47, Golf Course Closure, Keith Flatt Depo, Fore Stars v. Nel.*

The City has incorrectly argued that a Nevada per se regulatory taking requires the public to actually physically enter and use the property rather than just having authority to use the property or preserving the property. However, this argument belies the law in Nevada. In a companion airspace taking case, the Supreme Court held that whether the planes were actually using Mr. Sisolak's and Mr. Hsu's airspace was "inconsequential" to the liability determination; rather the Court focused on how Ordinance 1221 "preserved" the landowners' airspace for the public to use it. *LO Appx., Ex. 95, Johnson v. McCarran Int'l Airport, Supreme Court Case No. 53677, unpublished, pp. 5-6.* The Landowners understand that the Johnson case is unpublished, however, the case is critical to rebut the City's consistent misrepresentation of the Sisolak and Hsu cases. Moreover, the three main cases relied upon by the Sisolak Court for the per se regulatory taking standard (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). Therefore, even if the public is not physically using property, if the government engages in action that "authorize" the public to use private property or "preserves" private property for public use, this is a per se regulatory taking.

Nevada's per se regulatory taking standard is met here. As detailed above, as the City openly admitted its actions authorized the public to use the 35 Acre Property. The City adopted Bills 2018-5 and 2018-24 which target only the 250 Acres to prevent development and expressly states the Landowners **must** allow "ongoing public access" and "plans to ensure that such [public] access is maintained." *LO Appx., Ex. 108, Bill 2018-24- see Section G(2)(d).* The City openly admitted that it was denying all use of the 35 Acre Property for the "surrounding properties" which allowed the surrounding properties to use the 250 Acres for a viewshed and for recreation. (*LO Appx., Ex. 89, 92, 136, 150*). This was confirmed by Attorney Kaempfer who testified that,

"despite our best efforts, and despite the merits of our application(s)" the surrounding property owners wanted to use the property for their viewshed and the City would not allow development unless "virtually all" of them agreed to allow the development and the leader of that group firmly stated they would not agree - "I would rather see the golf course [250 Acre Land] a desert than a single home built on it." *LO Appx., Ex. 48, Declaration of Attorney Chris Kaempfer, p. 2, para. 12; see also LO Appx., Ex. 94, Declaration of Vickie DeHart.* The City even identified $15 million to purchase the 250 Acres for these surrounding property owners. *LO Appx., Ex. 144.* And, the City demonstrated hostility to any development that would deny the surrounding property owners use of the 35 Acre Property, with one councilman claiming the Landowners' use of their 35 Acre Property was the same as "Bibi Netanyahu's insertion of the concreted settlements in the West Bank neighborhoods."[49] As a result of the City's actions, the Landowners' Property has been preserved for public use and the public has been authorized to use the 35 Acre Property. Therefore, summary judgment should be granted on the Landowners' Third Claim for Relief – Per Se Regulatory Taking.

3. Fourth Claim for Relief - Non-regulatory De Facto Taking

The Landowners' fourth claim for relief is a non-regulatory / de facto taking. The Nevada Supreme Court holds that a non-regulatory / de facto taking occurs where, there is ***no physical invasion***, but the government has "taken steps that directly and substantially interfere[ ] with [an] owner's property rights to the extent of rendering the property **unusable or valueless to the owner**." State v. Eighth Judicial District Court, 131 Nev. 411, 421 (2015). The Court relied on Richmond Elks Hall Assoc. v. Richmond Red. Agency, 561 F.2d 1327, 1330 (9th Cir. 1977), where the Ninth Circuit held that "[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

[49] *LO Appx., Ex. 123, March 27, 2017 Letter from Coffin to Polikoff.*

of this constitutional provision; it is sufficient if the action by the government involves a **direct interference with or disturbance of property rights**." Emphasis added. And, in Sloat v. Turner, supra, the Supreme Court held a taking occurs where there is "**some derogation** of a right appurtenant to that property which is compensable" or "if some property right which is directly connected to the ownership or use of the property is **substantially impaired or extinguished**" Id., at 269. This rule is further supported by Article 1, section 22(3) of Nevada's Constitution (amended to the Constitution in 2008), which provides **"**taken **or damaged** property shall be valued at its highest and best use" and NRS 37.110(3), which provides that the court must assess the "damages" to property even though no property has been taken. Nevada is not alone in adopting this de facto taking law as the great majority of other jurisdictions have adopted a similar rule.[50] Nichols on Eminent Domain summarily describes this non-regulatory / de facto taking claim 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). Therefore, a

[50] *See e.g.* McCracken v. City of Philadelphia, 451 A.2d 1046 (Pa.Cmwlth. 1982) (holding 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." Id., at 1050. Emphasis added.); Robinson v. City of Ashdown, 783 S.W.2d 53 (Ark. 1990) (when government **"substantially diminishes** the value of a landowner's land" just compensation is required. Id., at 56. Emphasis added.). 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.). *See also LO Appx., Ex. 96, Summary of Other Jurisdiction's De Facto Taking Law.*

Nevada non-regulatory / de facto taking occurs where government action renders property unusable or valueless to the owner, substantially impairs or extinguishes some right directly connected to the property, or damages the property. This Court has previously held this claim is a "valid claim in the State of Nevada" and has been properly pled. *LO Appx., Ex. 8, May 15, 2019 Order Denying the City's Motion for Judgment on the Pleadings, pp. 4-5.*

Nevada's nonregulatory / de facto taking standard is met here. Although the Landowners have the "right" to develop residential units, **the City has denied 100%** of the Landowners' repeated attempts to use the 35 Acre Property for that purpose. The City has taken action to preserve the 35 Acre Property for use by the surrounding property owners. And, the City has mandated that the Landowners pay $205,227.22 per year in real estate taxes based on the exact same residential use the City will not allow. As a result of the City's actions, the 35 Acre Property has been rendered "useless and valueless" to the Landowners, there has been a "direct interference with or disturbance of" the 35 Acre Property, there has been "some derogation of a right appurtenant to [the 35 Acre Property] which is compensable," there has been a "property right which is directly connected to the ownership or use of the [35 Acre Property which has been] substantially impaired or extinguished," *and* there has been a "damage" to the 35 Acre Property. Therefore, summary judgment should be granted on the Landowners' Fourth Claim for Relief – Non-regulatory / De Facto Taking.

C. Because The City Singled Out The Landowners' Property, And Treated The Landowners Differently Than Any Other Owners, the Landowners' Claims Are "Much More Formidable"

Three general inverse condemnation principles are instructive in this case – 1) government action that singles out a landowner from similarly situated landowners raises the specter of a taking and makes the taking claim "much more formidable;"[51] 2) taking claims are much more formidable

[51] "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.

when government action targets vacant property, because it causes the landowner to become an involuntary trustee holding the vacant land for the government;[52] and, 3) "[w]hether the governmental entity acted in bad faith may also be a consideration in determining whether a governmental action gives rise to a compensable taking."[53]

As explained above, the City, in a rare but clear display of government overreach, made sure to hit every one of these escalating principles. The City clearly singled out the Landowners' Property, even adopting the "Yohan Lowie Bills" that solely target the 250 Acre Residential Zoned Land.[54] The City actions forced the Landowners to hold the 35 Acre Property in a vacant

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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); *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)." Lucas v. South Carolina Costal Council, 505 U.S. 1003, 1074, 112 S.Ct. 2886, 2924 (1992)(Stevens, j., dissenting).

[52] Ehrlander v. State, 797 P.2d 629, 634 (1990) (recognizing 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."); Manke v. Airport Authority, 101 Nev. 755, 757 (1985) (recognizing 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"); Althaus v. U.S., 7 Cl.Ct. 688, 695 (1985) (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.); Lange v. State, 86 Wash.2d 585, 595 (1976) (acknowledging that the effect of condemnation activity targeting vacant land "chains" landowners to the property.); Community Redevelopment Agency of City of Hawthorne v. Force Electronics, 55 Cal.App.4th 622, 634 (Cal. App. 1997) (recognizing government taking actions result in improperly making the landowner an "involuntary lender" who is forced to finance public projects without the payment of just compensation.).

[53] Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468, 487 (Tx. 2012). *See also* City of Austin v. Teague, 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.).

[54] *LO Appx., Ex. 114 line 487*; see also *Ex. 132*; *Ex. 53, Transcr. June 21, 2017 City Council meeting, line 1230*, wherein Tom Perrigo statement that six properties like the Landowners' were approved for development; *Ex. 133, map showing 1,067 approved developments contrary to the Peccole Plan.*

condition. And, the City clearly acted in bad faith, stating no valid reason to preclude all use of the 35 Acre Property other than the unconstitutional reason to freeze the use of the property for the surrounding properties.

VII. CONCLUSION

As explained, for a proper taking analysis, the Court is required to make two distinct "sub inquiries" in the correct order. First, what is the property interest the Landowners owned in the 35 Acre Property ***before*** the City engaged in its actions. Second, whether the government engaged in actions to take that underlying property interest.

This Court has already decided the first sub-inquiry; that the 35 Acre Property included the "right" to develop residentially. The Landowners now respectfully request that this Court enter an order on the second sub-inquiry that there has been a taking; that the City action in this case meets the standards for three of the Landowners' claims for relief - First (categorical), Third (per se regulatory), and Fourth (nonregulatory / de facto) because:

1) the City has denied all use of the Landowners' Property so that the Property is preserved in an undeveloped state for the surrounding owners' use (viewshed, open space, recreation) and the City adopted two Bills to implement the preservation of the Landowners' Property for this public use; and

2) the City adopted a Bill that forces the Landowners to acquiesce to a physical occupation of their Property by forcing the Landowners to allow "***ongoing public access***" onto their Property or be subjected to criminal charges.

Respectfully submitted this 26th day of March, 2021.

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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 26th day of March, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of **PLAINTIFF LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF** was served on the below via the Court's electronic filing/service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to, the following:

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