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. 24

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Pursuant to NRCP 12(b)(1) and 12(b)(5), Defendant CITY OF LAS VEGAS ("City") moves the Court for an Order dismissing the *Petition for Judicial Review, Complaint for Declaratory Relief, and Alternative Verified Claims in Inverse Condemnation* (the "Complaint") of Plaintiff 180 LAND COMPANY, LLC. Dismissal of the Developer's Complaint is warranted for lack of jurisdiction and failure to state claims upon which relief may be granted. The City respectively request that all claims be dismissed with prejudice.

Dated this 27th day of August, 2018.

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NOTICE OF MOTION

TO: ALL PARTIES AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the City of Las Vegas will bring its MOTION TO DISMISS for hearing before Department XXVI of the above-entitled Court on the 2 day of Oct., 2018, at the hour of 9:30 a.m. or as soon thereafter as counsel may be heard.

DATED this 27th day of August, 2018.

McDONALD CARANO LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is one of several cases concerning efforts by the Plaintiff and its affiliates (collectively, "the Developer") to convert the former Badlands Golf Course into residential housing. In each of these cases, the Developer erroneously asserts that it has vested rights to develop the golf course property based on an "R-PD7" zoning designation. Nevada law is clear that there are no vested rights in zoning. Because the Developer's claims are based on this faulty legal premise, they fail as a matter of law.

The Complaint challenges the City Council's action to strike the Developer's development applications for a 133-acre portion of the Badlands property ("the Applications") as procedurally incomplete. According to the Council's decision, the Developer need only file an application for a major modification to the Peccole Ranch Master Development Plan and comply with the City's Unified Development Code §19.16.030(D), which prohibits successive duplicative general plan amendment applications within a 12-month period, to have its Applications considered. Absent those prerequisites, the Developer's claims are not ripe for review.

Even were the Court to consider the Developer's claims now, they must be dismissed with prejudice as time barred, as prohibited by issue preclusion and for failure to state a claim upon which relief can be granted.

II. RELEVANT FACTUAL BACKGROUND

A. The Crockett Decision

On November 15, 2015, the Plaintiff's affiliate, Seventy Acres, LLC, filed applications for a General Plan Amendment (GPA-62387), Re-Zoning (ZON-62392), and Site Development Plan Review (SDR-62393) seeking to develop a 17.49-acre portion of the golf course property, which the City Council approved. Adjacent homeowners filed a petition for judicial review, which was assigned to the Honorable James Crockett in Department XXIV as Case No. A-17-752344-J. On March 5, 2018, Judge Crockett granted the homeowners' petition, ruling as a matter of law that the Title 19.10.040 of the City's Unified Development Code required the Council to first approve

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a major modification to the Peccole Ranch Master Development Plan before any other development applications could be approved. Ex. 1.[1]

As relevant here, Judge Crockett's order contained the following findings of fact and conclusions of law:

- On the maps of the City's General Plan, the land for the golf course/open space drainage is expressly designated as PR-OS, meaning Parks/Recreation/Open Space. *See* Ex. 1(006) at 5:13-14.
- There are no residential units permitted in an area designated as PR-OS. *Id.*
- The City's failure to require or approve a major modification of the Peccole Ranch Master Plan was legally fatal to the City's approval of the applications at issue because, under the City's Code, the City was required to first approve a major modification, which was never done. Ex. 1(014) at 13:4-8.

The Developer appealed the Crockett Order. The City did not. The Developer's appeal is pending before the Nevada Supreme Court as Case No. 75481.

B. The 133-Acre Applications

In October 2017, the Developer filed applications to develop a 133-acre portion of the Badlands Golf Course, which sought waivers of the City's development requirements, site development plan review, tentative map applications and a general plan amendment.[2] Compl. ¶¶7, 35. The Applications came before the City Council for consideration on May 16, 2018, and the Council voted to strike the Applications as incomplete for two reasons. First, they did not include an application for a major modification, as Judge Crockett's Order required. Compl. ¶64. Second, the application for a general plan amendment violated the City's Unified Development Code §19.16.030(D) because it was duplicative of one that had been filed within the previous 12-month period. Compl. ¶¶7, 56.

The Developer then filed this action asserting a petition for judicial review and claims for declaratory and injunctive relief, takings and alleged due process violations. For the following reasons, the action must be dismissed.

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[1] The City attaches this and other publicly available documents and asks that the Court take judicial notice of them pursuant to NRS 47.130 and 47.150.

[2] Although, throughout the Complaint, the Developer refers to its applications as "Tentative Map Applications," this is not entirely accurate.

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III. LEGAL ARGUMENT

A. The Court Lacks Subject Matter Jurisdiction Because Plaintiff's Claims Are Not Ripe

Because the Developer has not given the Council an opportunity to consider an application for a major modification, and the Developer's requested relief is contingent upon the Nevada Supreme Court affirming Judge Crockett's Order, the ripeness doctrine bars the Court from exercising jurisdiction over this case. "Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief." *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988), *quoting Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). To that end, the Nevada Supreme Court has adopted a two-part test for ripeness established by the U.S. Supreme Court, which requires courts to evaluate: "(1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review." *In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Ripeness pertains to the Court's subject matter jurisdiction and therefore is properly raised in a Rule 12(b)(1) motion to dismiss. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

1. The Issues Are Not Fit for Review

Because the Developer has yet to submit a major modification application for the Council's consideration, and because the Crockett Order may be reversed on appeal, the issues presented in this case lack the fitness of review needed to satisfy the ripeness doctrine. "In gauging the fitness of the issues in a case for judicial resolution, courts are centrally concerned with whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Resnick*, 104 Nev. at 66, 752 P.2d at 233, *quoting* L. Tribe, *American Constitutional Law* 78 (2nd ed. 1988). "Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be present." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006).

Here, the Developer's claims are not ripe for review for two primary reasons: (1) the Developer has not sought a major modification of the Master Development Plan and (2) it is

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unknown how the Supreme Court will decide the Developer's appeal of the Crockett Order. The Court cannot determine if or to what extent a taking has occurred unless the Developer seeks a major modification of the Master Development Plan. The mere fact that the Council rejected the Developer's Applications as incomplete because they did not include a major modification application as required by the Crockett Order does not, in and of itself, prevent the Developer from developing the golf course property. To the contrary, it implies that the Developer may develop the property upon obtaining approval of a major modification.

With respect to the second reason, the uncertainty of the appeal, and the fact that the Developer's claims are contingent upon an unsuccessful appeal, make the issues raised in the Complaint unfit for review. *See Resnick*, 104 Nev. at 66, 752 P.2d at 233. This Court lacks jurisdiction to consider a collateral attack on Judge Crockett's Order. *Rohlfing v. Second Jud. Dist. Ct.*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990) (citing Nev. Const. art. 6, § 6; NRS 3.220). Only an appellate court may consider the propriety of that order. If the appellate court affirms, the Developer lacks any legal grounds to assert the claims it raises here. If the appellate court reverses, the Developer can resubmit its Applications for the Council's consideration. Until that time, the issues are not fit for review.

2. Dismissal Will Not Impose Any Hardship on the Developer

In that the Developer may submit an application for a major modification at any time and continue to prosecute its appeal of Judge Crockett's Order, dismissal of the Complaint for lack of ripeness will impose no hardship. The ripeness doctrine "focuses on the timing of the action rather than on the party bringing the action." *In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003). Dismissal for lack of ripeness until all contingencies are satisfied does not constitute a hardship. Indeed, the Developer controls whether and when to file a major modification application in support of its Applications but has simply chosen not to. No hardship exists here.

3. The Developer Cannot Satisfy the Additional Ripeness Requirements for Inverse Condemnation Claims

Because the Developer has not sought a major modification, it also has not satisfied additional ripeness requirements to assert takings claims. A takings claim is not ripe unless "the

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government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). "A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of all economically beneficial use of the property … or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (internal citations and quotations omitted).

To resolve a takings claim, a court must know "the extent of permitted development on the land in question." *Id.*, *quoting MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986)). "[T]he final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted." *Id.*, *citing MacDonald, Sommer*, 477 U.S. at 353 n.9. The decisions of the U.S. Supreme Court regarding ripeness of inverse condemnation claims "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer*, 477 U.S. at 351.

Here, the Council's action to strike the Applications as incomplete in the absence of a major modification application does not foreclose development on the Property or preclude the City from ultimately approving the Applications or other development applications that the Developer may subsequently submit. It simply held that the City would not consider the Applications without the Developer first submitting a major modification application. As a result, there has been no final determination of the Developer's rights to develop the Property, and the Complaint must be dismissed on ripeness grounds. *See Palazzolo*, 533 U.S. at 618.

B. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted

1. Rule 12(b)(5) Standard

NRCP 12(b)(5) requires dismissal when a party has failed to state a claim upon which relief can be granted. On a motion to dismiss, the court "is to determine whether or not the

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challenged pleading sets forth allegations sufficient to make out the elements of a right to relief." *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792, 858 P.2d 380, 381 (1993). While the court must accept all factual allegations in the complaint as true, only "fair" inferences must be accepted. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). Bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not defeat a motion to dismiss. *See G.K. Las Vegas, Ltd. P'ship v. Simon Prop. Grp., Inc.,* 460 F. Supp. 2d 1246, 1261 (D. Nev. 2006). In addition to the allegations in the complaint, matters of public record may be considered on a motion to dismiss. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

2. Plaintiff's Takings Claims and Requests for Declaratory and Injunctive Relief Are Time Barred

The statute of limitations has run on the Developer's challenge to the parks, recreation and open space designation for the Property in the City's General Plan because that designation has existed since as least 1992. Takings claims are subject to a 15-year statute of limitations. *White Pine Lumber v. City of Reno*, 106 Nev. 778, 779, 801 P.2d 1370, 1371 (1990). For the purpose of a statute of limitations, a landowner claiming inverse condemnation is bound by its predecessor's acceptance of regulatory conditions imposed on the land and from which the predecessor benefitted. *Serra Canyon Co. v. California Coastal Com.*, 16 Cal. Rptr. 3d 110, 113 (Cal. Ct. App. 2004); *Ojavan Inv'rs, Inc. v. California Coastal Com.*, 32 Cal. Rptr. 2d 103, 110 (Cal. Ct. App. 1994), as modified on denial of reh'g (July 13, 1994) (successors acquire property "with the same limitations and restrictions which bound their predecessors in interest"). The limitation period commenced when the regulatory action occurred, even if the predecessor chose not to challenge it. *Serra Canyon*, 16 Cal. Rptr. 3d at 113.

Nevada law is similarly clear that a development restriction created by a predecessor landowner binds successors. *See* NRS 278.0205; *Tompkins v. Buttrum Const. Co. of Nevada*, 99 Nev. 142, 146, 659 P.2d 865, 868 (1983) (noting that successor landowner steps into shoes of predecessor, and "one who creates a restriction is not permitted to violate it"); *Gladstone v. Gregory*, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979) (holding that successor owner could not

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violate height restriction recorded by predecessor). In other words, the Developer can have no greater rights in the property than its predecessor.

Here, the Developer's Complaint challenges the General Plan's parks, recreation and open space designation on the Property. Compl. ¶¶27-29, 33, 61, 89-98. However, the open space designation was sought by and obtained by the Developer's predecessor in the 1989 Peccole Ranch Master Development Plan, as amended in 1990. Ex. 2. The City then incorporated that open space designation into its General Plan in 1992 and all subsequent ones since. Ex. 3. The 1992, 1996 and 1999 General Plan Land Use element maps show the area that was developed into the golf course property as parks, recreation and open space. Ex. 3.

The master plan area is subject to the terms, requirements and commitments made by the Developer's predecessor in the Master Development Plan. *See* Unified Development Code 19.10.040(F)-(G). In 1990, the Developer's predecessor received approval to develop 4,247 residential units within the master planned area of Peccole Ranch Master Development Plan conditioned upon setting aside 253 acres for golf course, open space and drainage. Ex. 2(027, 029, 035) at pp. 10, 12, 18. Only by doing so was the Developer's predecessor able to satisfy the City's parks set-aside requirement. Ex. 2(029) at p.12. The Developer's predecessor chose the location of the open space and developed the golf course in furtherance of the development plan it submitted, deriving economic benefit from being able to sell houses that abutted or were in close proximity to an open space amenity. Ex. 2(027, 029) at pp. 10, 12. The Peccole Ranch final maps identified the golf course land and likewise depicted a public drainage easement of the golf course property. Ex. 4.

Where the Developer's claims are premised on the General Plan's parks, recreation and open space designation and the Peccole Ranch Master Development Plan's set aside of the property for open space and drainage, which were invited and accepted by the Developer's predecessor, they are time barred. *See White Pine Lumber*, 106 Nev. at 779, 801 P.2d at 1371.

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3. Plaintiff Has Waived Any Challenge to a General Plan Amendment or Major Modification Requirement

The Developer is not in a position to challenge the need for a General Plan Amendment or a major modification of the Master Development Plan when it and its predecessors either actively sought the open space designation and/or assented to filing a general plan amendment. Failure of the predecessor to challenge restrictions and conditions on property constitutes a waiver to which the successor is bound. *City of Berkeley v. 1080 Delaware, LLC*, 184 Cal. Rptr. 3d 177, 182 (Cal. Ct. App. 2015), as modified (Feb. 26, 2015). Under Nevada law, a waiver is implied from "conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." *Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 457, 916 P.2d 786, 792 (1996); *see also City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 119 Nev. 429, 441, 76 P.3d 1, 9 (2003) (applying waiver doctrine in takings case).

The Developer's predecessor never objected to the open space designations in the Peccole Ranch Master Development Plan or the City's General Plan, and to the contrary, invited them. Ex. 2. Moreover, numerous times since the General Plan first identified the area as being for parks, recreation and open space starting in 1992, the Developer and its predecessors sought general plan amendments without objecting to the PR-OS designation. For example, in 1994, the Developer's predecessor filed a general plan amendment application to change the General Plan designation of property adjacent to the golf course property. GPA 54-94, Ex. 5. The map associated with this GPA amendment recognized the golf course property as having a parks, recreation and open space designation in the General Plan, to which the Developer's predecessor did not object. Ex. 5(059).

Subsequently, in 2005, Fore Stars, Ltd., the entity now owned by the Developer, sought a General Plan Amendment to develop a 32-unit townhouse project on part of the Badlands golf course. Ex. 6. In its justification letter submitted in support of that application, Fore Stars noted that "***the General Plan designation is PR-OS*** and the site is zoned R-PD7." Ex. 6(096) (emphasis added). In other words, the same entity now owned by the Developer knew and acknowledged the PR-OS designation over a decade ago and never challenged it. Ex. 6(096, 100).

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Additionally, before it started to take the position that it now asserts regarding alleged impropriety in the PR-OS designation, the Developer filed multiple applications that recognized and assented to the open space designation. On or about November 24, 2015, the Developer filed GPA-62387, which sought to change the General Plan designation on 17 acres of the Badlands property from PR-OS to high-density residential. Ex. 7. The Developer wrote in the application that the existing general plan designation was PR-OS, and nowhere in the application did the Developer contend that the PR-OS designation was improper. Ex. 7(109). The Council approved that application. Only after Judge Crockett reversed that approval does the Developer now challenge the propriety of the PR-OS designation. Ex. 1.

Similarly, on or about February 26, 2016, the Developer filed GPA-63599 in support of its proposed new master plan for the entire 253-acre Badlands property. Ex. 8(127). Again, the Developer's application recognized the existing PR-OS designation and did not object to that designation. Ex. 8(127). Also, in support of its proposed new master plan, the Developer filed an application for a major modification to the existing Peccole Ranch Master Development Plan, MOD-63600. Ex. 9. Because the City's Unified Development Code prevents a landowner from filing successive, duplicative general plan amendment applications within a 12-month period, the Developer now takes the position that a General Plan Amendment is not required. *See* §19.16.030(D).

As the actions of the Developer and its predecessors show, the Developer has waived any right to now challenge the propriety of the General Plan and Master Development Plan designations for the Badlands property. *See Hudson*, 112 Nev. at 457, 916 P.2d at 792. The Developer took title to the property with record notice that such designations existed. Exs. 2, 3 and 4. It bore the risk that the Council might exercise its discretion to deny a General Plan Amendment. Dismissal of the complaint is therefore warranted.

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4. The Constitutional Claims Fail as a Matter of Law Because the Developer Has No Vested Rights

a. The R-PD7 Zoning Designation Does Not Give the Developer a Vested Right to Have its Applications Approved

The Developer erroneously contends that the R-PD7 zoning on the Property confers a vested right to develop residential units at a density of up to 7.49 units per acre. That is not the law: "In order for rights in a proposed development project to vest, zoning or use approvals ***must not be subject to further governmental discretionary action affecting project commencement***, and the developer must prove considerable reliance on the approvals granted." *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (emphasis added); *see also Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527–28, 96 P.3d 756, 759–60 (2004) (holding that because City's site development review process under Title 19.18.050 involved discretionary action by Council, the project proponent had no vested right to construct). "[C]ompatible zoning does not, *ipso facto*, divest a municipal government of the right to deny certain uses based upon considerations of public interest." *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *see also Nev. Contractors v. Washoe Cnty.*, 106 Nev. 310, 311, 792 P.2d 31, 31-32 (1990) (affirming county commission's denial of a special use permit even though property was zoned for the use).

Here, the Applications submitted by the Developer were subject to the Council's discretionary approval. *See Am. W. Dev., Inc.*, 111 Nev. at 807, 898 P.2d at 112; *Cty. of Clark v. Doumani*, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998) (*superseded by statute on other grounds*); *Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nevada, Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983). The council members were free to exercise their discretion to consider, deny, or strike the Applications, no matter the zoning designation, so long as their actions were not arbitrary and capricious. *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112. As a result, the Developer's unsupported assertion that it has a "vested right" to develop the Property is legally erroneous.

b. NRS 278.349(e) Does Not Confer Any Vested Rights

The Developer's reliance on NRS 278.349(3)(e) as a basis for its claim of a vested right is misplaced for a number of reasons. First, NRS 278.349 relates only to tentative maps and not to

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the waiver, site development plan review and general plan amendment applications also filed by the Developer, which fall squarely within the Council's discretionary decision making and prior to which no vested right may attach. *See Stratosphere*, 120 Nev. at 527–28, 96 P.3d at 759-60. Second, a tentative map is a mechanism by which a landowner may divide a parcel of land into five or more parcels for transfer or development; approval of a map alone does not grant development rights. NRS 278.019; NRS 278.320.

Third, it is well-established law in Nevada that zoning must conform to the master plan, not the other way around. NRS 278.250(2). Pursuant to that statute, "municipal entities must adopt zoning regulations that are in substantial agreement with the master plan." *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995), quoting *Nova Horizon v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989). The City's Unified Development Code provides:

> It is the intent of the City Council that all regulatory decisions made pursuant to this Title be consistent with the General Plan. For purposes of this Section, "consistency with the General Plan" means not only consistency with the Plan's land use and density designations, but also consistency with all policies and programs of the General Plan, including those that promote compatibility of uses and densities, and orderly development consistent with available resources. Section 19.00.040.

Since at least 1992, the City's General Plan has set forth the City's policy to maintain the golf course property for parks, open space and recreation. Ex. 3. The City has an obligation to plan for these types of things, and when engaging in its General Plan process, chose to maintain the open space use for this area that was specified in the 1989 Peccole Ranch Master Development Plan, as amended in 1990. Ex. 2; *see also* Unified Development Code §19.00.050 (describing zoning districts as "one of the means of implementing the City's General Plan"). The zoning for the planned development district as a whole does not confer vested rights to develop any particular parcel in a manner that does not conform with the master planning documents. *See Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723.

Finally, NRS 278.349(3) merely provides that the governing body "shall consider" a list of factors when deciding whether to approve a tentative map. Subsection (e) is only one factor. Nothing in NRS 278.349 compels the conclusion that a municipality must approve a tentative map

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based only on an assertion that land is zoned for a particular use. NRS 278.349(e) cannot be construed to circumvent the black letter law that a zoning designation does not create a vested right. *Tighe*, 108 Nev. at 443, 833 P.2d at 1137.

c. Absent a Vested Right, Plaintiff's Constitutional Claims Are Legally Infirm

With no vested right to have the Applications granted, the Developer cannot state a constitutional claim. Constitutional guarantees are only triggered by a vested right. *See Nicholas v. State*, 116 Nev. 40, 44, 992 P.2d 262, 265 (2000); *Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949). Even if the Developer could be deemed to have constitutionally protected rights, its constitutional claims nevertheless must be dismissed.

First, the due process claim fails as a matter of law because the Developer received adequate notice of the Council's action and an opportunity to be heard. The agenda for the Council's May 16, 2018 meeting contained item #71, which stated: "Any items from the afternoon session that the Council, staff and/or the applicant ***wish to be stricken*** or held in abeyance to a future meeting may be brought forward and acted upon at this time." Ex. 10(146) (emphasis added). The Developer's Applications were listed as items 74 through 83 in the Council's afternoon session. Ex. 10(146-147). As a result, the Developer was on notice that its items could be stricken. *See id.* The Council had discretion as to how it wished to dispose of the Applications, whether through a vote to strike them or deny them. *Stratosphere*, 120 Nev. at 527–28, 96 P.3d at 759-60.

Moreover, it is undisputed that the Developer had the opportunity to be heard. Prior to the Council's action, the Developer's principal and ***three*** of its lawyers spoke at the Council meeting, taking a total of 20 minutes. Ex. 11(159, 199-205, 215-217). This is far beyond what is constitutionally required. *See J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 377, 240 P.3d 1033, 1041 (2010) ("Due process is satisfied where interested parties are given an 'opportunity to be heard at a meaningful time and in a meaningful manner.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

As to the various takings claims, absent any final regulatory action, there can be no taking as a matter of law. The Council's decision to strike the Applications as procedurally incomplete

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necessarily means that, should the Developer submit complete applications, they will be considered. Nothing can be deemed "taken" when the Developer can comply with Judge Crockett's Order and the Unified Development Code to have its applications considered. All constitutional claims, therefore, are legally insufficient.

5. The Council's Decision to Comply With Judge Crockett's Order, as a Matter of Law, Cannot be Deemed Arbitrary and Capricious

It was well within the Council's discretion to reject the Applications as incomplete because they were not accompanied by a major modification application, as required by Judge Crockett's Order. Judge Crockett's Order held:

> The City's failure to require or approve a major modification of the Peccole Ranch Master Plan was legally fatal to the City's approval of [other] applications [to develop the Badlands property] because, under the City's Code, the City was required to approve a major modification, which was never done. Ex. 1(014) at 13:4-8.

"[A] court has inherent power to protect the dignity and decency of its proceedings and to enforce its decrees, and thus it may issue contempt orders and sanction or dismiss an action for litigation abuses." *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007). It was well within the Council's discretion to avoid potential contempt sanctions by, prior to considering the Applications, requiring the Developer to submit a major modification application.

6. Injunctive Relief is a Remedy, Not a Cause of Action

The Developer's second alternative cause of action for a preliminary injunction should be dismissed because "[i]njunctive relief is a remedy, not a cause of action." *Nationstar Mortg., LLC v. Maplewood Springs Homeowners Ass'n*, 238 F. Supp. 3d 1257, 1267 (D. Nev. 2017); *see Dynalectric Co. of Nev. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 485 n.7, 255 P.3d 286, 289 n.7 (2011) (referring to an injunction as a remedy); *State Farm Mut. Auto Ins. Co. v. Jafbros, Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) (same). As the Supreme Court has explained, injunctive relief is available "to restrain a wrongful act that ***gives rise to a cause of action***." *Chateau Vegas Wine, Inc. v. S. Wine & Spirits of Am., Inc.*, 127 Nev. 818, 824, 265 P.3d 680, 684 (2011) (emphasis added). It does not itself constitute a cause of action. *See id.* To the

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extent the Developer seeks the remedy of an injunction, it must first prove the elements of a cognizable claim. Because injunctive relief is not a cognizable claim, it should be dismissed.

Even if the Court could treat a request for injunctive relief as a separate cause of action (it cannot), the Developer's second claim for relief should still be dismissed because the Developer has not adequately alleged irreparable harm and is unlikely to succeed on the merits. Irreparable harm is an injury "for which compensatory damage is an inadequate remedy." *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. Adv. Op. 38, 351 P.3d 720, 723 (2015). Where "money damages are an adequate remedy for the vindication of [a plaintiff's] rights," there is no irreparable harm and a district court should not issue extraordinary relief in the form of an injunction. *No. One Rent-A-Car v. Ramada Inns, Inc.*, 94 Nev. 779, 781, 587 P.2d 1329, 1330-31 (1978).

By pleading inverse condemnation claims in its Complaint, the Developer concedes that its alleged harm could be rectified through damages in that the only remedy for a taking is "just compensation." "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. As a result, "prospective injunctive relief is an inappropriate remedy" for an alleged taking. *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 849 (9th Cir. 2001), *aff'd sub nom. Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003). Moreover, because as set forth in this motion, the Developer's claims must be dismissed as a matter of law, it is unlikely to succeed on the merits. Its "claim" for preliminary injunctive relief should therefore be dismissed.

C. The Complaint Must Be Dismissed on Grounds of Issue Preclusion

Issue preclusion applies when the following elements are satisfied: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008). Each of these elements applies to the Crockett Order's holding that a major modification was required as a condition to approving the Applications.

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1. The Issue of Whether a Major Modification is a Prerequisite to Development of the Badlands Property is Identical to the Instant Case

"Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op. 28, 321 P.3d 912, 916-17 (2014). The issue decided in the Crockett Order – namely, whether a major modification of the Master Plan to change the PR-OS designation for the Badlands Property was necessary before the City Council could approve the Applications – is precisely the issue presented here. The Developer cannot circumvent issue preclusion by now challenging whether the PR-OS designation was invalid because the gravamen of its argument is that it should be allowed to build residential units on the property based purely on the R-PD7 zoning designation. As a result, the first element of issue preclusion is readily satisfied here.

2. The Crockett Order is a Final Judgment on the Merits

A final judgment is "any order from which an appeal lies." NRCP 54(a). Having filed a notice of appeal of the Crockett Order, the Developer concedes that is was a final judgment on the merits.

3. The Developer Was a Party to the Action in Which the Crockett Order Issued and/or in Privity With Those Parties

a. The Law Deems 180 Land Co LLC to be a Party to the Crockett Case

The Complaint indicates that the Plaintiff here and the named defendant in the Crockett Case, Seventy Acres, LLC ("Seventy Acres"), are affiliates under common ownership and control, such that issue preclusion would apply to both. Compl. ¶46. For purposes of preclusion doctrines, a "party" is one who is "directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment." *Paradise Palms*, 89 Nev. at 30-31, 505 P.2d at 598, *citing Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n,* 122 P.2d 892 (Cal. 1942).

Additionally, in numerous public proceedings, the Developer represented that the Plaintiff and Seventy Acres are affiliates under common ownership and control. In matters before the City

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Council, the Developer represented that the 250.92 Badlands Property was acquired by Fore Stars, Ltd., whose stock was then "acquired (through various entities and family limited partnerships) by the same principals as EHB Companies LLC." *See* Feb. 26, 2016 letter from Yohan Lowie to Tom Perrigo, Ex. 9(135). Fore Stars then transferred most of the 250.92 acres to two affiliates: 180 Land Co., LLC (178.27 acres) and Seventy Acres, LLC (70.52 acres) and retained the remaining 2.13 acres. (*Id.*). The three affiliated entities – 180 Land Co, LLC; Seventy Acres LLC; and Fore Stars, Ltd. – are all managed by EHB Companies, LLC, which, in turn, is managed by Yohan Lowie. Ex. 9. Mr. Lowie was the primary representative for all of these entities with regard to various development applications before the Council. Based on the Developer's representations, 180 Land, Fore Stars and Seventy Acres should be deemed parties to the Crockett Case. *See Paradise Palms Cmty. Ass'n v. Paradise Homes*, 89 Nev. 27, 30, 505 P.2d 596, 598 (1973).

b. 180 Land is in Privity With Seventy Acres

Even if the Developer is not deemed a "party" to the Crockett Case, it is certainly in privity with Seventy Acres under an adequate representation analysis. In *Mendenhall v. Tassinari*, 133 Nev. Adv. Op. 78, 403 P.3d 364, 369 (2017), the Supreme Court found that privity existed between certain entities and its corporate parent because of a "substantial identity" between them. This is consistent with the Restatement (Second) of Judgments §59(3), which looks at common ownership among entities for the purpose of evaluating whether a judgment as to one entity is conclusive on another.

Here, with identical ownership and management, the interests of Seventy Acres and the Plaintiff were completely aligned with respect to the subject matter of the Crockett Case, and Seventy Acres therefore adequately represented the Plaintiff's interests there. Moreover, in each of the each of the pending district court cases relating to the development of the Badlands Property in which both the Plaintiff and Seventy Acres are named parties, the two entities have never filed separate pleadings or motions and have always been represented together by the same counsel to advance their collective interests. As a result, privity exists between Seventy Acres and the Plaintiff for purposes of issue preclusion.

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4. The Major Modification Prerequisite and PR-OS Designation Were Actually and Necessarily Litigated in the Previous Action

The issue presented by the Developer here was actually and necessarily litigated in the Crockett Case. When an issue is properly raised and is submitted for determination, the issue is actually litigated for issue preclusion to apply. *Alcantara*, Inc., 130 Nev. at _, 321 P.3d at 918, *citing Frei v. Goodsell*, 129 Nev. 403, 305 P.3d 70, 72 (2013); *see also* Restatement (Second) of Judgments § 27 cmt. d (1982)). Whether the issue was necessarily litigated turns on whether "the common issue was necessary to the judgment in the earlier suit." *Alcantra*, 130 Nev. at __, 321 P.3d at 918, *quoting Tarkanian v. State Indus. Ins. Sys.*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994)).

Here, the Crockett Case turned on the PR-OS designation for the Badlands Property and whether a major modification of the Master Plan was necessary before the Applications could be approved. Judge Crockett's decision was predicated on his findings that the PR-OS designation existed on the Badlands property and precluded residential development. *See* Ex. 1 at pp. 5:13-14. This case challenges that very determination. As a result, the fourth element of issue preclusion applies to bar this case.

IV. CONCLUSION

Multiple bases exist to dismiss this action in its entirety for lack of jurisdiction and failure to state a claim. First, the Developer's claims cannot be deemed ripe until the Developer seeks and receives a decision on a major modification, and its appeal of the Crockett Order is decided. Second, the Developer's claims are time barred and fail to state a claim upon which relief can be granted. Third, issue preclusion bars the claims asserted here. As a result, all claims must be dismissed with prejudice.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 27th day of August, 2018.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 27th day of August, 2018, a true and correct copy of the foregoing **CITY OF LAS VEGAS' MOTION TO DISMISS** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

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Exhibit 20

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Judicial Review/Appeal	**COURT MINUTES**	**February 15, 2019**

A-18-775804-J 180 Land Company LLC, Petitioner(s)
vs.
Las Vegas City of, Respondent(s)

February 15, 2019 **03:00 AM** **All Pending Motions**

HEARD BY: Sturman, Gloria **COURTROOM:**

COURT CLERK: Shell, Lorna

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

This matter came on for argument on January 15, 2019 on the Motion to Dismiss filed by the City of Las Vegas (City) and Opposition/Countermotions to allow a More Definite Statement/ or for Stay/ and/or for NRCP 56(f) relief filed by Plaintiff 180 Land Co. (Landowner), supplemental briefing having been provided by the parties and the matter having been taken under advisement COURT HEREBY FINDS as follows:

COURT ORDERED, City's Motion to Dismiss GRANTED IN PART as to the Petition for Judicial Review only on the grounds of issue preclusion; Judge Crockett having decided the same issue in his Order issued in A-17-752344 and as that decision is currently on appeal, the dismissal herein is WITHOUT PREJUDICE should that decision be overturned.

COURT FURTHER ORDERED, Landowner's Countermotion for a More Definite Statement and/or for Stay and/or 56(f) relief DENIED AS MOOT as to the Petition for Judicial Review; however, the Complaint on file herein states alternative claims for Inverse Condemnation which may proceed in the ordinary course.

Counsel for the City shall prepare an Order in accordance with this minute order and provide counsel for the Landowner an opportunity to review for form and content, within 30 days from this date.

CLERK'S NOTE: A copy of this minute order was e-mailed, mailed, or faxed as follows: James Leavitt, Esq. (Jim@kermittwaters.com) and George Ogilvie, Esq. (gogilvie@mcdonaldcarano.com) ./ls 02-15-19

Exhibit 21

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 75481

SEVENTY ACRES, LLC,

Appellant,

v.

JACK B. BINION ET AL,

Respondents,

On Appeal from Eighth Judicial District Court
Honorable Jim Crockett

RESPONDENTS' ANSWERING BRIEF

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Attorneys for Respondents

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Turner Investments, LTD is a Nevada Limited Liability Company owned by Clyde Turner. Pyramid Lakes Holding LLC is a Nevada Limited Liability owned by Tim and Kris Ann McGarry. All other Respondents are individuals and/or trustees of the respective trust identified.

Pisanelli Bice represents the Respondents in this Court and similarly represented the Respondents in the District Court.

DATED this 6th day of February, 2018.

PISANELLI BICE PLLC

By: /s/ *Todd L. Bice*
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Attorneys for Respondents

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I. ROUTING STATEMENT

This matter is presumptively before the Court of Appeals. Namely, a petition from judicial review from the City of Las Vegas' (the "City") approval of developmental applications in contravention of the law. NRAP 17(b)(10). However, Respondents Jack B. Binion, Duncan R. and Irene Lee, individuals and trustees of the Lee Family Trust, Frank A. Schreck, Turner Investments, LTD, Rover P. and Carolyn G. Wagner, individuals and trustees of the Wagner Family Trust, Betty Englestad as trustee of the Betty Englestad Trust, Pyramid Lake Holdings, LLC, Jason and Shereen Awad as trustees of the Awad Asset Protection Trust, Thomas Love as trustee of the Zena Trust, Steve and Karen Thomas as trustees of the Steve and Karen Thomas Trust, Susan Sullivan as trustee of the Kenneth J. Sullivan Family Trust, Dr. Gregory Bigler and Sally Bigler (collectively the "Surrounding Homeowners") do not object to the Court retaining this appeal.

But, the Surrounding Homeowners certainly dispute Appellant Seventy Acres, LLC ("Seventy Acres") naked and unsupported assertion that this appeal presents "issues of error correction," issues of "first impression" concerning the United States or Nevada Constitution, or issues of "first impression" of statewide public importance. NRAP 17(a)(10)-(11).

II. ISSUES PRESENTED

1. Whether the District Court correctly found that the City must follow its own laws – laws that it has long interpreted to preclude altering a master plan residential community without seeking what is known as a Major Modification under the City's Code – and rejecting a one-time interpretation that was meant for litigation purposes?

2. Is the City's land use approval improper – changing the City's General Plan as well as a residential communities' Master Plan –when it rests upon the Developer "promising" to negotiate "in the future" if the City will just give him approvals now?

3. Whether this Court should entertain the Developer's purported judicial taking claim raised for the first time on appeal, even though the developer has already chosen to pursue that issue in a separate district court proceeding, and if so, does a judicial decision which makes no changes to any property rights amount to a taking under the Fifth Amendment?

III. STATEMENT OF THE CASE / SUMMARY OF THE ARGUMENT

This appeal arises from a land speculator's acquisition of approximately 250 acres of land set aside to serve as open space/parks/drainage within the Peccole Ranch Master Plan. Specifically, decades after this planned community's creation

and development, Yohan Lowie ("Lowie")[1], and the entities he controls[2] sought to fundamentally change the Peccole Ranch Master Planned Development by subdividing the property and then developing it for additional housing within the Master Plan community.[3] The Developer's present appeal stems from three applications related to his desire to build a 435 residential housing unit on approximately 17 acres of the land designated as Park/Open Space/Drainage within this Master Plan community.

The Developer's appeal seeks to revise history and the record below. The Developer omits (tellingly) the City's repeated applications of its own Code in explaining that no development may occur on the subject property absent compliance with the City Code's Title 19 provisions governing modifications of a

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[1] The seated justices of the Nevada Supreme Court have in the past recused themselves from hearing matters pertaining to Mr. Lowie and his companies as the Court's past "business relationship would cause a reasonable person to question the impartiality of all the currently seated justices…" *See RA Southeast Land, LLC v. Eighth Jud. Dist. Ct.*, No. 68778, Order of Recusal, filed June 8, 2016.

[2] The named Appellant in this matter is Seventy Acres. This is one of three single-member limited liability companies that is ultimately owned and controlled by Lowie and his affiliated company, EHB Companies, LLC ("EHB"). The other two entities are 180 Land Co., LLC ("180 Land") and Fore Stars, LTD. ("Fore Stars"). Collectively these entities and individuals are referred to as the "Developer" in this brief.

[3] The manner in which Developer subdivided the property is the subject of a separate lawsuit and related petition for this Court. *See Fore Stars, LTD, et al v. Eighth Jud. Dist. Ct.*, Case No. 73813.

previously approved Master Plan. Indeed, the Developer knew full well of this requirements which is why it submitted an application. It was only when the Developer realized he could not secure the votes – having lost a vote on a Major Modification before the Planning Commission – that he suddenly reversed course and brow beat the City's Planning Director into claiming that the Code meant the opposite of what the City had long insisted.

When confronted by the District Court over this prior and long-standing Interpretation, the City Attorney adopted an utterly new interpretation – solely developed in litigation – and claimed that the City's prior position should be disregarded as a "mistake". But as the District Court recognized, there was no "mistake." Instead, the City has simply manufactured a new interpretation – for the first time in litigation –to rationalize land use approvals that the City knew violated the requirements of its Code, approvals that were given based upon little more than the Developer's "promise" that in the future he could "negotiate". 71 AA 17423.

Contrary to the wants of the Developer, the City is bound to follow the requirements of its own Code, particularly requirements the City has long recognized and which the Developer himself recognized until they became an inconvenient obstacle. Tellingly, the City has accepted the District Court's ruling that it violated its own Code and declined to appeal.

IV. STATEMENT OF THE FACTS

A. The Development of the Peccole Ranch Master Plan Community.

In 1986, the Peccole Family presented their initial Master Development Plan under the name Venetian Foothills to the City. 11 AA 2666-2672. The original Master Plan contemplated two 18-hole golf courses (which would become known as Canyon Gate in Phase I and Badlands in Phase II). *Id*. The golf courses were "the focal point of the development," designed to be in a major flood zone and designated to serve as flood drainage and open space. *Id*. The City mandated these designations to address the natural flood problem and serve as the open space necessary for master plan developments. 11 AA 2628 – 2633.

In 1989, the Peccole Family submitted and the City approved the Peccole Ranch Master Plan that focused upon Phase I in the area from W. Sahara north to W. Charleston Blvd within the boundaries of Hualapai Way on the west and Durango Dr. on the east. In 1990, as development progressed on Phase I, the Peccole Family presented their Phase II portion of the Peccole Ranch Master Plan to the City, focusing upon the land located from west Charleston Boulevard north to Alta Drive west to Hualapai Way and east to Durango Drive ("Phase II Master Plan" or "Peccole Ranch Master Plan"). 15 AA 3452-3473. Queensridge (as it is known today) was included as part of this plan and covered West Charleston Boulevard north to Alta Drive, west to Hualapai Way and east to Rampart Boulevard. 15 AA 3465 ("A 50

acre single-family parcel central to Phase Two offers extensive golf course frontage to future residents in an exclusive environment bounded on all sides by the golf course.").

The Peccole Ranch Master Plan specifically defined what would become known as the Badlands golf course as flood drainage/golf course in addition to satisfying the required open space/parks necessitated by the City for a Master Planned Development. 15 AA 3463-3465. The Phase II Master Plan expressly designated the land as golf course drainage/open space and specifically was presented as zero net density and zero net units. 15 AA 3471. As the Phase II Master Plan makes clear, the Peccole Family knew residential development would not be feasible in the natural flood zone, but a golf course could be used to enhance the value of the surrounding residential lots:

> A focal point of Peccole Ranch Phase Two is the 199.8 acre golf course and open space drainage way system which traverses the site along the natural wash system. All residential parcels within Phase Two, except one, have exposure to the golf course and open space areas . . . . The close proximity to Angel Park along with the extensive ***golf course and open space network were determining factors in the decision not to integrate a public park in the proposed Plan***... The design of the ***golf course has been instrumental in*** preserving the natural character of the land and ***controlling drainage on and through the property***.

15 AA 3463-3465 (emphasis added). The Phase II Master Plan amplifies that it is a planned development, incorporating a multitude of permitted land uses as well as special emphasis on the open space:

> Incorporates office, neighborhood commercial, a nursing home, and a mixed-use village center around a strong residential base in a cohesive manner. A destination resort-casino, commercial/office and commercial center have been proposed in the most northern portion of the project area. Special attention has been given to the compatibility of neighboring uses for smooth transitioning, circulation patterns, convenience and aesthetics. ***An extensive 253 acre golf course and linear open space system winding throughout the community provides a positive focal point while creating a mechanism to handle drainage flows***.

15 AA 3457 (emphasis added). Likewise, the Phase II Master Plan outlines the permissible land use for each portion of the planned development, providing that there would be up to 2,807 single-family residential units on 401 acres, 1,440 multi-family units on 60 acres, and open space/golf course/drainage on approximately 211 acres. 15 AA 3471.

The City's Code in place in 1990 specified a zoning category known as Residential Planned Development districts ("R-PD"). Although the City's Code no longer provides for such zoning districts, this sort of zoning approval was common at the time for comprehensive planned developments. As the City's Code then provided, the purpose of the R-PD was "to allow maximum flexibility for imaginative and innovative residential design and land utilization in accordance with the General Plan. It is intended to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and homogeneity of patterns." 29 AA 7087.

The number that follows R-PD reflects the potential average number of

dwelling units allowed *per gross acre*; not the permissible use or density for all land within the Peccole Ranch Master Plan. *Id*. Instead, as shown by the Peccole Ranch Master Plan specific land use designations were provided in the plan. As the Phase II Master Plan provides for the single-family units which would border the proposed golf course/open space, the zoning sought was for a maximum of seven (7) single-family units per gross acre. 15 AA 3471. Yet, for the proposed golf course drainage, zero net density and zero net units were permitted. *Id*.

On April 4, 1990, in Case No. Z-17-90, the City Council approved Phase II of the Peccole Ranch Master Plan. 2 AA 258-266. As part of the approval, the City Council recited the land uses provided in the Peccole Ranch Master Plan. As set forth in the City's minutes of approval, the following table indicates the approved land use as an acreage for Phase II:

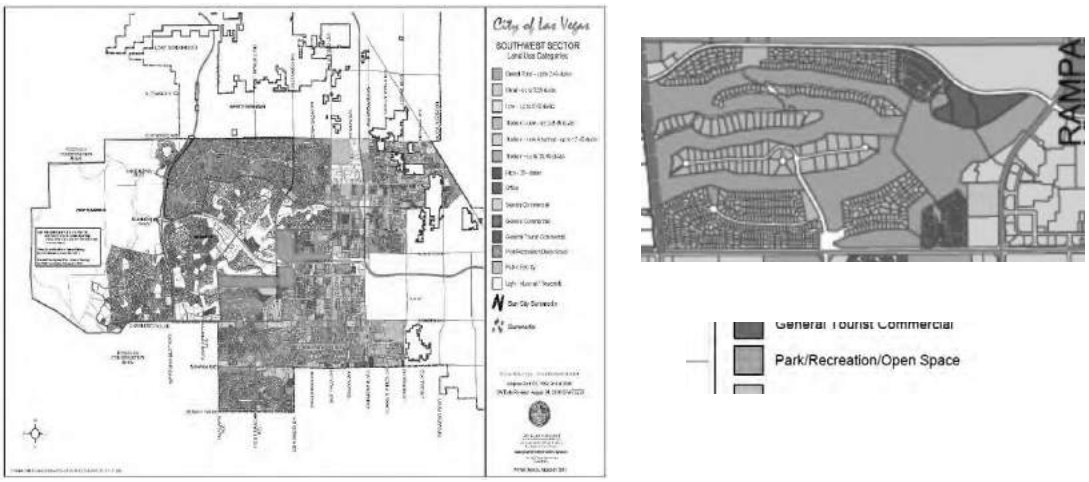
LAND USE	PHASE II ACREAGE	PERCENT OF SITE
Single Family	401	40.30 %
Multi-family	60	6.02 %
Neighborhood Commercial/Office	194.3	19.50 %
Resort/Casino	56.0	5.62 %
Golf Course/Drainage	211.6	21.24 %
School	13.1	1.31 %
Rights-of-Way	60.4	6.07 %

Id.

These specific designations of the Peccole Ranch Master Plan were incorporated as part of the R-PD zoning district and all other zoning was extinguished. Indeed, underscoring the original developer's emphasis on the use of

open space as part of its R-PD zoning approval, the City conditioned the approval with the express notation that the maximum number of dwelling units that would be allowed for Phase II was 4,247 as denoted in the Plan. *Id*. Thus, in approving the Peccole Ranch Master Plan, the City expressly designated the subject property as open space/golf course/drainage with zero net density. As shown by the City's approval of the zoning it is subject to "[c]onformance to the conditions of approval for the Peccole Ranch Master Development Plan, Phase II." *Id*.

The City confirmed the Peccole Ranch Master Plan in subsequent amendments and re-adoption of its own General or Master Plan, both in 1992 and againin 1999. 29 AA 7094-7098. On the maps of the City's Master Plan, the land for the golf course/open space/drainage is expressly designated as Parks/Recreation/Open Space (PR-OS):



29 AA 7066 (the color version is included above and is publically available

in CLV 2020 Master Plan, Land Use & Rural Neighborhoods Preservation Element, Map 3: Southwest Sector Land Use)

Both the City's Master Plan and the City's Code preclude residential units on land designed as PR-OS. As the City's Master Plan specifies: "the parks/recreation/open space category allows large public parks and recreation areas such as public and private golf courses, trails, easements, drainage ways, detention basins and other large areas or ***permanent open land***." 29 AA 6951; CLV 2020 Master Plan, Land Use & Rural Neighborhoods Preservation Element, Description of Master Plan Land Use Categories. Moreover, as the land use designation table in the City's Master Plan indicates residential density is not permitted for land designated PR-OS. *Id*.; CLV 2020 Master Plan, Land Use & Rural Neighborhoods Preservation Element, Table 5, Land Use Designations.

The City memorialized all Master Developments Plans in the 2020 Master Plan. Not coincidentally this portion of the City's Master Plan expressly identifies Peccole Ranch as a *Master Development Plan* in the Southwest Sector. 29 AA 7089-7090.

B. A Land Speculator Acquires the Property Decades Later, Betting that he can Change the Land Use.

After approval by the City, and as the City would later admit, all future development was done in deference to the Peccole Ranch Master Plan. 73 AA 17751("[s]ince adoption of the 1990 Peccole Ranch Master Plan ***the property was***

developed with deference to the Plan.")(emphasis added). Consistent with this deference, for the next two decades the Badlands golf course served as the approved open space, parks and required drainage for this master planned community. But, long after the original developer left, and the community being fully developed, a new developer, Lowie, acquired the property with the goal of removing all of the designated open space/drainage land for residential use.

Specifically, in March of 2015, the then-existing principals of Fore Stars sold their ownership interest to Lowie and other principals of EHB, who then became Fore Stars' manager. 1 AA 168 ("On March 2, 2015, the stock of Fore Stars was acquired (through various entities and family limited partnerships) by the same principals as EHB…"). After acquiring the property, Lowie then transferred approximately 180 acres and 70 acres of the property to his two other recently created entities, 180 Land and Seventy Acres, respectively. *Id*.; 11 AA 2576 – 2582. Through these three single member limited liability companies, Lowie and the other principals of EHB collectively own the land – approximately 250 acres – that was formerly known as Badlands golf course, land long-ago designated as parks/recreation/open space within this planned community. *Id*.

Indeed, the Developer knew before purchasing the property that the current land designation precluded residential units unless proper City approvals where received. Lowie would later testify at one City Council meeting that before

purchasing the property he had conversations with the City Council members from which he inferred that he would be able to secure approvals to redevelop the golf course/open space of this master planned community with housing units. 6 AA 1357 – 1360. Rather than secure any typical contingencies when purchasing the property, Lowie purchased the property - presumably at a better price without such contingencies - betting that with his political influence he could persuade the City to eliminate the Master Plan community's Park/Open Space/Drainage land so he could develop and sell the property for residential housing. 6 AA 1265 (Lowie told the surrounding homeowners that the development was a "done deal" even before he submitted his applications because he had the influence with the City Council).

C. The Developer Gets the City to Disregard its own Requirements.

1. The City admits that the Code mandates a Major Modification to the previously approved Master Plan.

Shortly after acquiring the property, in November 2015, Lowie, through Seventy Acres, filed with the City's Planning Department development applications - General Plan Amendment, Zone Change and Site Development Review - seeking to construct 720 condominium units on 17.49 acres of the Badlands golf course located on Alta/Rampart southwest corner. 11 AA 2476 (General Plan Amendment); 72 AA 17616 (Zone Change); 72 AA 17621 (Site Development Review).

This set of applications were scheduled in front of the City's Planning Commission on January 12, 2016. 71 AA 17442-17460. The Planning Report

prepared in advance confirmed that the City's Code mandated a Major Modification of the Peccole Ranch Master Plan. Specifically, as the City noted:

> The site is part of the Peccole Ranch Master Plan. ***The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outline in Title 19.10.040***.

71 AA 17448 (emphasis added).

Indeed, a critical issue noted by the City is that "[t]he proposed development ***requires a Major Modification*** of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." *Id*. (emphasis added). As the report notes, "[i]t is the determination of the Department of Planning that ***any proposed development not in conformance with the approved Peccole Ranch Master Plan*** would be ***required to pursue a Major Modification*** of the Plan prior to or concurrently with any new entitlements." 71 AA 17456 (emphasis added).

And, as the City's report confirmed, the proposed development was not in compliance with the designated land use of the Peccole Ranch Master Plan. 71 AA 17453. Nor was the proposed development in compliance with the City's Master Plan providing for a "land use designation of PR-OS (Parks/Recreation/Open Space) [that] does not allow for multi-family residential uses." 71 AA 17453. Lowie was aware of this fact as he was seeking a General Plan Amendment to lift this designation. 11 AA 2476. Yet, because the Developer had not submitted a Major Modification application, the City's Planning Staff held the matter in abeyance until

one was submitted. 71 AA 17448. As such, the applications were held over to the March 8, 2016 Planning Commission meeting. 72 AA 17526-17528.

Once again, the City's Report prepared in advance of the March 8, 2016 Planning Commission meeting recites that, "[t]he site is part of the Peccole Ranch Master Plan. The appropriate avenue for considering ***any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outline in Title 19.10.040***." 72 AA 17537-17549 (emphasis added). The Planning Department thus reiterated that "[i]t is the determination of the Department of Planning that ***any proposed development not in conformance with the approved Peccole Ranch Master Plan*** would be ***required to pursue a Major Modification*** of the Plan prior to or concurrently with any new entitlements." 72 AA 17545 (emphasis added). And once again, since the required Major Modification had not been submitted, the items were held over to the April 12, 2016 Planning Commission meeting. 72 AA 17537; 72 AA 17624-17626.

Consistent with the City's interpretation of its Code, the Developer in February 2016 finally filed an application (MOD-63600) pursuant to Title 19.10.040 for a Major Modification of the Peccole Ranch Master Plan, seeking to amend the number of allowable units, to change the land use designation of parcel, and to provide standards for redevelopment. 1 AA 055 – 58; 1 AA 167 – 170. Rather than submit multiple Major Modification applications the Developer elected to submit

one application focusing upon the entirety of the 250 acres. *Id*. As the City's report prepared in advance of the April 12, 2016 Planning Commission meeting states, "***[p]ursuant to 19.10.040***, a request has been submitted for a modification to the Peccole Ranch Master Plan to authorize removal of the golf course, change the designated land uses on those parcels to single family and multi-family residential and allow for additional residential units." 72 AA 17641 (emphasis added).

The Developer submitted the application for a Major Modification because "the determination of the Department of Planning that ***any proposed development*** not in conformance with the approved Peccole Ranch Master Plan would be ***required to pursue a Major Modification*** of the Plan prior to or concurrently with any new entitlements." 72 AA 17650 (emphasis added). As confirmed by the Planning Department a Major Modification was needed because "[s]ince adoption of the 1990 Peccole Ranch Master Plan ***the property was developed with deference to the Plan***." 73 AA 17751 (emphasis added).

Moreover as the report noted, "[a]n additional set of applications were submitted concurrently with the Major Modification that apply to the whole 250.92-acre golf course property." 72 AA 17641. These applications were submitted by Lowie's other entities (180 Land and Fore Stars) that held other portions of the Badlands golf course. 72 AA 17650. But, as Planning Department had stated three previous times, "[t]he proposed development ***requires a Major Modification of the***

Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." 72 AA 17641. Thus, the Planning Department again wanted the applications held in abeyance as it needed additional time to "review of the Major Modification and related development agreement." *Id*.

Over the next several months the applications were held in abeyance at the request of the Developer and/or the City. Yet, the City's Planning Department continuously noted any development is dependent upon an approval of a Major Modification of the Peccole Ranch Master Plan. For example, its May 10, 2016 report provides "[t]he proposed development requires a Major Modification…of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." 74 AA 18129. The City's Planning Department noted that development is "dependent on actions taken on the Major Modification." *Id*.

Likewise, in its July 12, 2016 report, the City's Planning Department found that under the City's Code "[t]he Peccole Ranch Master Plan ***must be modified to change the land use designations*** from Golf Course/Drainage to Multi-Family Residential and Single Family Residential." 77 AA 18833 (emphasis added). Indeed, the Developer understood that to "redevelop the [Badlands golf course] as anything other than a golf course or open space…a Major Modification of the 1990 Peccole Ranch Master Plan" was needed. 77 AA 18831.

But there is still more. Less than two months later, in its August 9, 2016

report, the City's Planning Department again found that "[t]he proposed development requires a Major Modification (MOD-6300) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." 82 AA 19986. Consistent with its past interpretation, "[t]he Department of Planning has determined that any proposed development not in conformance with the approved (1990) Peccole Ranch Master Plan would be required to pursue a Major Modification of the Plan prior to or concurrently with any new entitlements." 82 AA 19987. Again, the City's Planning Department made clear the need for a Major Modification "since adoption of the 1990 Peccole Ranch Master Plan, the property has been developed with deference to the Plan." 83 AA 20386.

2. The Planning Commission Denies the Major Modification Sought by the Developer.

Ultimately, all of the Developer's applications relating to the 250 acres came before a special Planning Commission meeting on October 18, 2016. 92 AA 22613 – 22614. The items before the Planning Commission sought to remove the entire 250 acre golf course drainage /open space property and replace it with residential housing, some of it high density. Included in the matters heard before the Planning Commission were, among other things, the applications related to the 720 condominium units, along with the application for a Major Modification of the Peccole Ranch Master Plan. *Id*.

The City's Planning Department again prepared reports in advance of the

meeting. In its reports, the City's Planning Department once again found that any approval is dependent upon a Major Modification of the Peccole Ranch Master Plan. 94 AA 23105-23119. Again, it explained that the proposed development on the 17.49 acre portion of the Badlands golf course "requires a Major Modification…of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-00017-90." 94 AA 23105.

Under the City's Code, "[t]he Peccole Ranch Master Plan ***must be modified to change the land use designation*** from Golf Course/Drainage to Multi-Family prior to approval," of any development. 94 AA 23108 (emphasis added). Thus, one important condition of the Planning Department's recommendation for any approval was the prior or concurrent approval of a Major Modification. 94 AA 23105-23119. Indeed, the Department noted, "***without prior approval of a modification of the Peccole Ranch Master Plan on this area, residential uses would not be allowed***." 94 AA 23108 (emphasis added).

The record reflects overwhelming public opposition to the proposed development and the requested modification to the community's Master Plan, with the Planning Commission receiving nearly four times the amount of written objections compared to written support. 87 AA 21284; 93 AA 22759; 94 AA 22999, 23097; 96 AA 23488, 23496. Nor was the public opposition from a select few of

surrounding homeowners.[4] Instead, two community-wide surveys showed nearly eighty percent of survey respondents opposed the proposed development. 92 AA 22653. Indeed, nearly three-quarters of the public in attendance at the Planning Commission meeting opposed the development. 92 AA 22654. This enormous amount of public opposition raised concerns regarding, among other things, the density, compatibility, traffic, quality of life, schools, and flood and drainage issues. 92 AA 22624 – 22625; 92 AA 22637 – 22705.

In the end, the City's Planning Commission denied the requested Major Modification (MOD-63600) and purportedly all other applications, except it approved the three applications focusing upon the 17.49 acre portion of the property by a five-to-two margin. 93 AA 22753 – 22758. In other words, the Planning Commission approved certain applications notwithstanding that it had expressly denied the Major Modification, which the City noted as a required prerequisite for any development.

3. The City Council now votes 4-to-3 to ignore the Master Plan.

All of the Developer's applications were then scheduled for the November 16,

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[4] The Developer simply embarrasses himself when he attempts to cast the opposition as a select group of surrounding homeowners who he disparagingly calls the "Queensridge Elite." Nice try. The public opposition came from nearly every facet of the community. Moreover, the Developer's use of this term is ironic since Lowie and his co-owners simultaneously tout that they are the elitist of the elite being "the single largest owners of real property" in Queensridge. *See* Developer's Op. Br., 9.

2016 City Council Meeting. But prior to that meeting, the Developer requested to withdraw without prejudice all other applications, including the Major Modification (MOD-63600), leaving the three applications (but no Major Modifications for the Master Plan) relating to the 720 multifamily residential building on a portion of the property. 1 AA 032. As shown by the Planning Commission's denial, the Developer knew it could not secure approval. Thus, the Developer switched tactics with the goal of obtaining the same outcome through a series of serial applications.

But even *after* receiving the Developer's request to withdraw all other applications, the City's Planning Director, through his staff in their report for the November 16, 2016 meeting, expressly reaffirmed that "the proposed development ***requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan***." 10 AA 2458 (emphasis added). Again, even these applications "are ***dependent*** on action taken on the ***Major Modification***" because the "***Peccole Ranch Master Plan must be modified to change the land use designation*** from Golf Course/Drainage to Multi-Family." 10 AA 2425-2428; 27 AA 6527-6530 (emphasis added).

At the beginning of the November 16, 2016 meeting the City Council approved - over public opposition and objection - the Developer's request to withdraw, without prejudice, all other developmental items expect the applications relating to the multifamily residential building on the 17.49 acre portion. 5 AA 1104-1164. The hearing on those items were then opened for public discussion.

Incidentally, after affirmatively noting that the City's Code for nearly a year required a Major Modification for any development, the City's Planning Director proffered an oral pronouncement *for the first time* that "a major modification was not required for these items." 5 AA 1166. Notably, no explanation was provided for this magical reversal. And, even the City Planning Department didn't believe it as its subsequent and later reports said the exact opposite. 47 AA 1130

The City Council then considered comments from the public. Again, there was overwhelming public opposition. The City Council heard extensive and detailed public opposition, including research, factual and legal arguments, as well as expert opinions against approval. 5 AA 1209 - 6 AA 1252. George Garcia ("Garcia"), a leader in Nevada land planning and development, provided a comprehensive background on the historical development of Peccole Ranch. As Garcia explained, the Peccole Ranch Master Plan, provided "no units, no density" whatsoever on this property and the City confirmed this fact in adopting its General/Master Plan. 5 AA 1216-1218.

Similarly, Garcia provided a detailed explanation concerning what "R-PD7" actually meant. The "PD" portion "is the plan, it is the document that says there is no residential in that golf course drainage area that was originally envisioned and, that document has not changed." 5 AA 1216. As the City's own Planning Staff knew, R-PD classification was no longer used under the City's zoning code and was

replaced by an analogous provision for PD districts. Thus, as the City's Code currently specifies, development within an R-PD district should apply the same standards and procedures applicable to equivalent districts – PD district. As Garcia explained, consistent with the Planning Staff's prior and long-standing interpretation a Major Modification is thus required. 5 AA 1222.

Other experts made similar points. For example, Michael Buckley ("Buckley"), a real estate attorney and former Planning Commissioner, reminded the City Council that when "these three applications were filed and it was presented to the Planning Commission back in January of this year, the Staff did without recommendation because there was not a major modification and they believed that there should be one." 5 AA 1225. This interpretation was not a coincidence as one of the conditions for approval contained in the current Staff Report is a Major Modification. *Id*.

Additional concerns were raised on other aspects of the proposed development. For example, Nelson Stone ("Stone"), a civil engineer, provided testimony and a report to the City Council concerning drainage and flooding issues. 5 AA 1234-1235. Stone explained that the piece of property is in a "FEMA floodplain" and given the complexities involved a drainage study should be approved prior to approval of the project. Such a drainage study had been submitted, but not approved. Brad Nelson ("Nelson"), a land developer with nearly 47 years of

experiences, testified that he had "never seen a Master Plan Community anywhere, after it's a complete, to have the icon of the community, the Badlands Golf Course, removed with no commitment to what's going to happen." 5 AA 1236-1210. As Nelson indicated to the City Council, this master plan community has been fully built out for years and the residents made investments into this community base upon this master plan. *Id*.

This point was reiterated by Richard Scott Dugan ("Dugan"), a certified general appraiser, who explained that "[i]t is well-documented that open space areas and golf courses within a Master Planned Community substantially contribute to the values of residential properties in those communities." 5 AA 1244. As records demonstrated, Peccole Ranch is an established master plan community, the original developer had a vision, which was approved by the City and residents made investments based upon this fact. Accordingly, Dugan informed the City Council that the removal of this open space amenity would "have a negative impact of $30 million to $80 million on the community." *Id*.

After closing public comments, the City Council made their comments. 6 AA 1331– 1340. Subsequently, Councilman Beers – a vocal support of the Developer – made a motion for approval. 6 AA 1348. This motion failed with four council members voting "no." 6 AA 1349. Unable to secure approval, Mayor Goodman discussed putting forth a motion that would withdrawal the applications without

prejudice with instructions for the Developer to negotiate a comprehensive and holistic plan with the surrounding residents. 6 AA 1349 - 1357.

As Mayor Goodman was set to make this motion, Lowie threatened to pull the proposed project all together and withdraw from any discussions. 6 AA 1357. As Lowie would tell the City Council, "you will never see this project again, ever, because we are only going to stick to our zoning no matter how tough the fight is." *Id*. Lowie reminded the City Council that he came to them even before purchasing the golf course to discuss development. *Id*. Yet, not getting his way, Lowie proclaimed he has "no interest anymore to meet with anybody." 6 AA 1360. Councilwomen Tarkanian noted that Lowie was attempting to bully the City Council. 6 AA 1363. Despite this recognition, Lowie's intimidation worked as the City Council subsequently approved an abeyance rather than a withdrawal. 6 AA 1372-1373.

After the abeyance, the matters came back before the City Council on February 15, 2017. Tellingly, despite the Planning Director's prior "oral" statement at the prior meeting, the Planning Department's Report latest report confirmed that under the City's Code "the proposed development ***requires a Major Modification*** (MOD-63600) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." 47 AA 11303 (emphasis added). The City's Planning Department again noted that the development was "***dependent*** on action taken on

the Major Modification" pursuant to Title 19.10.040. *Id*. (emphasis added). The City Planning Department was unequivocal: "The Department of Planning has determined that any proposed development not in conformance with the approved (1990) Peccole Ranch Master Plan would be ***required to pursue a Major Modification*** of the Plan prior to or concurrently with any new entitlements." 47 AA 11304 (emphasis added).

The information presented to the February 15, 2017 City Council meeting was largely the same. The only minor change was the Developer's announcement that it was amending the proposed development by reducing the units from 720 to 435 units on the 17.49 acres portion. 71 AA 17319. Yet, the Developer's proposal presented the same concerns and issues as before, including the failure to file an accompanying Major Modification of the Peccole Ranch Master Plan.

Once again many noted the Developer's failure to file a Major Modification. For example, Buckley indicated to the City Council that the approval with no reference to the Peccole Ranch Master Plan strips the plan of any meaning. 71 AA 17343. Frank Schreck likewise testified as to the need for a Major Modification and Planning Staff's numerous prior representations concerning the same. 71 AA 17345-17348. The City's Planning Department nor its Director disputed the need for a Major Modification or their prior representations. Rather, now the City Attorney purported to give "a flavor of one of the things" he would presumably argue in court

if the City now reversed course. 71 AA 17348. Moreover, as one observer informed the City Council, the Planning Report dated for the current meeting is littered with representations that a Major Modification was required. 71 AA 17357.

In addition, much like the previous City Council meeting, numerous members of the public expressed opposition, identifying concerns relating to, among other things, the lack of a comprehensive development plan, traffic congestion, over-crowded schools, drainage and flooding issues, and the incompatibility and inconsistency with the proposed development to the surrounding area. 71 AA 17343 - 17401.

After closing the public hearing, Mayor Goodman acknowledged that "the best thing for the entire development and for the security of the homeowners is to have a general development plan." 71 AA 17402. Councilman Anthony reiterated this, stating that "what keeps coming back in my mind is that Queensridge is a master plan community. It was master planned. It was built out." 71 AA 17407. Thus, it is "reasonable and fair that the developer plan out…the entire project." *Id*. In response to these concerns, Lowie pleaded with the City Council to approve the current proposal with the promise he would negotiate development on the rest of the property. 71 AA 17423 ("please vote on this…and allow us to move forward with some form of development so we can sit down and negotiate. You've known me for 20 years. I negotiate everything.").

In the end, despite the Code's requirements and the lack of any application to modify the Master Plan – as the City had long recognized is required - the City Council by a four-to-three margin voted to proceed anyway and approved the development. 71 AA 17433-17439. On or about February 16, 2017, The City issued its Notice of Final Action was issued.

D. The District Rules that the City Must Follow its Own Code.

Contrary to the City Council's efforts to appease this Developer, land use approvals cannot be granted in violation of the City's own code, based on a developer's assurances that it will come back in the future and "re-negotiated." Thus, on March 10, 2017, the Surrounding Homeowners timely filed their Petition for Judicial Review seeking review of the City's decision. 1 AA 001-012. In briefing, the Surrounding Homeowners argued that the City's decision should be set-aside because (1) the approval was made in contravention of the law, and (2) substantial evidence did not support the City's approval. 97 AA 23643-23665.

It bears noting how the Developer responded before the District Court as compared to the story it advances to this Court. Before the District Court, the Developer offered an altogether new theory: that a Major Modification under 19.10.040 is not prerequisite to changing the Master Plan because "Peccole Ranch was not included" as a "special area plan" in the "Land Use & Rural Neighborhoods Preservation Element of the Las Vegas 2020 Master Plan." 97 AA 23690-23691.

Ignoring the fact that the Peccole Master Plan is specifically noted as one of the City's approved Master Development Plans, even the Developer could not maintain a consistent position. It admitted that the Code's requirement for Major Modification would have applied if the Developer was seeking to change the land use on all 250 acres at one time. 97 AA 23760 ("So when we talk about when the major modification is required, ***it's required*** when they ask us to do the whole thing."). (emphasis added).[5] Similarly, the Developer conceded in the District Court that no density is currently authorized on the property. 97 AA 23783 ("…there's actually no density that is currently authorized for the land that is in questions here…").

But the ultimate Hail Mary came from the City. Before the District Court, the City's litigation counsel conceived an entirely new interpretation of the City's Code, one never adopted or advanced by the Planning Department or the City Council. Now, according to the City Attorney's office, the requirement for Major Modification under Section 19.10.040 only applied for Master Plans that are created under the PD zoning classification, never mind the fact that the PD zoning classification did not exists at the time of the Peccole Ranch Master Plan because the City called the classification R-PD. 29 AA 7087. According to the City Attorney's office, the City's own Code should not be interpreted to mean that the

[5] Thus, according to the Developer, as long as it simply sequences the applications and submits serial applications, it can subvert the Code's requirements. Once again, the Developer is too cute for his own good.

requirements of "any" Major Modification should be limited to just those Master Plans which were developed in later years under the PD classification simply as a consequence of the City changing its zoning definitions from R-PD to PD. *Id.* For litigation purposes, the City Attorney's office now purpose to dismiss the City's long-standing application of the PD standards to R-PD as nothing but an inconvenient "mistake". 97 AA 23770-23777.

Rather than get distracted with newly-minted interpretations of the City's Code – interpretations developed solely for litigation – the District Court returned to what the City had admitted time after time were the actual requirements of its one Code, "[t]he appropriate avenue for considering ***any amendment to the Peccole Ranch Master Plan is through the major modification process as outlined in title 19.10.040***." 91 AA 23751 (emphasis added). The City had made this pronouncement over and over for more than a year. As the District Court explained, rather than follow its own code, the City Council "chose to just ignore side-step or otherwise steam-roll past it and do simply what the applicant wanted, without justification for it, other than the applicant's will that it be done." 97 AA 23758. Accordingly, the District Court properly concluded that the City's failure to require or approve a Major Modification "without getting into the question of substantial evidence, is legally fatal" to the City's approval which allowed development in violation of the Peccole Ranch Master Plan. 97 AA 23753.

After announcing its ruling, the District Court instructed counsel to prepare an order and circulate to the other side for review. 97 AA 23788. Rather than provide comments, counsel for the Developer rejected the order entirely and demanded the submission of its own order. As the parties were unable to come to agreement, they both submitted competing orders. 97 AA 23800-23830. After reviewing both orders, the District Court signed and entered the order that was consistent with its ruling and supported by the record, including the fact that property is designed as PR-OS on the City's General Plan and such designation as confirmed by the City's Staff Reports does not permit residential units unless amended. 97 AA 23831-23846.

Tellingly, in the face of the District Court's ruling – noting the City's actual interpretation of its own Code – the City declined to appeal the District Court's ruling. Instead, the Developer filed an appeal now advancing the latest newly-minted interpretation developed only for litigation purposes, the very same one that the City has declined to advance. 97 AA 23847-23876.

V. ARGUMENT

A. The Requirements of the City Code do not Change Based upon the Developer's Foot Stomping.

Under well-settled law, the City's actions taken in violation of the law must be set aside. *City of N. Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 1197, 1210, 147 P.3d 1109, 1118 (2006)("Because the City Council proceeded with Davis's appeal in violation of the law, the district court

properly…vacated [the City Council's] invalid decision…"); *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 809, 898 P.2d 110, 114 (1995); *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 277, 236 P.3d 10, 19 (2010) (affirming the district court's conclusion that the City violated former RMC section 18.06.404(d)(1)(b)). It is a fundamental principle that the City must follow the law. *Jaworski v. Rhode Island Bd. of Regents for Ed.*, 530 F. Supp. 60, 65 (D.R.I. 1981) ("It is elementary that government must follow the law just as private citizens must."); *United States v. Orso*, 275 F.3d 1190, 1198 (9th Cir. 2001)("In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.").

Where, as here, the Court is called upon to interpret the City's municipal code, the Court applies a de novo standard of review. *City of Reno*, 126 Nev. at 271–72, 236 P.3d at 16. The Court's review is plenary, rather than deferential. *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 174, 162 P.3d 148, 151 (2007); *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993)("The construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate.").

The District Court's interpretation was sound, confirmed by the language of the City's Code and the City's own longstanding interpretation prior to litigation. Indeed, the Developer shifts tactics on appeal, advocating the interpretation the City

proffered for first time through its litigation counsel to the District Court. The District Court was not baited by the City's contradictory interpretation announced in hopes of defending actions taken in contravention of its own laws. Under the City's Code, a Major Modification of the Peccole Ranch Master Plan is legally required for any development. This interpretation is supported by the Code's actual language and confirmed by the City's established interpretation of its own Code. The City Council approved the Developer's applications in contravention of the law. Thus, the District Court made no error in setting aside the City's actions.

1. A Major Modification is a Legal Prerequisite to Change a Master Plan.

The thrust of the Developer's challenge to the District Court's decision focuses upon an argument that it did not even advance in the District Court, and which is contrary to the record. Specifically, the Developer claims that since Peccole Ranch is zoned as a R-PD district – as opposed to a PD district – there is no requirement for a Major Modification. Yet, the District Court did not pluck the requests for a Major Modification – whether in PD or R-PD zones - out of thin-air, as the Developer disingenuously pretends.

Instead, the City had consistently represented and interpreted its Code as requiring an amendment to the Peccole Ranch Master Plan "through the Major Modification process as outline in ***Title 19.10.040***." *See* 71 AA 17448 (January 2016 Report); 47 AA 11303 (February 2017 Report). Likewise, the City's Planning

Director and his Staff did not mistakenly apply the incorrect portion of the City's Code for nearly a year. Nor did the Developer somehow mistakenly agree with the City's interpretation when it submitted an application for a Major Modification. Instead, this conduct confirms what the City's Code actual requires.

In 1990, when the Peccole Ranch Master Plan ("Phase II") was approved, the City's zoning and development code was part of the City's Municipal Code as Title 19. Title 19.18 at the time identified what is known as an R-PD district. The purpose of R-PD designation was "to allow maximum flexibility for imaginative and innovative residential design and land utilization in accordance with the General Plan. It is intended to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and homogeneity of patterns." 29 AA 7087. In other words, an R-PD was a comprehensive planned development with the City approving a Master Plan that governed the development of the district.

With the passage of time, the City has, of course, changed some terminology. The City's current iteration of its zoning and development code is found in Title 19 of the City's Unified Development Code. As the Code currently provides, "new development under the R-PD District is not favored and will not be available under this Code." LVMC 19.10.050(A). Instead, the City has abandoned the use of R-PD districts and now employs what is known as PD districts. This new zoning district –

which is the replacement category for R-PD – largely mirrors the former R-PD standards, including "[p]roviding for an orderly and creative arrangement of land uses that are harmonious and beneficial to the community," and "flexibility in the distribution of land uses." LVMC 19.10.040 (A).

Because the R-PD category has been discontinued, Title 19.10.050(B)(2) expressly indicates that City should apply the developmental standards and procedures found in this analogous zoning district (*i.e.* PD). LVMC 19.10.050(B)(2); *See also* LVMC 19.00.100(B)(3)(Footnote 1)("Development within an R-PD District, except as provided for in LVMC 19.10.050 or elsewhere in this Title, is not available after the effective date of this Title."). Indeed, this section provides:

> With regard to *any issue of development* standards that may arise in connection with a Residential Planned Development District and that is not addressed or provided for specifically in this Section…the Director may *apply by analogy the general definitions, principles, standards and procedures* set forth in this Title, taking into consideration the intent of the approved Site Development Plan Review.

LVMC 19.10.050 (B)(2)(emphasis added). It is for this very reason that the City's Planning Director and his staff determined – from the very beginning – that a Major Modification as outline in Title 19.10.040 was necessary to amend the Peccole Ranch Master Plan, a *Master Development Plan* approved and recognized by the City.

Not coincidentally LVMC 19.10.040 (G) is entitled "Modification of *Master Development Plan* and Development Stands," providing in relevant part, that "[a]ny request by or on behalf of the property owner, or any proposal by the City, to modify

the approved *Master Development Plan* or Development Standards shall be filed with the Department," who "shall determine if the proposed modification is minor or major, and the request or proposal *shall be processed accordingly*." LVMC 19.10.040(G)(emphasis added). This provision does not permit the City to subsequently renege upon its decision merely to pander to this particular Developer.

The Developer's alternative wordsmithing and semantics – arguing that because the Peccole Ranch Master Plan is not listed in the Land Use Neighborhood Preservation Element of the City of Las Vegas 2020 Master Plan as a "special area plan," LVMC 19.10.040 purportedly has no application – is similarly nonsensical. The Developer fails to note that this list only relates to "special area plans," and that it does not provide a comprehensive list of Master Development Plans where a Minor or Major Modification is required. Indeed, LVMC 19.10.040 touches upon Master Development Plans, like that of Peccole Ranch, not "special area plans." Moreover, if the Developer's position were true, then the City would not have interpreted its Code as requiring a Major Modification of the Peccole Ranch Master Plan in the first place.

Incredibly, the Developer proclaims that the "City correctly noted that a major modification was unnecessary." *See* Developer's Op. Br, 34. Yet, the Developer fails to disclose that this interpretation was the one presented by the City during litigation and was completely at odds with the City's longstanding pre-litigation interpretation

that a Major Modification as outline in 19.10.040 was necessary. The only determination from the City that should be "cloaked with a presumption of validity," is the litany of times it determined a Major Modification of the Peccole Ranch Master Plan was needed to change the land use designation so as to permit residential development in this pre-existing planned development. Newly contrived interpretations developed solely for litigation purposes have no presumption of validity.

2. The only interpretation that violates statutory construction is the Developer's newly-adopted approach.

The Developer's reliance and recitation of the various canons of statutory interpretation is similarly unavailing. As the law provides "canons are not mandatory rules," but rather "guides that need not be conclusive." *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 535, 151 L. Ed. 2d 474 (2001). Indeed, specific canons "are often countered…by some maxim pointing in a different direction." *Id*. "They are designed to help judges determine the Legislature's intent as embodied in particular statutory language." *Id*. Here, the Developer's interpretation – one it did not advance in the District Court – finds no support in these cannons.

When interpreting a municipal code, the Court applies similar principles used in statutory interpretation. *City of Reno*, 126 Nev. at 271, 236 P.3d at 16. When interpreting a statute, legislative intent "is the controlling factor." *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). Courts must construe ordinances

in a manner that gives meaning to all of the terms and language. *Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nevada, Inc.*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). Courts "should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *Id*.

Here, the Developer proclaims that because the Major and Minor Modification process is not outlined in LVMC 19.10.050, the Court violated various cannons of statutory construction by enforcing the City's prior interpretation that a Major Modification was required pursuant to 19.10.040. Yet, as discussed above, and as pointed out to the District Court, the City knew very well why it was requiring a Major Modification. As the record shows, the use of R-PD zoning districts has been replaced in favor of PD zoning districts. Thus, Title 19.10.050(B)(2) expressly says that the City should apply the developmental standards and procedures found in the analogous zoning district. LVMC 19.10.050(B)(2). Because the Peccole Ranch Master Plan is a Master Development Plan recognized by the City, a Major Modification is legally required pursuant to LVMC 19.10.040. LVMC 19.10.040(G).

This interpretation is not only confirmed by the City itself and the Developer's past actions, but also under the principle that whenever possible, this Court will interpret a rule or statute in harmony with other rules or statutes. *Bowyer v. Taack*, 107 Nev. 625, 627, 817 P.2d 1176, 1177 (1991); *City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 892, 784 P.2d 974, 978 (1989). Moreover, when the City

adopted this provision, this Court presumes that it does so "with full knowledge of existing statutes relating to the same subject." *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985). Moreover, as the Developer notes, the title of the municipal code may be considered during interpretation. LVMC 19.10.040 (G) is entitled "Modification of Master Development Plan." The Peccole Ranch Master Plan is a Master Development Plan long ago recognized by the City.

The Developer's *post-hoc* attempt to evade the City's a pre-litigation falls flat. These principles only confirm the District Court's interpretation and the City's longstanding interpretation prior to litigation.

3. The District Court properly rejected the City's newly-minted interpretation proffered for litigation.

Nor does the Developer's challenge find any support in the notion that the District Court purportedly erred in refusing to "give due deference" to the City's interpretation of its Code. *See* Developer's Op. Br., 36-38. The District Court properly gave "due deference" to the City's longstanding pre-litigation interpretation and application - not the contrary one created for the first time during litigation.

When interpreting a statute, courts also consider an agency's interpretation prior to litigation. An interpretation of a statute by an agency prior to litigation is entitled to considerable weight. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel*, 439 U.S. 551, 566 n. 20, 99 S.Ct.

790, 800 n. 20 (1979) ("[A]n administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight."). But consistent with this principle, no deference is afforded to a conflicting interpretation adopted as a "convenient litigation position," or "a *post hoc* rationalization" advanced to defend against challenge. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S. Ct. 2156, 2166 (2012); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213, 109 S. Ct. 468, 474 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1146 (9th Cir. 2001)(rejecting a newly-minted and inconsistent interpretation advanced by an agency's counsel during litigation). This Court has similarly provided no deference to the City's self-serving and erroneous interpretation of its land use law. *City of N. Las Vegas*, 122 Nev. at 1208, 147 P.3d at 1116.

The Developer's argument that the City "consistently determined and expressed UDC 19.10.040 does not apply," is flatly untrue. In fact, the City said from the very beginning that LVMC 19.10.040 applied and a Major Modification is required:

> The site is part of the Peccole Ranch Master Plan. ***The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outlined in Title 19.10.040***.

71 AA 17448 (emphasis added). From there, the City repeated this interpretation

over-and-over again. As the record shows, the first time the City actually ever advanced this new interpretation was during the District Court proceedings.

The District Court made no error when it refused to give any deference to the City's conflicting interpretation, one unquestionably adopted as a litigation strategy. Instead, the District Court properly enforced the City's longstanding pre-litigation admissions where the City expressed that any "proposed development requires a Major Modification of the Peccole Ranch Master Plan," as "outlined in Title 19.10.040." *Id*. When interpreting the City's Code, this pre-litigation interpretation is what should be given deference.

4. A zoning application is not a substitute for a major modification.

The Developer also presents a new theory on appeal that because it submitted a rezoning application the Major Modification requirement is a "nullity." *See* Developer's Op. Br., 35-36. Yet, the Developer said the exact opposite to the District Court: "I agree with Your Honor absolutely that ***if in fact that a major mod is a requirement, that that was not complied with***…" 97 AA 23764 (emphasis added). The Developer is precluded from now asserting the exact opposite on appeal. *Tupper v. Kroc*, 88 Nev. 146, 151, 494 P.2d 1275, 1278 (1972) (a party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below).

Nonetheless, the Developer latest legal argument lacks any serious merit. A zoning application is not a substitute for a Major Modification. As the Developer notes the City Code provides that "[a] Major Modification shall be processed in accordance with the procedures and standards applicable to a rezoning application, as set forth in Subsections (I) to (M), inclusive, of LVMC 19.16.090." LVMC 19.110.040(G)(2). But it does not follow that the Developer "complied with all" Major Modification requirements because the procedure is similar to a zoning application.

The Major Modification application is distinct from a zoning application as it must be submitted when a developer seeks "to modify the approved Master Development Plan." LVMC 19.110.040(G). Here, the Developer seeks to modify the Peccole Ranch Master Plan, a Master Development Plan recognized by the City. A zoning application does nothing to modify the Peccole Ranch Master Plan. Under the Developer's specious theory it would be able to proceed with development without reference or deference to the Peccole Ranch Master all together.

Moreover, while a Major Modification application proceeds with the similar procedures as that of a zoning application, there are important reasons why an application for a Major Modification is still required. In particular, the notice provision. The Developer is required to provide public notice that he is seeking a

Major Modification of the Peccole Ranch Master Plan as opposed to just a zoning application. This requirement puts all stakeholders on notice.

B. Substantial Evidence Does Not Support the City's Action.

Because the District Court properly vacated the City's approval made in violation of the law, the Court need not even address whether substantial evidence supports the City's ultimate approval of the applications. *Am. W. Dev., Inc.*, 111 Nev. at 809, 898 P.2d at 114 ("Because Henderson's denial of AWD's zoning application was based upon an error of law, the fact that the denial may have otherwise been supported by substantial evidence and unabused discretion, as the district court concluded, is not relevant."). The District Court did not ultimately pass upon this issue once it determined that the City's approval could not legally stand due to the City's failure to require or approve a Major Modification. 97 AA 23845 ("The City's failure to require or approve a major modification, without getting into the question of substantial evidence, is legally fatal to the City's approval…").

Yet, to the extent the Court determines it necessary to address the basis for the City's approvals, then the City's approval should likewise be set-aside because substantial evidence does not support the actions. The City continually represented one thing to the surrounding homeowners effected by the development, only to change the rules midway through to arbitrarily force the approval of a portion of the development with no explanation. The City's actions in this case are the quintessential

definition of actions that are arbitrary, oppressive, and accompanied by manifest abuse. *State ex rel. Johns v. Gragson*, 89 Nev. 478, 483, 515 P.2d 65, 68 (1973).

The Court employs the same standard of review as the district court. The City's decision (assuming no legal error) is reviewed for abuse of discretion. *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). "A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal." *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id*. Substantial evidence does not support the City's Council's approval here. Instead, as the record shows, the City Council disregarded its own Code and abused its discretion to appease this Developer.

As an initial matter, with all applications the City Council ultimately approved, the City's Planning Department unequivocally indicated that any approval is dependent upon a Major Modification of the Peccole Ranch Master Plan. In fact, the City's analysis indicates that no residential uses would be allowed at all without the Major Modification. Yet, as discussed above, no approval or application for a Major Modification occurred. Instead, the City Council disregarded the requirements. This failure alone is fatal. *See City Council of City of Reno v. Travelers Hotel, Ltd.*, 100

Nev. 436, 440, 683 P.2d 960, 962 (1984) (upholding the district court's reversal of the City Council's decision when the City Council disregarded the staff reports).

Despite this failure, the record also demonstrates the proposed development was not compatible with the adjacent land use. Moreover, the City disregarded the negative impact to surrounding school and street facilities and the public's safety and general welfare in approving the development. The Clark County School District presented evidence that current schools in the surrounding area would not be able to handle the increased capacity the development required. 15 AA 3691 – 3692. No comprehensive plan was submitted to remedy these concerns. 5 AA 1236 – 1239. In addition, despite acknowledging that the development would cause surrounding roadways to reach maximum capacity, the City did not require any sort of comprehensive plan prior to approval.

Nor was there any measures taken that would secure or protect the public health, safety, and general welfare as it relates to the drainage and flooding issues with the property beyond a condition of approval that states a drainage study must be approved at some unknown time. As the expert testimony submitted to the City Council indicates, a drainage study should be approved prior to land use approval. 5 AA 1234 – 1235. No comprehensive plan was ever submitted to the City addressing the existing drainage facilities of this development and the steps that would be taken to prevent flooding.

Further the Developer's claim of purported "significant fiscal benefits" is not supported by the record. Naturally, the Developer ignores the fact that the purported economic study presented to the City Council evaluated the impact "on the proposed 250.92-acre Peccole Ranch mix-unit residential project." 1 AA 196. In other words, there is no evidence of any positive economic impact for the 17.8 acre development standing alone.

Indeed, all of the purported testimony the Developer presented to the City Council evaluated the totality of the full 250 acre project. Thus, no evidence did or could have support the City's approval of this 17 acre development in isolation. Instead, the City Council arbitrarily granted part of the development with no explanation other than to purportedly give Lowie a bargaining chip to use in negotiations with the homeowners. *See* 71 AA 17423 ("please vote on this…and allow us to move forward with some form of development so we can sit down and negotiate. You've known me for 20 years. I negotiate everything.").

The record also shows that public opposition far outweighed public approval. The public opposition voiced substantial and specific concerns regarding, among other issues, the proposed density, compatibility, traffic quality of life, negative impact upon the schools, and flood and drainage issues. 5 AA 1209 – 6 AA 1252; 71 AA 17343 – 17401. The overwhelming and specific public opposition presented to the City Council constitutes substantial evidence to deny the applications, not

supporting approval. *Stratosphere Gaming Corp.*, 120 Nev. at 529, 96 P.3d at 760 ("We conclude that the kind of concerns expressed by the individuals and businesses opposed to the proposed ride are substantial and specific."); *City of Las Vegas v. Laughlin*, 111 Nev. 557, 559, 893 P.2d 383, 385 (1995)(opinion of over 200 individuals was substantial and specific).

The City's approval was arbitrary, oppressive, and an abuse of discretion. The City abandoned its role of serving and protecting its constituents to appease a single developer's wishes so that he could use this approval as a negotiation chip. The City's actions should not be permitted to stand.

C. The District Court Did Not "Exceed the Proper Scope of Judicial Review."

The Developer makes various contentions in an ill-fated attempt to paint the District Court as a rogue judicial actor untethered to the law. The Developer's contentions are baseless. The District Court in no way exceeded the "proper scope of judicial review." This Court has long ago held that the City's actions taken in violation of the law must set aside. *City of N. Las Vegas*, 122 Nev. at 1210, 147 P.3d at 1118. Moreover, this Court has confirmed the scope of review is limited to the record. *City Council of City of Reno*, 100 Nev. at 439, 683 P.2d at 962 ("we are limited to the record made before the City Council in our review of the council's decision."). Telling, the Developer does not even argue the District Court improperly considered matters outside of the record. The District Court acted within the proper scope on a

petition for judicial review by interpreting the City's Code as requiring a Major Modification and setting aside the approvals for the City Council's failure to require or approve of a Major Modification of the Peccole Ranch Master Plan.

By all measures, it seems that the Developer's complaint is that the District Court entered too much detail to support its decision. Faulting the District Court for doing its job is not a basis for reversal nor a valid point for criticism. The District Court did not "reweigh unauthenticated evidence," whatever that means. The District Court's findings were all supported by the record and are verbatim representations from the City.

While the Developer says that the Court relied upon "outdated and inapplicable" staff representations, the simply Developer ignores the report prepared for the February 15, 2017 City Council meeting – where these applications were approved – which expressly states that "the proposed development ***requires a Major Modification*** (MOD-63600) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." 47 AA 11303 (emphasis added). Therefore, the City's Planning Department maintained that the development is "***dependent*** on action taken on the Major Modification" pursuant to Title 19.10.040. *Id*. (emphasis added). These representations were entirely consistent with the City's repeated prior representations.

D. The Developer's "Judicial Taking" Claim is Unfounded.

The concept of a judicial taking has been debated by the United States Supreme Court, but never recognized under the law as valid. The United States Supreme Court's sharply divided opinion in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 130 S. Ct. 2592 (2010) considered, without resolving, whether a judicial decision could violate the Takings Clause of the Fifth Amendment. As discussed below, there are numerous reasons why the United States Supreme Court has refused to hold that a court's opinion can constitute a taking.

Putting aside this point, the Developer's tactic in raising this issue on appeal is readily transparent. Indeed, the Developer's purported fear of waiving an unknown claim while simultaneously asserting its "judicial taking claim should be litigated" in subsequent lawsuit it filed against the District Court Judge in the Eighth Judicial District Court, Case No. A773268, are irreconcilable. Besides, the District Court only concluded that the Developer was required to follow the law by filing a Major Modification. By all measures, the Developer's purported takings theory stems from the idea the District Court "stripped" some unknown right to develop the property by purportedly finding no residential units are permitted. Not so. The District Court merely found that no residential development is permitted unless the land use designation is modified through the lawful procedure, *i.e.* a Major Modification. Having to follow the law is not a taking.

1. The Court should decline to entertain the Developer's purported judicial taking claim.

The Developer attempts to mitigate the impropriety of raising its purported judicial taking claim on this appeal by claiming confusion over the United States Supreme Court's opinion in *Stop the Beach*. In debating, but not deciding the concept of a judicial taking, Justice Scalia, writing for the plurality, and Justice Kennedy (joined by Justice Sotomayor) writing a concurring opinion grappled with the practical implications of a judicial taking claim, including ripeness. On this front, Justice Kennedy deemed it unclear "how a party should properly raise a judicial takings claim." *Stop the Beach*, 560 U.S. at 740, 130 S. Ct. at 2616-17 (Kennedy, concurring). He noted that if the issue is not litigated below, then the likely avenue was for the party to file a separate second lawsuit. *Id*. Justice Scalia on the other hand surmised that the party could petition the United States Supreme Court for review from the state supreme court's decision where the purported takings took place. *Id*. at 727-28, 2609-10 (Scalia, plurality). Indeed, *Stop the Beach* dealt with whether the Florida Supreme Court's decision had effected a judicial taking.

According to the Developer, it has already elected to pursue the procedure intimated by Justice Kennedy by filing a second lawsuit. Yet, at the same time the Developer claims it is simultaneously following the pluralities suggestions. But, the Developer is not properly following either. Irrespective of the proper avenue discussed by Justice Scalia or Justice Kennedy, both agreed that the finality principles

applicable to a taking claim as laid out in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985) would require a final decision from the state supreme court for such a claim to be ripe.

In addition to being unripe, there are numerous problems with the Developer raising this issue for the first time on appeal here. For example, it is unclear if the Developer is only asserting that the District Court's order violates the Takings Clause of the Fifth Amendment to the United States Constitution or the Takings Clause of the Nevada Constitution. The Developer does not argue the latter, but the lack of clarity is a major reason why this Court often refuses to consider arguments raised for the first time on appeal. *Archon Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 407 P.3d 702, 708–09 (Nev. 2017)("a legal issue not properly raised and resolved in district court does not promote sound judicial economy and administration, because the issue comes to us with neither a complete record nor full development of the supposed novel and important legal issue to be resolved."). Moreover, as the Developer proudly admits it filed a subsequent lawsuit electing its venue. Yet, by seeking to have this Court simultaneously decide the issue the Developer is effectively precluding the parties involved in the subsequent lawsuit a voice on the issue.

The Developer's claim that "this is the first opportunity" it had to raise the issue is likewise unavailing. When the parties submitted competing orders to the District

Court, the Developer failed to mention any concerns at that time about a potential judicial taking. 97 AA 23800 – 23830. Nor did the Developer file any sort of motion to amend or alter the judgment with the District Court.

In short, this Court should decline to entertain the Developer's judicial taking issue raised on this appeal.

2. The United States Supreme Court has never established a judicial taking claim.

In *Stop the Beach* the United States Supreme Court reviewed a Florida Supreme Court decision upholding a Florida Statue that requires the establishment of a fixed boundary along the shoreline between public and private lands before the start of a beach replenishment project. *Stop the Beach*, 560 U.S. at 707-713, 130 S. Ct. at 2597-2601. The case originated from a challenge by a group of beachfront landowners to the city of Destin and Walton County's beach replenishment project approved under the Florida Statue. *Id*. The District Court of Appeal for the First District certified to the Florida Supreme Court whether the Florida Statue deprived "upland owners of littoral rights without just compensation." *Id*. at 712, 2600. The Florida Supreme Court answered the certified question in the negative. *Id*.

The group of beachfront landowners then filed a petition for rehearing claiming the Florida Supreme Court's decision itself effected an unconstitutional taking. *Id*. The rehearing was denied and the subsequent petition for certiorari was granted. *Id*. A four-justice plurality authored supported the concept of a judicial taking, but the

remaining four Justices refused to recognize a judicial taking claim. *Petro-Hunt, L.L.C. v. United States*, 126 Fed. Cl. 367, 379 (2016), aff'd, 862 F.3d 1370 (Fed. Cir. 2017) ("The justices, however, did not agree on the definition of a judicial taking, or even whether judicial takings claims are cognizable…"). Justices Kennedy and Sotomayor refused to recognize the concept of judicial taking claim under the Fifth Amendment, indicating that such matters should be decided under the Due Process Clause of the Fourteenth Amendment. *Stop the Beach*, 560 U.S. at 733-742, 130 S. Ct. at 2613-2618. Justices Breyer and Ginsburg found it unnecessary to decide the issue. *Id*. at 742-745, 2618-2619. Yet, both concurring opinions expressed serious concerns over recognizing a judicial taking claim.

For example, Justice Kennedy feared that a judicial takings doctrine would give judges more power, not less. "Because the State would be bound to pay owners for takings caused by a judicial decision, it is conceivable that some judges might decide that enacting a sweeping new rule to adjust the rights of property owners in the context of changing social needs is a good idea." *Id*. at 738, 2616. Justice Breyer shared similar concerns, but in particular expressed concerns that in recognizing a judicial taking claim it would open the floodgate to lawsuits from dissatisfied litigants. "Losing parties in many state-court cases may well believe that erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims." *Id*. at 743, 2619.

In the end, the United States Supreme Court held that - irrespective of whether or not a judicial taking is cognizable under the law - the Florida Supreme Court's decision did not constitute a violation of the Fifth Amendment Takings Clause. *Id*. at 730–33, 2611-2613 (majority opinion). Yet, the Court failed to reach a majority on whether the law recognizes a judicial taking in the first place. Thus, the United States Supreme Court's plurality opinion in *Stop the Beach* offers no binding precedential weight. *Neil v. Biggers*, 409 U.S. 188, 192, 93 S. Ct. 375, 379(1972)("Nor is an affirmance by an equally divided Court entitled to precedential weight."); *Hertz v. Woodman*, 218 U.S. 205, 213–14, 30 S.Ct. 621, 623 (1910) ("Under the precedents of this court ..., an affirmance by an equally divided court…prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts").

Yet, in a further attempt to transform the plurality decision in the *Stop the Beach* into a majority, the Developer points to two additional cases. Yet, neither established a judicial taking claim. For example, in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S. Ct. 2035 (1980), the petitioner challenged a California Supreme Court decision that expressly overruled its own prior interpretation of the state constitution. The United States Supreme Court did not address the validity of judicial taking claim, but rather concluded that the state court decision did not constitute a taking because it did not unreasonably impair the property. *PruneYard*,

447 U.S. at 83, 100 S. Ct. at 2042. Likewise, the United States Supreme Court opinion in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446 (1980) did not recognize a judicial taking claim. Instead, the Court overturned a Florida Supreme Court decision on the grounds that the underlying state statute improperly took private property without just compensation. *Webb's Fabulous Pharmacies*, 449 U.S. at 164, 101 S. Ct. at 452.

Indeed, other opinions from the United States Supreme Court have rejected a judicial taking theory. *See*, *e.g.*, *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450, 44 S. Ct. 197, 198 (1924)("…. the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."); *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 682, 50 S. Ct. 451, 455 (1930); *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-366, 53 S. Ct. 145, 149 (1932). "[T]hese decisions proceed from the theory that courts do not create or change the law, but merely interpret and administer the Constitution, the law as declared by the legislature, and the common law." *Brace v. United States*, 72 Fed. Cl. 337, 359 (2006), aff'd, 250 F. App'x 359 (Fed. Cir. 2007). For these reasons, "the constitutional obligation not to take property does not fall equally on all branches." *Id*. (quotations and citations omitted).

In the end, the Developer confesses the shaky ground upon which its purported judicial taking theory lies, advocating for the Court to "adopt the judicial taking

doctrine." *See* Developer's Op. Br., 61. Like the United States Supreme Court has done, this Court should refuse the Developer's invitation.

3. There has been no judicial taking.

Even if a judicial taking theory were viable, no "taking" has occurred. The Developer fails to identify a valid property interest or any action that would amount to a taking of that property interest. The closest the Developer musters is it false claim that "Property is now entitled to no residential units due to an unlawfully placed PR-OS use designation." *See* Developer's Op. Br. at 63. The Developer's argument is a blatant misrepresentation of the District Court's order and the law.

By all measures, it seems the Developer's gripe is Paragraph 13, providing the following:

> 13. On the maps of the City's General Plan, the land for the golf course/open space/drainage is expressly designated as PR-OS, meaning Parks/Recreation/Open Space. ROR002735-2736. There are no residential units permitted in an area designated as PR-OS.

97 AA 23837. The District Court did not "unlawfully" place a PR-OS designation on this property. To the contrary, the City's Master Plan long-ago designated this property as PR-OS. The District Court merely noted the obvious. The Developer was fully aware that this property was designated on the City's Master Plan as PR-OS. Indeed, the ***Developer filed an application for a General Plan Amendment seeking to lift this designation***. 11 AA 2476.

Here, the District Court properly indicated that under the City's PR-OS land designation provided in its Master Plan residential units are not permitted unless this designation is changed. This fact is wholly consistent with the City's Master Plan. 29 AA 6951. The City confirmed as much stating in its Staff Reports that the "land use designation of PR-OS (Parks/Recreation/Open Space) does not allow for multi-family residential uses." 71 AA 17453. Perhaps most astounding is the fact that the Developer agreed, filed an application for a General Plan Amendment, and then defended this application in the District Court.

Yet, the Developer now wants to claim these two sentences in the District Court's order violates "decades' old Nevada property law," and thus warrants a judicial taking as a result. It seems the Developer claims NRS 278.349(3)(e) somehow creates a sweeping rule of Nevada law that "zoning trumps the general plan" in all other circumstances. Notably, the Developer did not even raise this argument below.

In any event, the Developer's attempts to manufacture a non-existent property right to give rise to a potential judicial taking claim fails. As an initial matter, the Developer desperately laches upon subsection (e) of NRS 278.349. The plain language makes clear it only applies when a governing body takes final action upon a "tentative map." Nev. R. Stat. § 278.349 (emphasis added). A tentative map is a mapping tool used to divide a parcel of land into five or more parcels for transfer or

development. *See*, *e.g.*, Nev. R. Stat. § 278.330. Importantly, this statute was not even implicated by the District Court's review as the Developer did not even file a tentative map along with the applications that were at issue.

Moreover, the statutory language also makes clear that no one criteria is dispositive when a governing body takes action on a tentative map. *See* Nev. R. Stat. § 278.349(3). The statute only states the governing body "shall consider" the various criteria. The Court should reject the Developer's attempt to extrapolate one sentence contained in this statute as if it creates a "decades' old Nevada property law."

Putting aside this legal flaw, the historical background concerning R-PD zoning does not support the Developer's contention. As discussed above, the zoning designation and density for specific parcels in an R-PD zoning district is the master plan's designation. Here, the Peccole Ranch Master Plan designated this property as "golf course/drainage" and permitted zero density. This fact was confirmed by the City in its adoption of its Master Plan.

As this Court has previously held, "[M]aster plans are to be accorded substantial compliance under Nevada's statutory scheme." *Nova Horizon, Inc. v. City Council of the City of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 724 (1989). "[T]he master plan of a community is a standard that commands deference and a presumption of applicability." *Sustainable Growth v. Jumpers, LLC*, 122 Nev. 53, 64, 128 P.3d 452, 460 (2006)(quotations and citations omitted). Under Nevada law, zoning must be

construed to comply with the master plan, not frustrate it. *Id*. Because under R-PD7 zoning the property is designated as open space/drainage, the zoning is not inconsistent to even implicate NRS 278.349 (3)(e)'s concerns, particularly since zoning should be construed to comply with the master plan, not frustrate it.

Even if the Court were to apply the plurality opinion in *Stop the Beach*, the Developer fails woefully short of proving any judicial taking. As discussed, in *Stop the Beach*, the claimed taking was the Florida Supreme Court's interpretation of Florida property law that the landowners contended deprived them of their right to littoral accretions. Under the plurality opinion, a judicial decision could constitute a taking is only when the court has declared what was once an established private property right no longer exists. *Id*. at 2610. Under this test the plurality reasoned, "[t]here is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." *Id*. at 730, 130 S.Ct. 2592. The landowners failed to make that showing. *Id*. at 730–733, 130 S.Ct. 2592.

The Developer seems to indicate its belief that the District Court order "strip[ed] the right to develop." The District Court order did not. The District Court merely found that a Major Modification was prerequisite for development under the City's Code. The Developer never had any vested rights to develop the property with

residential units. Under Nevada law, "in order for rights in a proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting project commencement, and the developer must prove considerable reliance on the approvals granted." *Stratosphere Gaming Corp.*, 120 Nev. at 527, 96 P.3d at 759–60 (quotations omitted).

As exhibited by the Developer's own submission of various applications the Developer never had any vested rights to develop the property with residential units. It like every other applicant had the right to seek approval. After the District Court's decision, the Developer still has the right to seek residential development. However, it must now follow the lawful procedure. The District Court made no change in substantive property law and merely ruled that a Major Modification of the Peccole Ranch Master was required as part of this process.

VI. CONCLUSION

The District Court's Order should be affirmed. The City approved the Developer's applications in contravention of the law. The City consistently represented that an application for a Major Modification pursuant to Title 19 of the

. . .

City's Code is required to change this designation. The District Court correctly told the City to follow the law, the very law which it repeatedly admitted.

DATED this 6th day of February, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Times New Roman.

I further certify I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 13,936 words.

. . .

. . .

. . .

Finally, I hereby certify to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of February, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 6th day of February, 2019, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENTS' ANSWERING BRIEF** properly addressed to the following:

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Exhibit 22

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

THE CITY OF LAS VEGAS; and SEVENTY ACRES, LLC, a Nevada Limited Liability Company,

Defendants.

Case No.: A-17-752344-J

Dept. No.: XXIV

ORDER GRANTING PLAINTIFFS' PETITION FOR JUDICIAL REVIEW

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☐ Voluntary Dismissal	☒ Summary Judgment
☐ Involuntary Dismissal	☐ Stipulated Judgment
☐ Stipulated Dismissal	☐ Default Judgment
☐ Motion to Dismiss by Deft(s)	☐ Judgment of Arbitration

On January 11, 2018, Plaintiffs[1] Petition for Judicial Review came before the Court for a hearing. Todd L. Bice, Esq. and Dustun H. Holmes, Esq. of the law firm PISANELLI BICE PLLC appeared on behalf of Plaintiffs, Christopher Kaempfer, Esq., James Smyth, Esq., Stephanie Allen, Esq appeared on behalf of Defendant Seventy Acres, LLC ("Seventy Acres"), and Philip T. Byrnes, Esq., with the LAS VEGAS CITY ATTORNEY'S OFFICE appeared on behalf of the Defendant City of Las Vegas ("City").The Court, having reviewed Plaintiffs' Memorandum in Support of the Petition for Judicial Review, the City's Answering Brief, Seventy Acres' Opposition Brief, Plaintiffs' Reply Brief, the Record for Review, and considered the matter and being fully advised, and good cause appearing makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

A. FINDINGS OF FACT

1. Plaintiffs challenge the City's actions and the final decision entered on February 16, 2017 regarding the approval of Seventy Acres' applications GPA-62387 for a General Plan Amendment from parks/recreation/open space (PR-OS) to medium density (M), ZON-62392 for rezoning from residential planned development – 7 units per acre (R-PD7) to medium density residential (R-3), and SDR-62393 site development plan related to GPA-62387 and ZON-62392 (collectively the "Applications") on 17.49 acres at the southwest corner of Alta Drive and

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[1] Jack B. Binion, Duncan R. and Irene Lee, individuals and trustees of the Lee Family Trust, Frank A. Schreck, Turner Investments, LTD, Rover P. and Carolyn G. Wagner, individuals and trustees of the Wagner Family Trust, Betty Englestad as trustee of the Betty Englestad Trust, Pyramid Lake Holdings, LLC, Jason and Shereen Awad as trustees of the Awad Asset Protection Trust, Thomas Love as trustee of the Zena Trust, Steve and Karen Thomas as trustees of the Steve and Karen Thomas Trust, Susan Sullivan as trustee of the Kenneth J. Sullivan Family Trust, and Dr. Gregory Bigler and Sally Bigler

[2] Any findings of fact which are more properly considered conclusions of law shall be treated as such, and any conclusions of law which are more properly considered findings of fact shall be treated as such.

Rampart Boulevard, more particularly described as Assessor's Parcel Number 138-32-301-005 (the "Property").[3]

2. The Property at issue in the Applications is a portion of land which was previously known as Badlands Golf Course and is part of the Peccole Ranch Master Plan.

3. In 1986, the William Peccole Family presented their initial Master Planned Development under the name Venetian Foothills to the City ("Peccole Ranch"). ROR002620-2639.

4. The original Master Plan contemplated two 18-hole golf courses, which would become known as Canyon Gate in Phase I of Peccole Ranch and Badlands in Phase II of Peccole Ranch. Both golf courses were designed to be in a major flood zone and were designated as flood drainage and open space. ROR002634. The City mandated these designations so as to address the natural flood problem and the open space necessary for master plan development. ROR002595—2604.

5. The William Peccole Family developed the area from W. Sahara north to W. Charleston Blvd. within the boundaries of Hualapai Way on the west and Durango Dr. on the east ("Phase I"). In 1989, the Peccole family submitted what was known as the Peccole Ranch Master Plan, which was principally focused on what was then commonly known as Phase I.

6. In 1990 the William Peccole Family presented their Phase II Master Plan under the name Peccole Ranch Master Plan Phase II (the "Phase II Master Plan") and it encompassed the land located from W Charleston Blvd. north to Alta Dr. west to Hualapai Way and east to Durango Dr. ("Phase II"). Queensridge was included as part of this plan and covered W.

[3] The Applications as originally submitted were for a General Plan Amendment from parks/recreation/open space (PR-OS) to high density residential (H), for rezoning from residential planned development – 7 units per acre (R-PD7) to high density residential (R-4). At the February 15, 2017 City Council meeting, Seventy Acres indicated that it was amending its Applications from 720 units on the Property to 435 units. The corresponding effect was an amendment to its General Plan Amendment from PR-OS to medium density (M) and rezoning from R-PD7 to medium density residential (R-3).

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Charleston Blvd. north to Alta Dr., west to Hualapai Way and east to Rampart Blvd. ROR002641-2670.

7. Phase II of the Peccole Ranch Master Plan was approved by the City Council of the City of Las Vegas on April 4, 1990 in Case No. Z-17-90. ROR007612, ROR007702-7704. The Phase II Master Plan specifically defined the Badlands 18 hole Golf Course as flood drainage/golf course in addition to satisfying the required open space necessitated by the City for Master Planned Development. ROR002658-2660.

8. The Phase II golf course open space designation was for 211.6 acres and specifically was presented as zero net density and zero net units. (ROR002666). The William Peccole Family knew that residential development would not be feasible in the flood zone, but as a golf course could be used to enhance the value of the surrounding residential lots. As the Master Plan for Phase II submitted to the City outlines:

> A focal point of Peccole Ranch Phase Two is the 199.8 acre golf course and open space drainage way system which traverses the site along the natural wash system. All residential parcels within Phase Two, except one, have exposure to the golf course and open space areas . . . The close proximity to Angel Park along with the extensive golf course and open space network were determining factors in the decision not to integrate a public park in the proposed Plan."

ROR002658-2660.

9. The Phase II Master Plan amplifies that it is a planned development, incorporating a multitude of permitted land uses as well as special emphasis the open space and:

> Incorporates office, neighborhood commercial, a nursing home, and a mixed-use village center around a strong residential base in a cohesive manner. A destination resort-casino, commercial/office and commercial center have been proposed in the most northern portion of the project area. Special attention has been given to the compatibility of neighboring uses for smooth transitioning, circulation patterns, convenience and aesthetics. An extensive 253 acre golf course and linear open space system winding throughout the community provides a positive focal point while creating a mechanism to handle drainage flows.

ROR00264-2669.

10. As the Plan for Phase II outlined, there would be up to 2,807 single-family residential units on 401 acres, 1,440 multi-family units on 60 acres and open space/golf

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course/drainage on approximately 211 acres. ROR002666-2667. For the single-family units which would border the proposed golf course/open space, the zoning sought was for R-PD7, which equates to a maximum of seven (7) single-family units per acre on average. ROR002666-2667. Such a zoning approval for a planned development like Peccole Ranch Phase II and its proposed golf course/open space/drainage is common as confirmed by the City's own code at the time because R-PD zoning category was specifically designed to encourage and facilitate the extensive use of open space within a planned development, such as that being proposed by the Peccole Family. ROR02716-2717.

11. Both the Planning Commission and the City Council approved this 1990 Amendment for the Phase II Plan (the "Plan"). ROR007612, ROR007702-7704.

12. The City confirmed the Phase II Plan in subsequent amendments and re-adoption of its own General Plan, both in 1992 and again in 1999. ROR002735-2736.

13. On the maps of the City's General Plan, the land for the golf course/open space/drainage is expressly designated as PR-OS, meaning Parks/Recreation/Open Space. ROR002735-2736. There are no residential units permitted in an area designated as PR-OS.

14. The City's 2020 Master Plan specifically lists Peccole Ranch as a Master Development Plan in the Southwest Sector.

15. In early 2015, the land was acquired by a developer and as a representative of the developer, Yohan Lowie, would testify at the November 16, 2016 City Council meeting that before purchasing the property he had conversations with the City Council members from which he inferred that he would be able to secure approvals to redevelop the golf course/open space of this master planned community with housing units. ROR001327-1328; ROR007364-7365. The purchaser elected to take on the risk of acquiring the property and did not provide for typical contingencies, such as a condition of land use approvals prior to closing.

16. Instead, it was after acquiring the land that one of the developer's entities, Seventy Acres, filed the Applications with the City in November 2015.

17. When the Applications were initially submitted they were set to be heard in front of the City's Planning Commission on January 12, 2016. ROR017362-17377. The Staff Report

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prepared in advance of this meeting states that the City's Planning Department had no recommendation at the time because the City's code required an application for a major modification of the Peccole Ranch Master Plan prior to the approval of the Applications. ROR017365. Specifically, the Staff Report states:

> The site is part of the Peccole Ranch Master Plan. The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outline in Title 19.10.040. As this request has not been submitted, staff recommends that the [Applications] be held in abeyance has no recommendation on these items at the time.
> (*Id.*)

18. Indeed, a critical issue noted by the City pertaining to the Applications was that "[t]he proposed development requires a Major Modification of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90. As such, staff is recommending that these items be held in abeyance." (*Id.*)

19. Following staff's recommendation, the Applications were held over to the March 8, 2016 Planning Commission meeting.

20. Again, the Staff Report prepared in advance of the meeting states, "[t]he site is part of the Peccole Ranch Master Plan. The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outline in Title 19.10.040." ROR017445-17538. As no Major Modification had been submitted the City's staff had no recommendation on the Applications at the time. *Id.*

21. As a result, the Applications were held over to the April 12, 2016 Planning Commission meeting.

22. Consistent with the City's requirements, the developer subsequently filed an application MOD-63600 for a Major Modification of the Peccole Ranch Master Plan to amend the number of allowable units, to change the land use designation of parcel, and to provide standards for redevelopment.

23. As the Staff Report prepared in advance of an April 12, 2016 Planning Commission meeting states, "[p]ursuant to 19.10.040, a request has been submitted for a modification to the Peccole Ranch Master Plan to authorize removal of the golf course, change

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the designated land uses on those parcels to single family and multi-family residential and allow for additional residential units." ROR017550-17566.

24. The Staff Report goes on to state that "[i]t is the determination of the Department of Planning that any proposed development not in conformance with the approved Peccole Ranch Master Plan would be required to pursue a Major Modification of the Plan prior to or concurrently with any new entitlements. *Id.* Such an application (MOD-63600) was filed with the City of Las Vegas on 02/25/16 along with a Development Agreement (DIR-63602) for redevelopment of the golf course parcels." *Id.*

25. As the Staff Report indicates, "[a]n additional set of applications were submitted concurrently with the Major Modification that apply to the whole of the 250.92-acre golf course property." These applications were submitted by entities – 180 Land Co LLC and Fore Stars, Ltd-controlled and related to the developer submitting the Applications at issue here. *Id.*

26. As with the previous Staff Reports, the Staff emphasized that "[t]he proposed development requires a Major Modification of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." *Id.* However, the City's Staff was now recommending the Applications be held in abeyance as additional time was needed for "review of the Major Modification and related development agreement." *Id.*

27. Over the next several months the Applications were held in abeyance at the request of Seventy Acres and/or the City. Specifically, the Staff Reports prepared in advance of every meeting continuously noted that approval of the Applications was dependent upon an approval of a Major Modification of the Peccole Ranch Master Plan.

28. For example, the May 10, 2016 Staff Report provides "[t]he proposed development requires a Major Modification (MOD-6300) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." ROR018033-18150. The Staff findings likewise provide the Applications "would result in the modification of the Peccole Ranch Master Plan. Without the approval of a Major Modification to said plan, no finding can be reached at this time." *Id.*

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29. In the July 12, 2016 Staff Report, staff states "[t]he Peccole Ranch Master Plan must be modified to change the land use designations from Golf Course/Drainage to Multi-Family Residential and Single Family Residential prior to approval of the proposed" Applications. ROR018732-18749. ROR0198882-

30. Less than two months later, in an August 9, 2016 Staff Report, the City's Staff reiterated that "[t]he proposed development requires a Major Modification (MOD-6300) of the Peccole Ranch Master Plan, specifically the Phase Two area as established by Z-0017-90." ROR0198882-19895.

31. Ultimately, the Applications came before a special Planning Commission meeting on October 18, 2016. ROR000725-870. The Applications were heard along with other applications from the developer, including application for a Major Modification of the Peccole Ranch Master Plan. (MOD-63600).

32. The City's Planning Commission denied all other applications, including MOD-63600, except for the Applications at issue in this case by a five-to-two margin. ROR00865-870. In other words, the Planning Commission approved certain applications notwithstanding that it had expressly denied the Major Modification (MOD-63600) that the City's Staff recognized as a required prerequisite to any applications moving forward.

33. The Applications, along with all other applications from the developer, were then scheduled to be heard in front of the City Council on November 16, 2016.

34. Prior to the City Council Meeting the developer requested that the City permit it to withdraw without prejudice all other applications, including the Major Modification (MOD-63600), leaving the Applications at issue relating to the 720 multifamily residential buildings on 17.49 acres located on Alta/Rampart southwest corner. ROR001081-1135.

35. But again, the City's Staff Report prepared in advance of the City Council meeting confirmed that one of the conditions for approving these Applications was that there be a Major Modification of the Peccole Ranch Master Plan. ROR002421-2441. As the City's staff explains, the Applications "are dependent on action taken on the Major Modification and the related Development Agreement between the application and the City for the development of the golf

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course property." ROR002425. This point is reiterated in the report that "[t]he proposed development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan." (*Id.*).

36. Yet, as the City's Staff Report confirms, the developer had submitted no request for a Major Modification to the 1990 Peccole Ranch Master Development Plan Phase II to authorize modification for the 17.49 acres of golf course/drainage/open space land use to change the designated land uses, and increase in net units, density, and maximum units per acre. Rather, the application for a Major Modification was submitted on February 25, 2016, relating to the entirety of the Badlands Golf Course, along with an application for a development agreement, and the developer had now withdrawn any request for a major modification.

37. The City Council voted to hold the matter in abeyance. ROR001342.

38. Subsequently, the Applications came back before the City Council on February 15, 2017.

39. The Staff Report again provided that "[p]ursuant to Title 19.10.040, a request has been submitted for a Modification to the 1990 Peccole Ranch Master Plan to authorize removal of the golf course, change the designated land uses on those parcels to single-family and multi-family residential and allow for additional residential units." The City's Staff maintained that Applications "are dependent on action taken on the Major Modification," and that the "the proposed development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan." ROR011240.

40. There is no question that the City's own Staff had long recognized that these Applications were dependent upon a Major Modification of the Peccole Ranch Master Plan.

41. At the February 15, 2017 City Council meeting, Seventy Acres announced that it was amending its Applications by reducing the units from 720 to 435 units on 17.49 acres located on Alta/Rampart southwest corner. ROR017237-17358. The corresponding effect was an amendment to its application for a general plan amendment PR-OS to medium density, application for rezoning from R-PD7 to medium density residential, and application for SDR-62393 site development plan subject to certain conditions. *Id.*

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42. Despite no Major Modification as the City had long recognized as required, the City Council by a four-to-three vote proceeded anyway and approved the Applications.

43. On or about February 16, 2017, a Notice of Final Action was issued.

44. On March 10, 2017, Plaintiffs timely filed this Petition seeking judicial review of the City's decision.

B. CONCLUSIONS OF LAW

1. The City's decision to approve the Applications is reviewed by the district court for abuse of discretion. *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004). "A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal." *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* Yet, on issue of law, the district court conducts an independent review with no deference to the agency's determination. *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993).

2. Although the City's interpretation of its land use laws is cloaked with a presumption of validity absent manifest abuse of discretion, questions of law, including Municipal Codes, are ultimately for the Court's determination. *See Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1994); *City of N. Las Vegas v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 1197, 1208, 147 P.3d 1109, 1116 (2006).

3. Here, while the City says that this Court should defer to its interpretation, the Court must note that what the City is now claiming as its interpretation of its own Code appears to have been developed purely as a litigation strategy. Before the homeowners filed this suit, the City and its Planning Director had consistently interpreted the Code as requiring a major modification as a precondition for any application to change the terms of the Peccole Ranch Master Plan. Indeed, it was not until oral argument on this Petition for Judicial Review that the City Attorneys' office suggested that the terms of LVMC 19.10.040(G) only applied to property that is technically zoned for "Planned Development" as opposed to property that is zoned R-PD which is "Residential-Planned Development." This position is completely at odds with the City's

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own longstanding interpretation of its own Code and that its own Director of Development had long determined that a major modification was required and that the terms of LVMC 19.10.040(G) applied here. Respectfully, interpretations that are developed by legal counsel, as part of a litigation strategy, are not entitled to any form of deference by the judiciary. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012)(no deference is provided when the agency's interpretation is nothing more than a "convenient litigating position."). What is most revealing is the City's interpretation of its own Code before it felt compelled to adopt a different interpretation as a defense strategy to this litigation.

4. The Court finds the City's pre-litigation interpretation and enforcement of its own Code – that a major modification to the Peccole Ranch Master Plan is required to proceed with these Applications – to be highly revealing and consistent with the Code's actual terms.

5. LVMC 19.10.040(G) is entitled "Modification of Master Development Plan and Development Standards." It provides, in relevant part, that:

> The development of property within the Planned Development District may proceed only in strict accordance with the approved Master Development Plan and Development Standards. Any request by or on behalf of the property owner, or any proposal by the City, to modify the approved Master Development Plan or Development Standards shall be filed with the Department. In accordance with Paragraphs (1) and (2) of this Subsection, the Director shall determine if the proposed modification is "minor" or "major," and the request or proposal shall be processed accordingly.

See LVMC 19.10.040(G).

6. Accordingly, under the Code, "[a]ny request by or on behalf of the property owner, or any proposal by the City, to modify the approved Master Development Plan or Development Standards shall be filed with the Department." LVMC 19.10.040(G). It is the City's Planning Department who "shall determine if the proposed modification is minor or major, and the request or proposal shall be processed accordingly." *Id.*

7. There is no dispute that the Peccole Ranch Master Plan is a Master Development Plan recognized by the City and listed in the City's 2020 Master Plan accordingly.

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8. Likewise, there is no dispute that throughout the application process, the City's Planning Department continually emphasized that approval of the Applications was dependent upon approval of a major modification of the Peccole Ranch Master Plan. For example, the record contains the following representations from the City:

- "The site is part of the 1,569-acre Peccole Ranch Master Plan. Pursuant to Title 19.10.040, a request has been submitted for a Modification to the 1990 Peccole Ranch Master Plan to authorize removal of the golf course, change the designated land uses on those parcels to single family and multi-family residential and allow for additional residential units."
- "The site is part of the Peccole Ranch Master Plan. The appropriate avenue for considering any amendment to the Peccole Ranch Master Plan is through the Major Modification process as outline in Title 19.10.040..."
- "The current General Plan Amendment, Rezoning and Site Development Plan Review requests are dependent upon on action taken on the Major Modification..."
- "The proposed Development requires a Major Modification (MOD-63600) of the Peccole Ranch Master Plan...."
- "The Department of Planning has determined that any proposed development not in conformance with the approved (1990) Peccole Ranch Master Plan would be required to pursue a Major Modification..."
- "The Peccole Ranch Master Plan must be modified to change the land use designations from Golf Course/Drainage to Multi-Family prior to approval of the proposed General Plan Amendment..."
- "In order to redevelop the Property as anything other than a golf course or open space, the applicant has proposed a Major Modification of the 1990 Peccole Master Plan."
- "In order to address all previous entitlements on this property, to clarify intended future development relative to existing development, and because of the acreage of

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the proposed for development, staff has required a modification to the conceptual plan adopted in 1989 and revised in 1990."

ROR000001-27; ROR002425-2428; ROR006480-6490; ROR017362-17377.

9. The City's failure to require or approve of a major modification, without getting into the question of substantial evidence, is legally fatal to the City's approval of the Applications because under the City's Code, as confirmed by the City's Planning Department, the City was required to first approve of a major modification of the Peccole Ranch Master Plan, which was never done. That, by itself, shows the City abused its discretion in approving the Applications.

10. Instead of following the law and the recommendations from the City's Planning Department, over the course of many months there was a gradual retreat from talking about a major modification and all of a sudden that discussion and the need for following Staff's recommendation just went out the window.

11. The City is not permitted to change the rules and follow something other than the law in place. The Staff made it clear that a major modification was mandatory. The record indicates that the City Council chose to just ignore and move past this requirement and did what the developer wanted, without justification for it, other than the developer's will that it be done.

12. In light of the foregoing, the Court finds that the City abused its discretion in approving the Applications. The Court interprets the City's Code, just as the City itself had long interpreted it, as requiring a major modification of the Peccole Ranch Master Plan. Since the City failed to approve of a major modification prior to the approval of these Applications the City abused its discretion and acted in contravention of the law.

Based upon the Findings and Facts and Conclusions of Law above:

IT IS HEREBY ORDERED that Plaintiffs' Petition for Judicial Review is **GRANTED**.

. . .

. . .

. . .

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IT IS FURTHER ORDERED that the approval of the applications GPA-62387, ZON-62392, and SDR-62393 are hereby vacated, set aside, and shall be void, and judgment shall be entered against Defendant City of Las Vegas and Seventy Acres, LLC in favor of Plaintiffs accordingly.

DATED: March 1, 2018

THE HONORABLE JIM CROCKETT
EIGHTH JUDICIAL DISTRICT COURT

Submitted by:

PISANELLI BICE PLLC

By: _____
Todd L. Bice, Esq., Bar No. 4534
Dustun H. Holmes, Esq., Bar No. 12776
400 South 7th Street, Suite 300
Las Vegas, Nevada 89109

Attorneys for Plaintiffs

Approved as to Form and Content by:

KAEMPFER CROWELL

By: NOT SIGNED
Christopher L. Kaempfer, Esq., Bar No. 1625
Stephanie Allen, Esq., Bar No. 8486
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Las Vegas, Nevada 89135

Attorneys for Seventy Acres, LLC

Approved as to Form and Content by:

By: NOT SIGNED
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Attorneys for City of Las Vegas

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Exhibit 23

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
JACK B. BINION, AN INDIVIDUAL; DUNCAN R. LEE AND IRENE LEE, INDIVIDUALS AND TRUSTEES OF THE LEE FAMILY TRUST; FRANK A. SCHRECK, AN INDIVIDUAL; TURNER INVESTMENTS, LTD., A NEVADA LIMITED LIABILITY COMPANY; ROGER P. WAGNER AND CAROLYN G. WAGNER, INDIVIDUALS AND AS TRUSTEES OF THE WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC; JASON AWAD AND SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE THOMAS AND KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE KENNETH J. SULLIVAN FAMILY TRUST; DR. GREGORY BIGLER; AND SALLY BIGLER,
Respondents.

No. 75481

FILED
MAR 05 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order granting a petition for judicial review of the Las Vegas City Council's decision that approved

20-08895

three land use applications. Eighth Judicial District Court, Clark County; James Crockett, Judge.[1]

Appellant Seventy Acres filed three development applications with the City's Planning Department in order to construct a multi-family residential development on a parcel it recently acquired. Specifically, Seventy Acres filed a general plan amendment, a rezoning application, and a site development plan amendment. Relying on reports compiled by the Planning Commission staff and statements made by the Planning Director, the City's Planning Commission and City Council approved the three applications.

Respondents filed a petition for judicial review of the City Council's approval of Seventy Acres's applications. Respondents' primary argument was that the City failed to follow the express terms of Title 19 of the Las Vegas Municipal Code (LVMC) in granting the applications. Respondents also argued that the City's decision was not supported by substantial evidence. Following a hearing, the district court concluded that the City adopted its interpretation of Title 19 of the LVMC as a litigation strategy and declined to give the City's interpretation of its land use ordinances deference. Citing a report prepared by the Planning Commission staff, the district court found that the City previously interpreted Title 19 of the LVMC as requiring Seventy Acres to obtain a major modification of the Peccole Ranch Master Plan before it could develop

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[1]The Honorables Kristina Pickering, Chief Justice, and Mark Gibbons, James Hardesty, Ron Parraguirre, and Abbi Silver, Justices, voluntary recused themselves from participation in the decision of this matter. The Governor designated The Honorable Lynne Simons, District Judge of the Second Judicial District Court, to sit in place of the Honorable James Hardesty.

the parcel. Therefore, the district court determined that the City's previous interpretation should apply and Seventy Acres was required to obtain a major modification of the Peccole Ranch Master Plan before having the subject applications approved. Accordingly, the district court granted the petition for judicial review and vacated the City Council's approval of Seventy Acres's three applications. Seventy Acres appeals.

Title 19 of the LVMC does not require a major modification for residential planned development districts

This court's role in reviewing an administrative agency's decision is identical to that of the district court and we give no deference to the district court's decision. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013); *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011). We review an administrative agency's legal conclusions de novo and its "factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011) (internal quotations omitted). When construing ordinances, this court "gives meaning to all of the terms and language[,] . . . read[ing] each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 274, 236 P.3d 10, 17-18 (2010) (internal citation and internal quotation omitted). Additionally, this court presumes a city's interpretation of its land use ordinances is valid "absent a manifest abuse of discretion." *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871 P.2d 320, 326 (1994).

Having considered the record and the parties' arguments, we conclude that the City Council properly interpreted the City's land use ordinances in determining that Seventy Acres was not required to obtain a major modification of the Peccole Ranch Master Plan before it could develop the parcel. LVMC 19.10.040(B)(1) expressly limits master development plans to planned development district zoning designations. Therefore, the major modification process described in LVMC 19.10.040(G)(2), which is required to amend a master development plan, only applies to planned development district zoning designations. Here, the parcel does not carry the planned development district zoning designation. Therefore, the major modification process is not applicable to the parcel.

Instead, the parcel carries a zoning designation of residential planned development district. LVMC 19.10.050(B)(1) expressly states that site development plans govern the development of residential planned development districts. Therefore, as the City correctly determined, Seventy Acres must follow the site development plan amendment process outlined under LVMC 19.16.100(H) to develop the parcel. LVMC 19.10.050(D). This process does not require Seventy Acres to obtain a major modification of the Peccole Ranch Master Plan prior to submitting the at-issue applications. Accordingly, we conclude that the City Council's interpretation of the City's land use ordinances did not constitute a manifest abuse of discretion. *Cinnamon Hills Assocs.*, 110 Nev. at 247, 871 P.2d at 326 (1994).

Substantial evidence supports the City's approval of the applications

We next consider whether substantial evidence supports the City's decision to grant Seventy Acres's applications. "Substantial evidence is evidence that a reasonable person would deem adequate to support a decision." *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 899,

59 P.3d 1212, 1219 (2002). In determining whether substantial evidence exists to support an agency's decision, this court is limited to the record as presented to the agency. *Id.* Although conflicting evidence may be present in the record, "we cannot substitute our judgment for that of the City Council as to the weight of the evidence." *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 530, 96 P.3d 756, 761 (2004).

The parties dispute whether substantial evidence supported the City's decision to grant Seventy Acres's three applications.[2] The governing ordinances require the City to make specific findings to approve a general plan amendment, LVMC 19.16.030(I), a rezoning application, LVMC 19.16.090(L), and a site development plan amendment, LVMC 19.16.100(E). In approving the applications, the City primarily relied on a report prepared by the Planning Commission staff that analyzed the merits of each application.[3] The report found that Seventy Acres's applications met the statutory requirements for approval. The City also relied on the testimony

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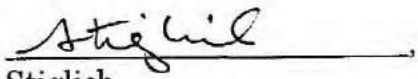
[2]Respondents point to evidence in the record showing that the public schools that serve the community where the parcel is located are currently over capacity and that many of the residents that live in the surrounding area are opposed to the project. However, "it is not the place of the court to substitute its judgment for that of the [City Council] as to weight of the evidence." *Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) (explaining that "conflicting evidence does not compel interference with [a] . . . decision so long as the decision was supported by substantial evidence").

[3]The report erroneously found that Seventy Acres had to obtain a major modification of the Peccole Ranch Master Plan prior to submitting a general plan amendment. Setting that finding aside, the report found that Seventy Acres met the other statutory requirements for approval of its general plan amendment, its rezoning application, and its site development plan amendment.

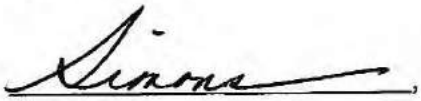
of the Planning Director, who found that the applications were consistent with the goals, objectives, and policies of the City's 2020 Master Plan, compatible with surrounding developments, and substantially complied with the requirements of the City's land use ordinances. Evidence in the record supports these findings. Accordingly, we conclude that a reasonable person would find this evidence adequate to support the City's decision to approve Seventy Acres's general plan amendment, rezoning application, and site development plan amendment. *Reno Police Protective Ass'n*, 118 Nev. at 899, 59 P.3d at 1219.

In sum, we conclude that the district court erred when it granted respondents' petition for judicial review. The City correctly interpreted its land use ordinances and substantial evidence supports its decision to approve Seventy Acres's three applications. We therefore

ORDER the judgment of the district court REVERSED.


, J.
Stiglich


, J.
Cadish


, D.J.
Simons

cc: Hon. James Crockett, District Judge
Ara H. Shirinian, Settlement Judge
Law Offices of Kermitt L. Waters
EHB Companies, LLC
Marquis Aurbach Coffing
Claggett & Sykes Law Firm
Hutchison & Steffen, LLC/Las Vegas
Pisanelli Bice, PLLC
Las Vegas City Attorney
Eighth District Court Clerk

Exhibit 24

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,

vs.

JACK B. BINION, AN INDIVIDUAL; DUNCAN R. LEE; IRENE LEE, INDIVIDUALS AND TRUSTEES OF THE LEE FAMILY TRUST; FRANK A. SCHRECK, AN INDIVIDUAL; TURNER INVESTMENTS, LTD., A NEVADA LIMITED LIABILITY COMPANY; ROGER P. WAGNER; CAROLYN G. WAGNER, INDIVIDUALS AND AS TRUSTEES OF THE WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC; JASON AWAD; SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE THOMAS; KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE KENNETH J. SULLIVAN FAMILY TRUST; DR. GREGORY BIGLER; AND SALLY BIGLER,
Respondents.

No. 75481

FILED

MAY 12 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

_____, J.
Stiglich

_____, J.
Cadish

_____, D.J.
Simons

cc: Hon. James Crockett, District Judge
Law Offices of Kermitt L. Waters
EHB Companies, LLC
Hutchison & Steffen, LLC/Las Vegas
Claggett & Sykes Law Firm
Pisanelli Bice, PLLC
Las Vegas City Attorney
Eighth District Court Clerk

Exhibit 25

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,

vs.

JACK B. BINION, AN INDIVIDUAL; DUNCAN R. LEE; IRENE LEE, INDIVIDUALS AND TRUSTEES OF THE LEE FAMILY TRUST; FRANK A. SCHRECK, AN INDIVIDUAL; TURNER INVESTMENTS, LTD., A NEVADA LIMITED LIABILITY COMPANY; ROGER P. WAGNER; CAROLYN G. WAGNER, INDIVIDUALS AND AS TRUSTEES OF THE WAGNER FAMILY TRUST; BETTY ENGLESTAD AS TRUSTEE OF THE BETTY ENGLESTAD TRUST; PYRAMID LAKE HOLDINGS, LLC; JASON AWAD; SHEREEN AWAD AS TRUSTEES OF THE AWAD ASSET PROTECTION TRUST; THOMAS LOVE AS TRUSTEE OF THE ZENA TRUST; STEVE THOMAS; KAREN THOMAS AS TRUSTEES OF THE STEVE AND KAREN THOMAS TRUST; SUSAN SULLIVAN AS TRUSTEE OF THE

No. 75481

KENNETH J. SULLIVAN FAMILY TRUST; DR. GREGORY BIGLER; AND SALLY BIGLER,
Respondents.

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

_____, C.J.
Stiglich

_____, J.
Cadish

_____, Sr. J.
Saitta

_____, D.J.
Simons

cc: Law Offices of Kermitt L. Waters
EHB Companies, LLC
Hutchison & Steffen, LLC/Las Vegas
Claggett & Sykes Law Firm
Pisanelli Bice, PLLC
Las Vegas City Attorney

KENNETH J. SULLIVAN FAMILY TRUST; DR. GREGORY BIGLER; AND SALLY BIGLER,
Respondents.

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

_____, C.J.
Stiglich

_____, J.
Cadish

_____, Sr. J.
Saitta

_____, D.J.
Simons

cc: Law Offices of Kermitt L. Waters
EHB Companies, LLC
Hutchison & Steffen, LLC/Las Vegas
Claggett & Sykes Law Firm
Pisanelli Bice, PLLC
Las Vegas City Attorney

Exhibit 26

Electronically Filed
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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT N. PECCOLE and NANCY A. PECCOLE, individuals, and Trustees of the ROBERT N. AND NANCY A. PECCOLE FAMILY TRUST,

Plaintiffs,

v.

PECCOLE NEVADA, CORPORATION, a Nevada Corporation; WILLIAM PECCOLE 1982 TRUST; WILLIAM PETER and WANDA PECCOLE FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership; WILLIAM PECCOLE and WANDA PECCOLE 1971 TRUST; LISA P. MILLER 1976 TRUST; LAURETTA P. BAYNE 1976 TRUST; LEANN P. GOORJIAN 1976 TRUST; WILLIAM PECCOLE and WANDA PECCOLE 1991 TRUST; FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO, LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company; EHB COMPANIES, LLC, a Nevada Limited Liability Company; THE CITY OF LAS VEGAS; LARRY MILLER, an individual; LISA MILLER, an individual; BRUCE BAYNE, an individual; LAURETTA P. BAYNE, an individual; YOHAN LOWIE, an individual; VICKIE DEHART, an individual; and FRANK PANKRATZ, an individual,

Defendants.

Case No. A-16-739654-C
Dept. No. VIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT GRANTING DEFENDANTS FORE STARS, LTD., 180 LAND CO LLC, SEVENTY ACRES LLC, EHB COMPANIES LLC, YOHAN LOWIE, VICKIE DEHART AND FRANK PANKRATZ'S NRCP 12(b)(5) MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Hearing Date: November 1, 2016
Hearing Time: 8:00 a.m.

Courtroom 11B

This matter coming on for Hearing on the 2nd day of November, 2016 on Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz's NRCP 12(B)(5) Motion To Dismiss Plaintiffs' Amended Complaint, James J. Jimmerson of the Jimmerson Law Firm, P.C. appeared on behalf of Defendants, Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz; Stephen R. Hackett of Sklar Williams, PLLC and Todd D. Davis of

EHB Companies LLC, appeared on behalf of Defendant EHB Companies LLC; and Robert N. Peccole of Peccole & Peccole, Ltd. appeared on behalf of the Plaintiffs.

The Court, having fully considered the Motion, the Plaintiffs' Oppositions thereto, the Defendants' Replies, and all other papers and pleadings on file herein, including each party's Supplemental filings following oral argument, as permitted by the Court, hearing oral argument, and good cause appearing, issues the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

Complaint and Amended Complaint

1. Plaintiffs initially filed a Complaint in this matter on July 7, 2016 which raised three Claims for Relief against all Defendants: 1) Declaratory and Injunctive Relief; 2) Breach of Contract and 3) Fraud.

2. On August 4, 2016, before any of the Defendants had filed a responsive pleading to the original Complaint, Plaintiffs filed their Amended Complaint which alleged the following Claims for Relief against all Defendants: 1) Injunctive Relief; 2) Violations of Plaintiffs' Vested Rights and 3) Fraud.

3. Plaintiffs Robert and Nancy Peccole are residents of the Queensridge common interest community ("Queensridge CIC"), as defined in NRS 116, and owners of the property identified as APN 138-31-215-013, commonly known as 9740 Verlaine Court, Las Vegas, Nevada ("Residence"). (Amended Complaint, Par. 2).

4. At the time of filing of the Complaint and Amended Complaint, the Residence was owned by the Robert N. and Nancy A. Peccole Family Trust ("Peccole Trust"). The Peccole Trust acquired title to the Residence on August 28, 2013 from Plaintiff's Robert and Nancy Peccole, as individuals, and transferred ownership of the residence to Plaintiff's Robert N. and Nancy A. Peccole on September 12, 2016.

5. Plaintiff's Robert and Nancy Peccole, as Trustees of the Peccole Trust, have no ownership interest in the Residence and therefor have no standing in this action.

6. Plaintiff's Robert N. and Nancy A. Peccole, as individuals, acquired their present ownership interest in the Residence on September 12, 2016 and therefore had full knowledge of the plans to develop the land upon which the Badlands Golf Course is presently operated at the time they acquired the Residence.

7. Plaintiffs' Amended Complaint alleges that the City of Las Vegas, along with Defendants Fore Stars Ltd., Yohan Lowie, Vickie DeHart and Frank Pankratz, openly sought to circumvent the requirements of state law, the City Code and Plaintiffs' alleged vested rights, which they allegedly gained under their Purchase Agreement, by applying to the City for redevelopment, rezoning and by interfering with and allegedly violating the drainage system in order to deprive Plaintiffs and other Queensridge homeowners from notice and an opportunity to be heard and to protect their vested rights under the Master Declaration of Covenants, Conditions, Restrictions and Easements for Queensridge (hereinafter "Master Declaration" or "Queensridge Master Declaration")(*See* Amended Complaint, Par. 1).

8. Plaintiffs allege that Defendant Fore Stars Ltd. convinced the City of Las Vegas Planning Department to put a Staff sponsored proposed amendment to the City of Las Vegas Master Plan on the September 8, 2015 Planning Commission Agenda. The Amended Complaint alleges that the proposed Amendment would have allowed Fore Stars Ltd. to exceed the density cap of 8 units per acre on the Badlands Golf Course located in the Queensridge Master Planned Community. (Amended Complaint, Par. 44).

9. Plaintiffs allege that Defendant Fore Stars Ltd., recorded a Parcel Map relative to the Badlands Golf Course property without public notification and process required by NRS 278.320 to 278.4725. Plaintiffs further allege that the requirements of NRS 278.4925 and City of Las Vegas Unified Development Code 19.16.070 were not met when the City Planning Director certified the Parcel Map and allowed it to be recorded by Fore Stars, Ltd. and that the City of Las Vegas should have known that it was unlawfully recorded. (Amended Complaint, Par. 51, 61 and 62).

10. Plaintiffs allege in their First Claim for Relief that they are entitled to Injunctive Relief against the Developer Defendants and City of Las Vegas enjoining them from taking any action that violates the provisions of the Master Declaration.

11. Plaintiffs allege in their Second Claim for Relief that Developer Defendants have violated their "vested rights" as allegedly afforded to them in the Master Declaration.

12. Plaintiffs allege the following "Specific Acts of Fraud" committed by some or all of the Defendants in this case:

1. Implied representations by Peccole Nevada Corporation, Larry Miller, Bruce Bayne and Greg Goorjian. (Amended Complaint, ¶ 76).

2. A "scheme" by Defendants Peccole Nevada Corporation, Larry Miller, Bruce Bayne, all of the entities listed in Paragraph 34 as members of Fore Stars, Ltd, and Yohan Lowie, Vickie DeHart, Frank Pankratz and EHB Companies LLC in collusion with each other whereby Fore Stars, Ltd would be sold to Lowie and his partners and they in turn would clandestinely apply to the City of Las Vegas to eliminate Badlands Golf Course and replace it with residential development including high density apartments. (Amended Complaint, ¶ 77).

3. The City of Las Vegas, through its Planning Department and members joined in the scheme contrived by the Defendants and participated in the collusion by approving and allowing Fore Stars to illegally record a Merger and Resubdivision Parcel Map and accepting an illegal application designed to change drainage system and subdivide and rezone the Badlands Golf Course. (Amended Complaint, ¶ 78).

4. That Yohan Lowie and his agents publicly represented that the Badlands Golf Course was losing money and used this as an excuse to redevelop the entire course. (Amended Complaint, ¶ 79).

5. That Yohan Lowie publically represented that he paid $30,000,000 for Fore Stars of his own personal money when he really paid $15,000,000 and borrowed $15,800,000. (Amended Complaint, ¶ 80).

6. Lowie's land use representatives and attorneys have made public claims that the golf course is zoned R-PD7 and if the City doesn't grant this zoning, it will result in an inverse condemnation. (Amended Complaint, ¶ 81).

Plaintiffs' Motions for Preliminary Injunction against the City of Las Vegas and against the Developer Defendants and Orders Denying Plaintiffs' Motions for Rehearing, for Stay on Appeal and Notice of Appeal.

13. On August 8, 2016, Plaintiffs filed a Motion for Preliminary Injunction seeking to enjoin the City of Las Vegas from entertaining or acting upon agenda items presently before the City Planning Commission that allegedly violated Plaintiffs' vested rights as home owners in the Queensridge common interest community.

14. The Court denied Plaintiffs' Motion for Preliminary Injunction in an Order entered on September 30, 2016 because Plaintiffs failed to demonstrate that permitting the City of Las Vegas Planning Commission (or the Las Vegas City Council) to proceed with its consideration of the Applications constitutes irreparable harm to Plaintiffs that would compel the Court to grant Plaintiffs the requested injunctive relief in contravention of the Nevada Supreme Court's holding in *Eagle Thrifty Drugs & Market v. Hunter Lake Parent Teachers Ass'n*, 85 Nev. 162, 165, 451 P.2d 713, 714 (1969).

15. On September 28, 2016—the day after their Motion for Preliminary Injunction directed at the City of Las Vegas was denied—Plaintiffs filed a virtually identical Motion for Preliminary Injunction, but directed it at Defendants Fore Stars Ltd., Seventy Acres LLC, 180 Land Co LLC, EHB Companies LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz (hereinafter "Developer Defendants").

16. On October 5, 2016, Plaintiffs improperly filed a Motion for Rehearing of Plaintiffs' Motion for Preliminary Injunction.[1]

17. On October 12, 2016, Plaintiffs filed a Motion for Stay Pending Appeal in relation to the Order Denying their Motion for Preliminary Injunction against the City of Las Vegas.

18. On October 17, 2016, the Court, through Minute Order, denied the Plaintiffs' Motion for Rehearing, Motion for Stay Pending Appeal and Motion for Preliminary Injunction

[1] The Motion was procedurally improper because Plaintiffs are required to seek leave of Court prior to filing a Motion for Rehearing pursuant to EDCR 2.24(a) and Plaintiffs failed to do so. On October 10, 2016, the Court issued an Order vacating the erroneously-set hearing on Plaintiffs Motion for Rehearing, converting Plaintiffs Motion to a Motion for Leave of Court to File Motion for Rehearing and setting same for in chambers hearing on October 17, 2016.

against Developer Defendants. Formal Orders were subsequently entered by the Court thereafter on October 19, 2016, October 19, 2016 and October 31, 2016, respectively.

19. The Court denied Plaintiffs' Motion for Rehearing of the Motion for Preliminary Injunction because Plaintiffs could not show irreparable harm, because they possess administrative remedies before the City Planning Commission and City Council pursuant to NRS 278.3195, UDC 19.00.080(N) and NRS 278.0235, and because Plaintiffs failed to show a reasonable likelihood of success on the merits at the September 27, 2016 hearing and failed to allege any change of circumstances since that time that would show a reasonable likelihood of success as of October 17, 2016.

20. The Court denied Plaintiffs' Motion for Stay Pending Appeal on the Order Denying Plaintiffs' Motion for Preliminary Injunction against the City of Las Vegas because Plaintiffs failed to satisfy the requirements of NRAP 8 and NRCP 62(c). Plaintiffs failed to show that the object of their potential writ petition will be defeated if their stay is denied, they failed to show that they would suffer irreparable harm or serious injury if the stay is not issued and they failed to show a likelihood of success on the merits.

21. The Court denied Plaintiffs' Motion for Preliminary Injunction against Developer Defendants because Plaintiffs failed to meet their burden of proof that they have suffered irreparable harm for which compensatory damages are an inadequate remedy and failed to show a reasonable likelihood of success on the merits. The Court also based its denial on the fact that Nevada law does not permit a litigant from seeking to enjoin the Applicant as a means of avoiding well-established prohibitions and/or limitations against interfering with or seeking advanced restraint against an administrative body's exercise of legislative power:

> In Nevada, it is established that equity cannot directly interfere with, or in advance restrain, the discretion of an administrative body's exercise of legislative power. [Citation omitted] This means that a court could not enjoin the City of Reno from entertaining Eagle Thrifty's request to review the planning commission recommendation. ***This established principle may not be avoided by the expedient of directing the injunction to the applicant instead of the City Council.***

Eagle Thrifty Drugs & Market v. Hunter Lake Parent Teachers Ass'n, 85 Nev. 162, 165, 451 P.22d 713, 714 (1969) (emphasis added).

22. On October 21, 2016, Plaintiffs filed a Notice of Appeal on the Order Denying their Motion for Preliminary Injunction against the City of Las Vegas. Subsequently, on October 24, 2016, Plaintiffs filed a Motion for Stay in the Supreme Court. On November 10, 2016, the Nevada Supreme Court dismissed Plaintiffs' Appeal, and the Motion for Stay was therefore denied as moot.

Defendants' Motion to Dismiss

23. Defendants Fore Stars, Ltd., 180 Land Co., LLC, Seventy Acres LLC, EHB Companies, LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz filed a Motion to Dismiss Amended Complaint on September 6, 2016.

24. The Amended Complaint makes several allegations against the Developer Defendants:

1) that they improperly obtained and unlawfully recorded a parcel map merging and re-subdividing three lots which comprise the Badlands Golf Course land;
2) that, with the assistance of the City Planning Director, they did not follow procedures for a tentative map in the creation of the parcel map,;
3) that the City accepted unlawful Applications from the Developer Defendants for a general plan amendment, zone change and site development review and scheduled a hearing before the Planning Commission on the Applications;
4) that they have violated Plaintiffs' "vested rights" by filing Applications to rezone, develop and construct residential units on their land in violation of the Master Declaration and by attempting to change the drainage system; and
5) that Developer Defendants have committed acts of fraud against Plaintiffs.

25. The Developer Defendants contended that they properly followed procedures for approval of a parcel map because the map involved the merger and re-subdividing of only three parcels and that Plaintiffs' arguments about tentative maps only apply to transactions involving five or more parcels, whereas parcel maps are used for merger and re-subdividing of four or

fewer parcels of land. *See* NRS 278.461(1)(a)("[a] person who proposed to divide any land for transfer or development into four lots or less... [p]repare a parcel map...").

26. The Developer Defendants further argued that Plaintiffs erroneously represent that a parcel map is subject to same requirements as a tentative map or final map of NRS 278.4925. Tentative maps are used for larger parcels and subdivisions of land and subdivisions of land require "five or more lots." NRS 278.320(1).

27. The Developer Defendants argued that Plaintiffs have not pursued their appeal remedies under UDC 19.16.040(T) and have failed to exhaust their administrative remedies. The City similarly notes that they seek direct judicial challenge without exhausting their administrative remedies and this is fatal to their claims regarding the parcel map in this case. *See Benson v. State Engineer*, 131 Nev. ____, 358 P.3d 221, 224 (2015) and *Allstate Insurance Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993-94 (2007).

28. The Developer Defendants also argued that Plaintiffs have failed to exhaust their administrative remedies prior to seeking judicial review. The Amended Complaint notes that the Defendants' Applications are scheduled for a public hearing before the City Planning Commission and thereafter, before the City of Las Vegas City Council. The Planning Commission Staff had recommended approval of all seven (7) applications. *See* Defendants' Supplemental Exhibit H, filed November 2, 2016. The Applications were heard by the City Planning Commission at its Meeting of October 18, 2016. The Planning Commission's action and decisions on the Applications are subject to review by the Las Vegas City Council at its upcoming November 16, 2016 Meeting under UDC 19.16.030(H), 19.16.090(K) and 19.16.100(G). It is only after a final decision of the City Council that Plaintiffs would be entitled to seek judicial review in the District Court pursuant to NRS 278.3195(4).

29. The Developer Defendants argued that Plaintiffs do not have the "vested rights" that they claim are being violated in their Second Claim for Relief because the Badlands Golf Course land that was not annexed into Queensridge CIC, as required by the Master Declaration

and NRS 116, is unburdened, unencumbered by, and not subject to the CC&Rs and the restrictions of the Master Declaration.

30. The Developer Defendants argued that the Plaintiffs have failed to plead fraud with particularity as required by NRCP 9(b).

31. The Developer Defendants argued that Plaintiffs have not alleged any viable claims against them and their Amended Complaint should be dismissed for failure to state a claim.

Plaintiffs' Voluntary Dismissal of Certain Defendants

32. On October 4, 2016, Plaintiffs dismissed several Peccole Defendants from this case through a Stipulation and Order Dismissing Without Prejudice Defendants Lauretta P. Bayne, individually, Lisa Miller, individually, Lauretta P. Bayne 1976 Trust, Leann P. Goorjian 1976 Trust, Lisa P. Miller 1976 Trust, William Peccole 1982 Trust, William and Wanda Peccole 1991 Trust, and the William Peccole and Wanda Peccole 1971 Trust was entered.

33. On October 11, 2016, Plaintiffs dismissed the remaining Peccole Defendants through a Stipulation and Order Dismissing Without Prejudice Defendants: Peccole Nevada Corporation; William Peter and Wanda Peccole Family Limited Partnership, Larry Miller and Bruce Bayne. As such, no Peccole-related Defendants remain as Defendants in this case.

Dismissal of the City of Las Vegas

34. The City of Las Vegas filed a Motion to Dismiss on August 30, 2016. Said Motion was heard on October 11, 2016 and was granted on October 19, 2016, dismissing all of Plaintiffs' claims against the City of Las Vegas.

Lack of Standing

35. Plaintiff's Robert and Nancy Peccole, as Trustees of the Peccole Trust, have no ownership interest in the Residence and therefor have no standing in this action. As such, all

claims asserted by Plaintiff's Robert and Nancy Peccole, as Trustees of the Peccole Trust are dismissed.

Facts Regarding Developer Defendants' Motion to Dismiss

36. The Court has reviewed and considered the filings by Plaintiffs and Defendants, including the Supplements filed by both sides following the November 1, 2016 Hearing, as well as the oral argument of counsel at the hearing.

37. Plaintiff's Robert N. and Nancy A. Peccole, as individuals, acquired their present ownership interest in the Residence on September 12, 2016 and therefore had full knowledge of the plans to develop the land upon which the Badlands Golf Course is presently operated at the time they acquired the Residence.

38. Plaintiffs have not set forth facts that would substantiate a basis for the three claims set forth in their Complaint against the Developer Defendants: Injunctive Relief/Parcel Map, Vested Rights, and Fraud.

39. The Developer Defendants are the successors in interest to the rights, interests and title in the Badlands Golf Course land formerly held by Peccole 1982 Trust, Dated February 15, 1982; William Peter and Wanda Ruth Peccole Family Limited Partnership; and Nevada Legacy 14 LLC.

40. Plaintiffs' have made some scurrilous allegations without factual basis and without affidavit or any other competent proof. The Court sees no evidence supporting those claims.

41. The Developer Defendants properly followed procedures for approval of a parcel map over Defendants' property pursuant to NRS 278.461(1)(a) because the division involved four or fewer lots. The Developer Defendants parcel map is a legal merger and re-subdividing of land within their own boundaries.

42. The Developer Defendants have complied with all relevant provisions of NRS Chapter 278.

43. NRS 278A.080 provides: "The powers granted under the provisions of this chapter may be exercised by any city or county which enacts an ordinance conforming to the provisions of this chapter."

44. The Declaration of Luann Holmes, City Clerk for the City of Las Vegas, Exhibit L to Defendants' November 2, 2016 Supplemental Exhibits, states at paragraph 5, "[T]he Unified Development Code and City Ordinances for the City of Las Vegas do not contain provisions adopted pursuant to NRS 278A."

45. The Queensridge Master Declaration (Court Exhibit B and attached to Defendants' November 2, 2016 Supplement as Exhibit B), at p. 1, Recital B, states: "Declarant intends, without obligation, to develop the Property and the Annexable Property in one or more phases as a mixed-use common interest community pursuant to Chapter 116 of the Nevada Revised Statutes ("NRS"), which shall contain "non-residential" areas and "residential" areas, which may, but is not required to, include "planned communities" and "condominiums," as such quoted terms are used and defined in NRS Chapter 116."

46. The Queensridge community is a Common Interest Community organized under NRS 116. This is not a PUD community.

47. NRS 116.1201(4) states that "The provisions of Chapter 117 and 278A of NRS do not apply to common-interest communities." See Defendants' Supplemental Exhibit Q.

48. In contrast to the City of Las Vegas' choice not to adopt the provisions of NRS 278A, municipal or city councils that choose to adopt the provisions of NRS 278A do so, as required by NRS 278A.080, by affirmatively enacting ordinances that specifically adopt Chapter 278A. *See, e.g.,* Defendants' Supplemental Exhibit N and O, Title 20 Consolidated

Development Code 20.704.040 and 20.676, Douglas County, Nevada and Defendants' Supplemental Exhibit P, Ordinance No. 17.040.030, City of North Las Vegas. The provisions of NRS 278A do not apply to the facts of this case.

49. The City Council has not voted on Defendants' pending Applications and the Court will not stop the City Council from conducting its ordinary business and reaching a decision on the Applications. Plaintiffs may not enjoin the City of Las Vegas or Defendants with regard to their instant Applications, or other Applications they may submit in the future. *See Eagle Thrifty Drugs & Market v. Hunter Lake Parent Teachers Ass'n*, 85 Nev. 162, 165, 451 P.2d 713, 714 (1969).

50. Plaintiffs are improperly trying to impede upon the City's land use review and zoning processes. The Defendants are permitted to seek approval of their Applications, or any Applications submitted in the future, before the City of Las Vegas, and the City of Las Vegas, likewise, is entitled to exercise its legislative function without interference by Plaintiffs.

51. Plaintiffs' claim that the Applications were "illegal" or "violations of the Master Declaration" is without merit. The filing of these Applications by Defendants, or any Applications by Defendants, is not prohibited by the terms of the Master Declaration, because the Applications concern Defendants' own land, and such land that is not annexed into the Queensridge CIC is therefore not subject to the terms of its Master Declaration. Defendants cannot violate the terms of an agreement to which they are not a party and which does not apply to them.

52. Plaintiffs' inferences and allegations regarding whether the Badlands Golf Course land is subject to the Queensridge Master Declaration are not fair and reasonable, and have no support in fact or law.

53. The land which is owned by the Defendants, upon which the Badlands Golf Course is presently operated ("GC Land") that was never annexed into the Queensridge CIC, never became part of the "Property" as defined in the Queensridge Master Declaration and is therefore not subject to the terms, conditions, requirements or restrictions of the Queensridge Master Declaration.

54. Plaintiffs cannot prove a set of facts under which the GC Land was annexed into the "Property" as defined in the Queensridge Master Declaration.

55. Since Plaintiffs have failed to prove that the GC Land was annexed into the "Property" as defined in the Master Declaration, then the GC Land is not subject to the terms and conditions of the Master Declaration.

56. There can be no violation of the Master Declaration by Defendants if the GC Land is not subject to the Master Declaration. Therefore, the Defendants' Applications are not prohibited by, or violative of, the Master Declaration.

57. Plaintiffs' Exhibit 1 to their Supplement filed November 8, 2016 depicts a proposed and conceptual master plan amendment. The maps attached thereto do not appear to depict the 9-hole golf course, but instead identifies that area as proposed single family development units.

58. Plaintiffs' Exhibit 2 to their Supplement filed November 8, 2016, which is also Exhibit J to Defendants' Supplement filed November 2, 2016, approves a request for rezoning to R-PD3, R-PD7 and C-1, which all indicate the intent to develop in the future as residential or commercial. Plaintiffs alleged this was a Resolution of Intent which was "expunged" upon approval of the application. Plaintiffs alleged that Exhibit 3 to their Supplement, the 1991 zoning approval letter, was likewise expunged. However, the Zoning Bill No. Z-20011, Ordinance No. 5353, attached as Exhibit I to Defendants' Motion to Dismiss, demonstrates that

the R-PD7 Zoning was codified and incorporated into the amended Atlas in 2001. Therefore, Plaintiffs' claim that Attorney Jerbic's presentation at the Planning Commission Meeting (Exhibit D to Defendants' Supplement) is "erroneous" is, in fact, incorrect. Attorney Jerbic's presentation is supported by the documentation of public record.

59. Defendants' Supplemental Exhibit I, a March 26, 1986 letter to the City Planning Commission, specifically sought the R-PD zoning for a planned golf course "as it allows the developer flexibility and the City design control." Thus, keeping the golf course zoned for potential future development as residential was an intentional part of the plan.

60. Further, Defendants' Supplemental Exhibit K, two letters from the City of Las Vegas to Frank Pankratz dated December 20, 2014, confirm the R-PD7 zoning on all parcels held by Fore Stars, Ltd.

61. Plaintiffs' Exhibit 4 to their Supplement filed November 8, 2016, a 1986 map depicts two proposed golf courses, one proposed in Canyon Gate and the other proposed around what is currently Badlands. However, the current Badlands Golf Course is not the same as what is depicted on that map. Of note, the area on which the 9 hole golf course currently sits is depicted as single family development.

62. Exhibit A to the Queensridge Master Declaration defines the initial land committed as "Property" and Exhibit B defines the land that is eligible to be annexed, but it only becomes part of the "Property" if a Declaration of Annexation is filed with the County Recorder.

63. The Court finds that Recital A to the Queensridge Master Declaration defines "Property" to "mean and include both of the real property described in Exhibit "A" hereto and that portion of the Annexable Property which may be annexed from time to time in accordance with Section 2.3, below."

64. The Court finds that Recital A of the Queensridge Master Declaration further states that "In no event shall the term "Property" include any portion of the Annexable Property for which a Declaration of Annexation has not been Recorded…"

65. The Court finds that after reviewing the Supplemental Exhibit, Annexation Binder filed on October 20, 2016 at the Court's request, and the map entered as Exhibit A at the November 1, 2016 Hearing and to Defendants' November 2, 2016 Supplement, that the property owned by Developer Defendants that was never annexed into the Queensridge CIC is therefore not part of the "Property" as defined in the Queensridge Master Declaration.

66. The Court therefore finds that the terms, conditions, and restrictions of the Queensridge Master Declaration do not apply to the GC Land and cannot be enforced against the GC Land.

67. The Court finds that Exhibit C to the Master Declaration is not a depiction exclusively of the "Property" as Plaintiffs allege. It is clear that it depicts both the Property, which is a very small piece, and the Annexable Property, pursuant to the Master Declaration, page 10, Section 1.55, which states that Master Plan is defined as the "Queensridge Master Plan proposed by Declarant for the Property and the Annexable Property which is set forth in Exhibit "C," hereto…" Plaintiffs' Supplement filed November 8, 2016, Exhibit 5, is page 10 of the Master Declaration, and Plaintiffs emphasize that is a master plan proposed by the Declaration "for the property." But reading the provision as a whole, it is clear that it is a "proposed" plan for the Property (as defined by the Master Declaration at Recital A) and "the Annexable Property."

68. Likewise, Exhibit 6 to Plaintiffs' Supplement filed November 8, 2016 defines 'Final Map' as a Recorded map of "any portion" of the Property. It does not depict all of the Property. The Master Declaration at Section 1.55 is clear that its Exhibit C depicts the Property

and the Annexable Property, and Defendants' Supplemental Exhibit A makes clear that not all of the Annexable Property was actually annexed into the Queensridge CIC.

69. Plaintiffs' Supplemental Exhibit 7, which is Exhibit C to the Master Declaration, does not depict "Lot 10" as part of the Property. It depicts Lot 10 as part of the Annexable Property. Plaintiffs' Supplemental Exhibit 8 depicts, as discussed by Defendants at the November 1, 2016 Hearing, that Lot 10 was subdivided into several parcels, one of which became the 9 hole golf course. It was not designated as "not a part of the Property or Annexable Property" because it was Annexable Property. However, again, the public record Declarations of Annexation, as summarized in Defendants' Supplemental Exhibit A, shows that Parcel 21, the 9 holes, was never annexed into the Queensridge CIC.

70. The Master Declaration at Recital B provides that the Property "may, but is not required to, include…a golf course."

71. The Master Declaration at Recital B further provides that "The existing 18-hole golf course commonly known as the "Badlands Golf Course" is not a part of the Property or Annexable Property." The Court finds that does not mean that the 9-hole golf course was a part of the Property. It is clear that it was part of the Annexable Property, and was subject to development rights. In addition to the "diamond" on the Exhibit C Map indicating it is "subject to development rights, p. 1, Recital B of the Master Declaration states: "Declarant intends, without obligation, to develop the Property and the Annexable Property…"

72. In any event, the Amended and Restated Master Declaration of October, 2000 included the 9 holes, and provides "The existing 27-hole golf course commonly known as the "Badlands Golf Court" is not a part of the Property or Annexable Property."

73. The Court finds that Mr. Peccole's Deed (Plaintiffs' Supplemental Exhibit 9) and Preliminary Title Report provided by Plaintiffs both indicate that his home was part of the

Queensridge CIC, that it sits on Parcel 19, which was annexed into the Queensridge CIC in March, 2000. Both indicate that his home is subject to the terms and conditions of the Master Declaration, "including any amendments and supplements thereto."

74. The Court finds that, conversely, the Fore Stars, Ltd. Deed of 2005 does not have any such reference to the Queensridge Master Declaration or Queensridge CIC. Likewise none of the other Deeds involving the GC Land, Defendants' Supplemental Exhibits E, F, and G filed November 2, 2016, make any reference to such land being subject to, or restricted by, the Queensridge Master Declaration.

75. Plaintiffs' Supplemental Exhibit 10, likewise, ignores the second sentence of Section 13.2.1, which provides "In addition, Declarant shall have the right to unilaterally amend this Master Declaration to make the following amendments..." The four (4) rights including the right to amend the Master Declaration as necessary to correct exhibits or satisfy requirements of governmental agencies, to amend the Master Plan, to amend the Master Declaration as necessary or appropriate to the exercise Declarant's rights, and to amend the Master declaration as necessary to comply with the provisions of NRS 116. Declarant, indeed, amended the Master Declaration as such just a few months after Plaintiffs' purchased their home.

76. Contrary to Plaintiffs' claim, the Amended and Restated Master Declaration was, in fact, recorded on August 16, 2002, as reflected in Defendants' Second Supplement, Exhibit Q.

77. Regardless, whether or not the 9-hole course is "not a party of the Property or Annexable Property" is irrelevant, if it was never annexed.

78. The Court finds that the Master Declaration and Deeds, as well as the Declarations of Annexation, are recorded documents and public record.

79. This Court has heard Plaintiffs' arguments and is not satisfied, and does not believe, that the GC Land is subject to the Master Declaration of Queensridge.

80. This Court is of the opinion that Plaintiffs' counsel Robert N. Peccole, Esq. may be so personally close to the case that he is missing the key issues central to the causes of action.

81. The Court finds that the Developer Defendants have the right to develop the GC Land.

82. The Court finds that the GC Land owned by Developer Defendants has "hard zoning" of R-PD7. This allows up to 7.49 development units per acre subject to City of Las Vegas requirements.

83. Of Plaintiffs' six averments of Fraud in their Amended Complaint, the only one that could ***possibly*** meet all of the elements required is #1. That is the only averment where Plaintiffs claim that a false representation was made by any of the Defendants with the intention of inducing Plaintiffs to act based upon a specific misrepresentation. None of the remaining five averments involve representations made directly to Plaintiffs. Plaintiffs' first fraud claim fails for two reasons: first, Plaintiffs alleged that the representations were "implied representations." The elements of Fraud require actual representations, not implied representations and second, and more importantly, Plaintiffs have dismissed all of the Defendants listed in averment #1 who they claim made false representations to them.

84. Plaintiffs allegations of fraud against Developer Defendants fail and are insufficient pursuant to NRCP 9(b) because they are not plead with particularity and do not include averments as to time, place, identity of parties involved and the nature of the fraud. Plaintiffs have not plead any facts which allege any contact or communication with the Developer Defendants at the time of purchase of the custom lot. Furthermore, Plaintiffs have voluntarily dismissed the Peccole Defendants who allegedly engaged in said alleged fraud.

85. Assuming the facts alleged by Plaintiffs to be true, Plaintiffs cannot meet the elements of any type of fraud recognized in the State of Nevada, including: negligent

misrepresentation, intentional misrepresentation or fraud in the inducement as their claim is pled against Developer Defendants. This alleged "scheme," does not meet the elements of fraud because Plaintiffs fail to allege that Developer Defendants made a false representation to them; that Developer Defendants knew the representation was false; that Developer Defendants intended to induce Plaintiffs to rely on this knowing, false representation; and that Plaintiffs actually relied on such knowing, false representation. Plaintiffs not only fail to allege that they have ever spoken to any of the Developer Defendants, but Mr. Peccole admitted at the October 11, 2016 Hearing that he had never spoken to Mr. Lowie.

86. Plaintiffs are alleging a conspiracy, but that would be a criminal matter. What they are trying to do is stop an administrative arm of the City of Las Vegas from doing their job.

87. Plaintiffs' general and unsupported allegations of a "scheme" involving Developer Defendants and the now-dismissed Peccole Defendants and Defendant City of Las Vegas do not meet the legal burden of stating a fraud claim with particularity. There is quite simply no competent evidence to even begin to suggest the truth of such scurrilous allegations.

88. Plaintiffs have failed to state a claim for relief against the following Defendants: Yohan Lowie, Vickie DeHart, Frank Pankratz and EHB Companies LLC and those claims should be dismissed. Plaintiffs' only claims against Lowie, DeHart and Pankratz are the fraud claims, but the fraud claim is legally insufficient because it fails to allege that any of these individuals ever made any fraudulent representations to Plaintiffs. Lowie, DeHart and Pankratz are Mangers of EHB Companies LLC. EHB Companies LLC is the sole Manager of Fore Stars Ltd., 180 Land Co LLC, and Seventy Acres LLC. Plaintiffs have failed to properly allege the elements of any causes of action sufficient to impose liability, nor even pierce the corporate veil, against the Managers of any of the above-listed entities.

89. In light of Plaintiffs voluntarily dismissal of the Peccole Defendants, whom are alleged to have actually made the fraudulent representations to Plaintiff Robert Peccole, Plaintiffs' claims against Yohan Lowie, Vickie DeHart, Frank Pankratz, and EHB Companies LLC, whom are not alleged to have ever held a conversation with Plaintiff Robert Peccole, appear to have been brought solely for the purpose of harassment and nuisance.

90. Although ordinarily leave to amend the Complaint should be freely given when justice requires, Plaintiffs have already amended their Complaint once and have failed to state a claim against the Developer Defendants. For the reasons set forth hereinabove, Plaintiffs shall not be permitted to amend their Complaint a second time in relation to their claims against Developer Defendants as the attempt to amend the Complaint would be futile.

91. Developer Defendants introduced, and the Court accepted, the following Exhibits at the Hearing, as well as taking notice of multiple other exhibits which were attached to the various filings (including Plaintiffs' Deeds, Title Reports, Plaintiffs' Purchase Agreement, Addendum to Plaintiffs' Purchase Agreement, Fore Stars, Ltd.'s Deed, the Declarations of Annexation, and others):

1) Exhibit A: Property Annexation Summary Map;
2) Exhibit B: Master Declaration;
3) Exhibit C: Amended Master Declaration;
4) Exhibit D: Video/thumb drive from Planning Commission hearing of City Attorney Brad Jerbic.

92. If any of these Findings of Fact is more appropriately deemed a Conclusion of Law, so shall it be deemed.

CONCLUSIONS OF LAW

93. The Nevada Supreme Court has explained that "a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court" and that the point at which jurisdiction is transferred from the district court to the Supreme Court must be clearly

defined. Although, when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before the Supreme Court, the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits. *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-530 (2006).

94. In order for a complaint to be dismissed for failure to state a claim, it must appear beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000)(emphasis added).

95. The Court must draw every fair inference in favor of the non-moving party. *Id.* (emphasis added).

96. Courts are generally to accept the factual allegations of a Complaint as true on a Motion to Dismiss, but the allegations must be legally sufficient to constitute the elements of the claim asserted. *Carpenter v. Shalev*, 126 Nev. 698, 367 P.3d 755 (2010).

97. Plaintiffs have failed to state a claim upon which relief can be granted, even with every fair inference in favor of Plaintiffs. It appears beyond a doubt that Plaintiffs can prove no set of facts which would entitle them to relief.

98. NRS 52.275 provides that "the contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation."

99. While a Court generally may not consider material beyond the complaint in ruling on a 12(b)(6) motion, "[a] court may take judicial notice of 'matters of public record' without converting a motion to dismiss into a motion for summary judgment," as long as the facts noticed are not "subject to reasonable dispute." *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499

F.3d 1048, 1052 (9th Cir. 2007)(citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001); *see also United States v. Ritchie,* 342 F.3d 903, 908–09 (9th Cir.2003)). Courts may take judicial notice of some public records, including the "records and reports of administrative bodies." *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (citing *Interstate Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir.1953)). The administrative regulations, zoning letters, CC&R and Master Declarations referenced herein are such documents.

100. Plaintiffs have sought judicial challenge and review of the parcel maps without exhausting their administrative remedies first and this is fatal to their claims regarding the parcel maps. *Benson v. State Engineer*, 131 Nev. ___, 358 P.3d 221, 224 (2015) and *Allstate Insurance Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993-94 (2007).

101. The City Planning Commission and City Council's work is of a legislative function and Plaintiffs' claims attempting to enjoin the review of Defendant Developers' Applications are not ripe. UDC 19.16.030(H), 19.16.090(K) and 19.16.100(G).

102. Plaintiffs have an adequate remedy in law in the form of judicial review pursuant to UDC 19.16.040(T) and NRS 233B.

103. Zoning ordinances do not override privately-placed restrictions and courts cannot invalidate restrictive covenants because of a zoning change. *Western Land Co. v. Truskolaski*, 88 Nev. 200, 206, 495 P.2d 624, 627 (1972).

104. NRS 278A.080 provides: "The powers granted under the provisions of this chapter may be exercised by any city or county which enacts an ordinance conforming to the provisions of this chapter."

105. NRS 116.1201(4) specifically and unambiguously provides, "The provisions of chapters 117 and 278A of NRS do not apply to common-interest communities."

106. NRS 278.320(2) states that "A common-interest community consisting of five or more units shall be deemed to be a subdivision of land within the meaning of this section, but need only comply with NRS 278.326 to 278.460, inclusive and 278.473 to 278.490, inclusive."

107. Private land use agreements are enforced by actions between the parties to the agreement and enforcement of such agreements is to be carried out by the Courts, not zoning boards.

108. Plaintiffs "vested rights" Claim for Relief is not a viable claim because Plaintiffs have failed to show that the GC Land is subject to the Master Declaration and therefore that claim should be dismissed.

109. Plaintiffs have failed to plead fraud with particularity as required by NRCP 9(b). The absence of any plausible claim of fraud against the Defendants was further demonstrated by the fact that throughout the Court's lengthy hearing upon the Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, Plaintiffs did not make a single reference or allegation whatsoever that would suggest in any way that the Plaintiffs had any claim of fraud against any of the Defendants. Plaintiffs did not reference their alleged claim at all, and the Court Finds, at this time, that the Plaintiffs have failed o state any claim upon with relief may be granted against the Defendants. *See NRCP 9(b).*

110. Under Nevada law, a Plaintiff must prove the elements of fraudulent misrepresentation by clear and convincing evidence: (1) A false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation. *Barmettler v. Reno Air, Inc.*, 114 Nev.

441, 447, 956 P.2d 1382, 1386 (1998), citing *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992); *Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975).

111. Nevada law provides: (i) a shield to protect members and managers from liability for the debts and liabilities of the limited liability company. *NRS 86.371*; and (ii) a member of a limited-liability company is not a proper party to proceedings by or against the company. *NRS 86.381*. The Court finds that naming the individual Defendants, Lowie, DeHart and Pankratz, was not made in good faith, nor was there any reasonable factual basis to assert such serious and scurrilous allegations against them.

112. If any of these Conclusions of Law is more appropriately deemed a Findings of Fact, so shall it be deemed.

ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz' Motion to Dismiss Amended Complaint is hereby GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as to the Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz, Plaintiffs' Amended Complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that collateral to the instant Findings of Fact, Conclusions of Law, Order and Judgment, the Court will address the Defendants' Motion for Attorneys' Fees and Costs, and Supplement thereto pursuant to NRCP 11, and issue a separate Order and Judgment relating thereto.

DATED this 21 day of November 2016.

DISTRICT COURT JUDGE
A-16-739654-C

Respectfully submitted by:

JIMMERSON LAW FIRM, P.C.

/s/ James J. Jimmerson, Esq.
James J. Jimmerson, Esq.
Nevada Bar No. 000264
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101
(702) 388-7171

Exhibit 27

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CLERK OF THE COURT

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James J. Jimmerson, Esq.
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Attorneys for Defendants Fore Stars, Ltd., 180 Land Co., LLC., Seventy Acres, LLC; Yohan Lowie, Vickie DeHart and Frank Pankratz

DISTRICT COURT
CLARK COUNTY, NEVADA

ROBERT N. PECCOLE and NANCY A. PECCOLE, individuals, and Trustees of the ROBERT N. and NANCY A. PECCOLE FAMILY TRUST,

Plaintiffs,

vs.

PECCOLE NEVADA, CORPORATION, a Nevada Corporation; WILLIAM PECCOLE 1982 TRUST; WILLIAM PETER and WANDA PECCOLE FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership; WILLIAM PECCOLE and WANDA PECCOLE 1971 TRUST; LISA P. MILLER 1976 TRUST; LAURETTA P. BAYNE 1976 TRUST; LEANN P. GOORJIAN 1976 TRUST; WILLIAM PECCOLE and WANDA PECCOLE 1991 TRUST; FORE STARS, LTD., a Nevada Limited Liability Company; 180 Land Co., LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC., a Nevada Limited Liability Company; EHB COMPANIES, LLC, a Nevada Limited Liability Company; THE CITY OF LAS VEGAS; LARRY MILLER, an individual; LISA MILLER, an individual; BRUCE BAYNE, an individual; LAURETTA P. BAYNE, an individual; YOHAN LOWIE, an individual; VICKIE DEHART, an individual; FRANK PANKRATZ, an individual,

Defendants.

CASE NO. A-16-739654-C

DEPT. NO: VIII

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT

Date: January 10, 2017
Courtroom 11B

THE JIMMERSON LAW FIRM, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 388-7171 - Facsimile (702) 387-1167

PLEASE TAKE NOTICE that Findings of Fact, Conclusions of Law, Final Order and Judgment was entered in the above-entitled action on the 31st day of January, 2017, a copy of which is attached hereto.

Dated: January 31st, 2017.

THE JIMMERSON LAW FIRM, P.C.

By: _____
James J. Jimmerson, Esq.
Nevada State Bar No. 000264
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101
Attorneys for Defendants Fore Stars, Ltd., 180 Land Co., LLC., Seventy Acres, LLC; Yohan Lowie, Vickie DeHart and Frank Pankratz

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Jimmerson Law Firm, P.C. and that on this 31st day of January, 2017, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT** as indicated below:

__X__ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

__X__ by electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk

To the attorney(s) listed below at the address, email address, and/or facsimile number indicated below:

Robert N. Peccole, Esq. PECCOLE & PECCOLE, LTD. 8689 W. Charleston Blvd., #109 Las Vegas, NV 89117 bob@peccole.vcoxmail.com	Todd Davis, Esq. EHB Companies LLC 1215 S. Fort Apache, Suite 120 Las Vegas, NV 89117 tdavis@ehbcompanies.com
Lewis J. Gazda, Esq. GAZDA & TADAYON 2600 S. Rainbow Blvd., #200 Las Vegas, NV 89146 efile@gazdatadayon.com abeltran@gazdatadayon.com kgerwick@gazdatadayon.com lewisjgazda@gmail.com mhdeptula@gazdatadayon.com	Stephen R. Hackett, Esq. SKLAR WILLIAMS, PLLC 410 S. Rampart Blvd., #350 Las Vegas, NV 89145 ekapolnai@klar-law.com shackett@sklar-law.com

An employee of The Jimmerson Law Firm, P.C

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT N. PECCOLE and NANCY A. PECCOLE, individuals, and Trustees of the ROBERT N. AND NANCY A. PECCOLE FAMILY TRUST,

Plaintiffs,

v.

PECCOLE NEVADA, CORPORATION, a Nevada Corporation; WILLIAM PECCOLE 1982 TRUST; WILLIAM PETER and WANDA PECCOLE FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership; WILLIAM PECCOLE and WANDA PECCOLE 1971 TRUST; LISA P. MILLER 1976 TRUST; LAURETTA P. BAYNE 1976 TRUST; LEANN P. GOORJIAN 1976 TRUST; WILLIAM PECCOLE and WANDA PECCOLE 1991 TRUST; FORE STARS, LTD., a Nevada Limited Liability Company; 180 LAND CO, LLC, a Nevada Limited Liability Company; SEVENTY ACRES, LLC, a Nevada Limited Liability Company; EHB COMPANIES, LLC, a Nevada Limited Liability Company; THE CITY OF LAS VEGAS; LARRY MILLER, an individual; LISA MILLER, an individual; BRUCE BAYNE, an individual; LAURETTA P. BAYNE, an individual; YOHAN LOWIE, an individual; VICKIE DEHART, an individual; and FRANK PANKRATZ, an individual,

Defendants.

Case No. A-16-739654-C
Dept. No. VIII

FINDINGS OF FACT, CONCLUSIONS OF LAW, FINAL ORDER AND JUDGMENT

Hearing Date: January 10, 2017
Hearing Time: 8:00 a.m.

Courtroom 11B

This matter coming on for Hearing on the 10th day of January, 2017 *on* Plaintiffs' *Renewed Motion For Preliminary Injunction,* Plaintiffs' *Motion For Leave To Amend Amended Complaint,* Plaintiffs' *Motion For Evidentiary Hearing And Stay Of Order For Rule 11 Fees And Costs,* Plaintiffs' *Motion For Court To Reconsider Order Of Dismissal,* and Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie,

Vickie Dehart and Frank Pankratz's *Oppositions* thereto and *Countermotions for Attorneys' Fees and Costs*, and upon *Plaintiffs' Opposition to Countermotion for Attorney's Fees and Costs* and Defendants' *Countermotion to Strike Plaintiffs' Rogue and Untimely Opposition filed January 5, 2017 and Attorneys' Fees and Costs*, and upon Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz's *Memorandum of Costs and Disbursements*, and no objection or Motion to Retax having been filed by Plaintiffs in response thereto, ROBERT N. PECCOLE, ESQ. of PECCOLE & PECCOLE, LTD. and LEWIS J. GAZDA, ESQ. of GAZDA & TADAYON appearing on behalf of Plaintiffs, and Plaintiff, ROBERT N. PECCOLE being present, and JAMES J. JIMMERSON, ESQ. of THE JIMMERSON LAW FIRM, P.C. appearing on behalf of Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz, and Defendants Yohan Lowie and Vickie DeHart being present, and STEPHEN R. HACKETT, ESQ. of SKLAR WILLIAMS, PLLC and TODD DAVIS, ESQ. of EHB COMPANIES, LLC appearing on behalf of Defendants EHB Companies, LLC and the Court having reviewed and fully considered the papers and pleadings on file herein, and having heard the lengthy arguments of counsel, and having allowed Plaintiffs, over Defendants' objection, to enter Exhibits 1-13 at the hearing, and having reviewed the record, good cause appearing, issues the following Findings of Fact, Conclusions of Law, Final Orders and Judgment:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Findings

1. The Court hearing on November 1, 2016 was extensive and lengthy, and this Court does not need a re-argument of those points. At that time, the Court granted both parties great leeway to argue their case and, thereafter, to file any and all additional documents and/or

exhibits that they wished to file, so long as they did so on or before November 15, 2016. Each party took advantage of said opportunity by submitting additional documents for the Court's review and consideration. The Court has reviewed all submissions by each party. Further, at the Court's extended hearing on January 10, 2017, upon Plaintiffs' and Defendants' post-judgment motions and oppositions, the Court further allowed the parties to make whatever arguments necessary to supplement their respective filings and in support of their respective requests;

2. On November 30, 2016, this Court, after a full review of the pleadings, exhibits, affidavits, declarations, and record, entered extensive *Findings of Fact, Conclusions of Law, Order and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies, LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz's NRCP 12(b)(5) Motion to Dismiss Plaintiffs' Amended Complaint.* On January 20, 2017, the Court also entered its *Findings Of Fact, Conclusions Of Law, and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart And Frank Pankratz's Motion For Attorneys' Fees And Costs* (the "Fee Order"). Both of these Findings of Fact, Conclusions of Law and Orders are hereby incorporated herein by reference, as if set forth in full, and shall become a part of these Final Orders and Judgment;

3. Following the Notice of Entry of the Court's extensive *Findings of Fact, Conclusions of Law, Order and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies, LLC, Yohan Lowie, Vickie DeHart and Frank Pankratz's NRCP 12(b)(5) Motion to Dismiss Plaintiffs' Amended Complaint,* Plaintiffs filed four (4) Motions and one (1) Opposition, on an Order Shortening Time set for hearing on this date, Defendants filed their Oppositions and Countermotions for Attorneys' Fees and Costs, Defendants timely filed their *Memorandum of Costs and Disbursements*, and Plaintiffs chose not to file any Motion to Retax. After this briefing, Plaintiffs, at the January 10, 2017 Court hearing,

presented in excess of an hour and a half of oral argument. The Court allowed the new exhibits to be admitted over the objection of Defendants;

4. Following the hearing, the Court has reviewed the papers and pleadings filed by both Plaintiffs and Defendants, along with Exhibits, and the oral argument of Plaintiffs and Defendants, and relevant statutes and caselaw, and based upon the totality of the record, makes the following Findings:

Plaintiffs' Renewed Motion for Preliminary Injunction

5. As a preliminary matter, based on the record and the evidence presented to date by both sides, the Court does not believe the golf course land ("GC Land") is subject to the terms and restrictions of the Master Declaration of Covenants, Conditions, Restrictions and Easements of Queensridge ("Master Declaration" or "CC&Rs"), because it was not annexed into, or made part of, the Queensridge Common Interest Community ("Queensridge CIC") which the Master Declaration governs. The Court has repeatedly made, and stands by, this Finding;

6. The Court does not believe that William and Wanda Peccole, or their entities (Nevada Legacy 14, LLC, the William Peter and Wanda Ruth Peccole Family Limited Partnership, and/or the William Peccole 1982 Trust) intended the GC Land to be a part of the Queensridge CIC, as evidenced by the fact that if that land had been included within that community, then every person in Queensridge would be paying money to be a member of the Badlands Golf Course and paying to maintain it. They were not, and have not. In fact, the Master Declaration at Recital B states that the CIC "may, but is not required to include...a golf course" and Plaintiffs' Purchase documents make clear that residents of Queensridge acquire no golf course rights or membership privileges by their purchase of a house within the Queensridge CIC. *Exhibit C to Defendants' Opposition filed September 2, 2016 at page 1, Recital B, and Exhibit L to Defendants' Opposition filed September 2, 2016 at paragraph 4 of Addendum 1*;

7. By Plaintiffs' own exhibit, the enlargement of the Exhibit C Map to the Master Declaration, it shows that the GC Land is not a part of the CC&Rs. The Exhibit C map showed the initial Property *and* the Annexable Property, as confirmed by Section 1.55 of the Master Declaration;

8. Therefore, the argument about whether or not the Master Declaration applies to the GC Land does not need to be rehashed, despite Plaintiffs' insistence that it do so. The Court has repeatedly found that it does not. That is the Court's prior ruling, and nothing Plaintiffs have brought forward reasonably convinces the Court otherwise. *See* the Court's November 20, 2016 Order, Findings 51-76;

9. Regarding the Renewed Motion for Preliminary Injunction, Plaintiffs' Renewed Motion and Exhibits are not persuasive, and the Court has made clear that it will not stop a governmental agency from doing its job. The Court does not believe that intervention is "clearly necessary" or appropriate for this Court. As the Court understands it, if the owner of the GC Land has made an application, the governmental agency would be derelict in their duty if it did not review it, consider it and do all of its necessary work to follow the legal process and make its recommendations and/or decision. The Court will not stop that process;

10. Based upon the papers, there is no basis to grant Plaintiffs' Renewed Motion for Preliminary Injunction;

11. Plaintiffs' argument that there is a "conspiracy" with the City of Las Vegas "behind closed doors" to get certain things done is inappropriate and without merit;

12. It is entirely proper for Defendants to follow the City rules that require the filing of applications if they want to develop their property, or to discuss a development agreement with the City Attorney, or present a plan to the City of Las Vegas Planning Commission or the Las Vegas City Council. That is what they are supposed to do;

13. Plaintiffs submitted four (4) photos to demonstrate that the proposed new development under the current application would "ruin his views." However, Plaintiffs' purchase documents make clear that no such "views" or location advantages were guaranteed to Plaintiffs, and that Plaintiffs were on notice through their own exhibit that their existing views could be blocked or impaired by development of adjoining property "whether within the Planned Community or outside of the Planned Community" *Exhibit 1 to Plaintiffs' Reply to Defendants' Motion to Dismiss, filed September 9, 2016.*

14. In response to the Court's inquiry regarding what Plaintiffs are trying to enjoin, Plaintiffs indicate they desire to enjoin Defendants from resubmitting the four (4) applications that have been withdrawn, without prejudice, but which can be refiled. The Court finds that refiling is exactly what Defendants are supposed to do if they want those applications considered;

15. Plaintiffs' argument that Defendants cannot file Applications with the City, because it is a violation of the Master Declaration is without merit. That might be true if the GC Land was part of the CC&R's. As repeatedly stated, this Court does not believe, and the evidence does not suggest, that the GC Land is subject to the CC&Rs, period;

16. Defendants' applications were legal and the proper thing to do, and the Court will not stop such filings. Plaintiffs' position is the filing was not allowed under the Master Declaration, and Plaintiffs will not listen to the Court's Findings that the GC Land was not added to the Queensridge CIC by William Peccole or his entities. Plaintiffs' position is vexatious and harassing to the Defendants under the facts of this case;

17. Plaintiffs argue that the new applications that were filed were negotiated and discussed with the City Attorneys' Office without the knowledge of the City Council. But, again, that is not improper. The City Council does not get involved until the applications are

submitted and reviewed by the Planning Staff and City Planning Commission. The Court finds that there is no "conspiracy" there. People are supposed to follow the rules, and the rules say that if you are going to seek a zone change or a variance, you may submit a pre-application for review, have appropriate discussions and negotiations, and then have a public review by the Planning Commission and ultimately the City Council;

18. The fact that a new application was submitted proposing 61 homes, which is different from the original applications submitted for "The Preserve" which were withdrawn without prejudice, is irrelevant;

19. Plaintiffs' argument that Defendants submitted a new application on December 30, 2016 to allegedly defeat Plaintiffs' Renewed Motion for Preliminary Injunction, to bring the case back into the administrative process, is not reasonable, nor accurate. There were already three (3) applications which were pending and which had been held in abeyance, and thus were still within the administrative process. The new application changes nothing as far as Plaintiffs' requests for a preliminary injunction;

20. Plaintiffs' Exhibit 5 demonstrates that notice was provided to the homeowners, which is what Defendants were supposed to do. There was nothing improper in this;

21. Even if *all* the applications had been withdrawn, Plaintiffs could not "directly interfere with, **or in advance restrain**, the discretion of an administrative body's exercise of legislative power." *Eagle Thrifty Drugs & Markets, Inc. v. Hunter Lake Parent Teachers Assn. et al*, 85 Nev. 162, 451 P.2d 713 (1969) at 165, 451 P.2d at 714. Additionally, "This established principle **may not be avoided by the expedient of directing the injunction to the applicant instead of the City Council.**" *Id.* This holding still applies to these facts;

22. Regardless, the possible submission of zoning and land use applications will not violate any rights or restrictions Plaintiffs claim in their Master Declaration, as "A zoning

ordinance cannot override privately-placed restrictions, and a trial court cannot be compelled to invalidate restrictive covenants merely because of a zoning change." *W. Land Co. v. Truskolaski*, 88 Nev. 200, 206, 495 P.2d 624, 627 (1972). Additionally, UDC 19.00.0809(j) provides: "No provision of this Title is intended to interfere with or abrogate or annul any easement, private covenants, deed restriction or other agreement between private parties.... Private covenants or deed restrictions which impose restrictions not covered by this Title, are not implemented nor superseded by this Title."

23. Plaintiffs' argument that Defendants needed permission to file the applications for the 61 homes is, again, without merit, because Plaintiffs incorrectly assume that the CC&Rs apply to the GC Land, when the Court has already found they do not. Plaintiffs unreasonably refuse to accept this ruling;

24. Plaintiffs have no standing under *Gladstone v. Gregory*, 95 Nev. 474, 596 P.2d 491 (1979) to enforce the restrictive covenants of the Master Declaration against Defendants or the GC Land. The Court has already, repeatedly, found that the Master Declaration does not apply to the GC Land, and thus Plaintiffs have no standing to enforce it against the Defendants. Defendants did not, and cannot, violate a rule that does not govern the GC Land. The Plaintiffs refuse to hear or accept these findings of the Court;

25. Contrary to Plaintiffs' statement, the Court is not making an "argument" that Plaintiffs' are required to exhaust their administrative remedies; that is a "decision" on the part of the Court. As the Court stated at the November 1, 2016 hearing, Plaintiffs believe that CC&Rs of the Queensridge CIC cover the GC Land, and Mr. Peccole is so closely involved in it, he refuses to see the Court's decision coming in as fair or following the law. No matter what decisions are made, Mr. Peccole is so closely involved with the issues, he would never accept

any Court's decision, because if it does not follow his interpretation, in Plaintiffs' mind, the Court is wrong. *November 1, 2016 Hearing Transcript, P. 3, L. 13-2;*

26. Defendants have the right to close the golf course and not water it. This action does not impact Plaintiffs' "rights;"

27. A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits. *Boulder Oaks Cmty. Ass'n v. B & J Andrew Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009); citing NRS 33.010, *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); *Dangberg Holdings v. Douglas Co.*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999). A district court has discretion in deciding whether to grant a preliminary injunction. *Id.* The Plaintiffs have failed to make the requisite showing;

28. On September 27, 2016, the parties were before the Court on Plaintiffs' first Motion for Preliminary Injunction and, after reading all papers and pleadings on file, the Court heard extensive oral argument lasting nearly two (2) hours from all parties. The Court ultimately concluded that Plaintiffs failed to meet their burden for a Preliminary Injunction, had failed to demonstrate irreparable injury by the City's consideration of the Applications, and failed to demonstrate a likelihood of success on the merits, amongst other failings;

29. On September 28, 2016—the day after their Motion for Preliminary Injunction directed at the City of Las Vegas was heard—Plaintiffs ignored the Court's words and filed another Motion for Preliminary Injunction which, substantively, made arguments identical to those made in the original Motion which had just been heard the day before, except that Plaintiffs focused more on the "vested rights" claim, namely, that the applications themselves could not have been filed because they are allegedly prohibited by the Master Declaration. On

October 31, 2016, the Court entered an Order denying that Motion, finding that Plaintiffs failed to meet their burden of proof that they have suffered irreparable harm for which compensatory damages are an inadequate remedy and failed to show a reasonable likelihood of success on the merits, since the Master Declaration of the Queensridge CIC did not apply to land which was not annexed into, nor a part of, the Property (as defined in the Master Declaration). The Court also based its denial on the fact that Nevada law does not permit a litigant from seeking to enjoin the Applicant as a means of avoiding well-established prohibitions and/or limitations against interfering with or seeking advanced restraint against an administrative body's exercise of legislative power. See *Eagle Thrifty Drugs & Markets, Inc., v. Hunter Lake Parent Teachers Assoc.*, 85 Nev. 162, 164-165, 451 P.2d 713, 714-715 (1969);

30. On October 5, 2016, Plaintiffs filed a Motion for Rehearing of Plaintiffs' first Motion for Preliminary Injunction, without seeking leave from the Court. The Court denied the Motion on October 19, 2016, finding Plaintiffs could not show irreparable harm, because they possess administrative remedies before the City Planning Commission and City Council pursuant to NRS 278.3195, UDC 19.00.080(N) and NRS 278.0235, which they had failed to exhaust, and because Plaintiffs failed to show a reasonable likelihood of success on the merits at the September 27, 2016 hearing and failed to allege any change of circumstances since that time that would show a reasonable likelihood of success as of October 17, 2016;

31. At the October 11, 2016 hearing on Defendants City of Las Vegas' Motion to Dismiss Amended Complaint, which was ultimately was granted by Order filed October 19, 2016, the Court advised Mr. Peccole, as an individual Plaintiff and counsel for Plaintiffs, that it believed that he was too close to this" and was missing that the Master Declaration would not apply to land which is not part of the Queensridge CIC. *October 11, 2016 Hearing Transcript at 13:11-13;*

32. On October 12, 2016, Plaintiffs filed a Motion for Stay Pending Appeal in relation to the Order Denying their first Motion for Preliminary Injunction against the City of Las Vegas, which sought, again, an injunction. That Motion was denied on October 19, 2016, finding that Plaintiffs failed to satisfy the requirements of NRAP 8 and NRCP 62(c), Plaintiffs failed to show that the object of their potential writ petition will be defeated if their stay is denied, Plaintiffs failed to show that they would suffer irreparable harm or serious injury if the stay is not issued, and Plaintiffs failed to show a likelihood of success on the merits;

33. On October 21, 2016, Plaintiffs filed a Notice of Appeal on the Order Denying their Motion for Preliminary Injunction against the City of Las Vegas, and on October 24, 2016, Plaintiffs filed a Motion for Stay in the Supreme Court. On November 10, 2016, the Nevada Supreme Court dismissed Plaintiffs' Appeal, and the Motion for Stay was therefore denied as moot;

34. Plaintiffs can assert no harm, let alone "irreparable" harm from the three remaining pending applications, which deal with development of 720 condominiums located a mile from Plaintiffs' home on the Northeast corner of the GC Land;

35. Plaintiffs cannot demonstrate a likelihood of success on the merits. Plaintiffs have argued the "merits" of their claims *ad nausem* and they have not had established any possibility of success;

36. The Court has repeatedly found that the claim that Defendants' applications were "illegal" or "violations of the Master Declaration" is without merit, and such claim is being maintained without reasonable grounds;

37. Plaintiffs' argument within his Renewed Motion is just a rehash of his prior arguments that Lot 10 was "part of" the "Property," (as defined in the Master Declaration) that

the flood drainage easements along the golf course are not included in the "not a part" language, and that he has "vested rights." These arguments have already been addressed repeatedly;

38. In its *Findings of Fact, Conclusions of Law and Order Granting Defendants Motion to Dismiss*, filed November 30, 2016, the Court detailed its analysis of the Master Declaration, the Declarations of Annexation, Lot 10, and the other documents of public record, and made its Findings that the Plaintiffs were not guaranteed any golf course views or access, and that the adjoining GC Land was not governed by the Master Declaration. Those Findings are incorporated herein by reference, as if set forth in full. Specifically Findings No. 51-76 make clear that the GC Land is not a part of and not subject to the Master Declaration of the NRS 116 Queensridge CIC;

39. There is no "new evidence" that changes this basic finding of fact, and Plaintiffs cannot "stop renewal of the 4 applications" or "stop the application" allegedly contemplated for property merely adjacent to Plaintiffs' Lot and which is not within the Queensridge CIC;

40. Since Plaintiffs were on notice of this undeniable fact on September 2, 2016, yet persisted in filing Motion after Motion to try and "enjoin" Defendants, that is exactly why this Court awarded Defendants $82,718.50 relating to the second Motion for Preliminary Injunction, the Motion for Rehearing and the Motion for Stay (Injunction), and why this Court awards additional attorneys' fees and costs for being forced to oppose a Renewed Motion for Preliminary Injunction and these other Motions now;

41. The alleged "new" information cited by Plaintiffs--the withdrawal of four applications without prejudice at the November 16, 2016 City Council meeting--is irrelevant because this Court cannot and will not, in advance, restrain Defendants from submitting applications. Further, the three (3) remaining applications are pending and still in the administrative process;

42. Zoning is a matter properly within the province of the legislature and that the judiciary should not interfere with zoning decisions, especially before they are even final. *See, e.g., McKenzie v. Shelly*, 77 Nev. 237, 362 P.2d 268 (1961) (judiciary must not interfere with board's determination to recognize desirability of commercial growth within a zoning district); *Coronet Homes, Inc. v. McKenzie*, 84 Nev. 250, 439 P.2d 219 (1968) (judiciary must not interfere with the zoning power unless clearly necessary); *Forman v. Eagle Thrifty Drugs and Markets*, 89 Nev. 533, 516 P.2d 1234 (1973) (statutes guide the zoning process and the means of implementation until amended, repealed, referred or changed through initiative). Court intervention is not "clearly necessary" in this instance;

43. Plaintiffs have admitted to the Supreme Court that their duplicative Motion for Preliminary Injunction filed on September 28, 2016 was without merit and unsupported by the law. In their *Response to Motion to Amend Caption and Joinder and Response to the Motion to Dismiss Appeal of Order Granting the City of Las Vegas Motion to Dismiss Amended Complaint*, filed November 10, 2016, Plaintiff's state:"..[T]he case of *Eagle Thrifty Drugs & Market, Inc. v. Hunter Lake Parent Teachers Association,* 85 Nev. 162 (1969) **would not allow directing** of a **Preliminary Injunction against any party but the City Council.** Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres, LLC, Yohan Lowie, Vickie DeHart, Frank Pankratz and EHB Companies, LLC **could not be made parties to the Preliminary Injunction because only the City was appropriate under *Eagle Thrifty.*"** (Emphasis added.) Yet Plaintiffs have now filed a "Renewed" Motion for Preliminary Injunction;

44. Procedurally, Plaintiffs' Renewed Motion is improper because 'No motions once heard and disposed of may be *renewed* in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of

such motion to the adverse parties." *EDCR 2.24 (Emphasis added.)* This is the second time the Plaintiffs have failed to seek leave of Court before filing such a Motion;

45. After hearing all of the arguments of Plaintiffs and Defendants, Plaintiffs have failed to meet their burden for a preliminary injunction against Defendants, and Plaintiffs have no standing to do so;

Plaintiffs' Motion for Leave to Amend Amended Complaint

46. Plaintiffs have already been permitted to amend their Complaint, and did so on August 4, 2016;

47. Plaintiffs deleted the Declaratory Relief cause of action, but maintained a cause of action for injunctive relief even after Plaintiffs were advised that the same could not be sustained, Plaintiffs withdrew the Breach of Contract cause of action and replaced it with a cause of action entitled "Violations of Plaintiffs' Vested Rights," and Plaintiffs' Fraud cause of action remained, for all intents and purposes, unchanged;

48. Plaintiffs were given the opportunity to present a proposed Amended Complaint and failed to do so. There is no Amended Complaint which supports the new alter ego theory Plaintiffs suggest;

49. After the November 1, 2016 hearing on the Motion to Dismiss, the Court provided an opportunity for Plaintiffs (or Defendants) to file any additional documents or requests, including a request to Amend the Complaint, with a deadline of November 15, 2016. Plaintiffs' Motion to Amend Amended Complaint was not filed within that deadline;

50. EDCR 2.30 requires a copy of a proposed amended pleading to be attached to any motion to amend the pleading. Plaintiffs never attached a proposed amended pleading, in violation of this Rule. This makes it impossible for the Court to measure what claims Plaintiffs

propose, other than those outlined in their briefs, all of which are based on a failed and untrue argument;

51. Plaintiffs continue to attempt to enjoin the City from completing its legislative function, or to in advance, restrain Defendants from submitting applications for consideration. This Court has repeatedly Ordered that it will not do that;

52. The Court considered Plaintiffs' oral request from November 1, 2016 to amend the Amended Complaint, and made a Finding in its November 30, 2016 Order of Dismissal, at paragraph 90, "Although ordinarily leave to amend the Complaint should be freely given when justice requires, Plaintiffs have already amended their Complaint once and have failed to state a claim against the Defendants. For the reasons set forth hereinabove, Plaintiffs shall not be permitted to amend their Complaint a second time in relation to their claims against Defendants as the attempt to amend the Complaint would be futile;"

53. Further amending the Complaint, under the theories proposed by Plaintiffs, remains futile. The Fraud cause of action does not state a claim upon which relief can be granted, as the alleged "fraud" lay in the premise that there was a representation that the golf course would remain a golf course in perpetuity. Again, Plaintiffs' own purchase documents evidence that no such guarantee was made and that Plaintiffs were advised that future development to the adjoining property could occur, and could impair their views or lot advantages. The alleged representation is incompetent *(See NRCP 56(e))*, fails woefully for lack of particularity as required by NRCP 9(b), and appears disingenuous under the facts and law of this case;

54. The Fraud claim also fails because Plaintiffs voluntarily dismissed the Defendants—all his relatives or their entities--who allegedly made the fraudulent representations that the golf course would remain in perpetuity;

55. While it is true that Defendants argued that Plaintiffs did not plead their Fraud allegations with particularity as required by NRCP 9(b), Defendants also vociferously argued in their Motion to Dismiss that Plaintiffs failed to state a Fraud claim upon which relief could be granted because their allegations failed to meet the basic and fundamental elements of Fraud: (1) a false representation of fact; (2) made to the plaintiff; (3) with knowledge or belief that the representation was false or without a sufficient basis; (4) intending to induce reliance; (5) creating justifiable reliance by the plaintiff; (6) resulting in damages. *Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992). The Court concurred;

56. To this day, Plaintiffs failed to identify any actual false or misleading statements made by Defendants to them, and that alone is fatal to their claim. Defendants' zoning and land use applications to the City to proceed with residential development upon the GC Land does not constitute fraudulent conduct by Defendants because third-parties allegedly represented at some (unknown) time roughly 16 years earlier that the golf course would never be replaced with residential development;

57. Plaintiffs do not and cannot claim that they justifiably relied on any supposed misrepresentation by any of the Defendants or that they suffered damages as a result of the Defendants' conduct because such justifiable reliance requires a causal connection between the inducement and the plaintiff's act or failure to act resulting in the plaintiff's detriment;

58. Plaintiffs have not, and cannot claim that any representations on the part of Defendants lead them to enter into their "Purchase Agreement" in April 2000, over 14 years prior to any alleged representations or conduct by any of the Defendants. The Court was left to wonder if any of these failings could be corrected in a second amended complaint, as Plaintiffs failed to proffer a proposed second amended complaint as is required under EDCR 2.30. As such, Plaintiffs' Motion to Amend Complaint was doomed from the outset;

59. All of Plaintiffs' claims are based on the theory that Plaintiffs have "vested rights" over the Defendants and the GC Land. The request for injunctive relief is based on the assertion of alleged "rights" under the Master Declaration;

60. The Court has already found, both of Plaintiffs' legal theories (1) the zoning aspect and exhaustion of administrative remedies, and (2) the alleged breach of the restrictive covenants under a Master Declaration "contract," are maintained without reasonable ground. Defendants are not parties to the "contract" alleged to have been breached, and Court intervention is not "clearly necessary" as an exception to the bar to interfere in an administrative process;

61. The zoning on the GC Land dictates its use and Defendants rights to develop their land;

62. Plaintiffs' reargument of the "Lot 10" claim, which Plaintiffs have argued before, which this Court asked Plaintiffs not to rehash, is without merit. Drainage easements upon the GC Land in favor of the City of Las Vegas do not make the GC Land a part of the Queensridge CIC. The Queensridge CIC would have to be a party to the drainage easements in order to have rights in the easements. Plaintiffs presented no evidence to establish that the Queensridge CIC is a party to any drainage easements upon the GC Land;

63. Plaintiffs do not represent FEMA or the government, who are the authorities having jurisdiction to set the regulations regarding "flood drainage." Plaintiffs do not have any agreements with Defendants regarding flood drainage and nor any jurisdiction nor standing to claim or assert "drainage" rights. Any claims under flood zones or drainage easements would be asserted by the governmental authority having jurisdiction;

64. Notwithstanding any alleged "open space" land use designation, the zoning on the GC Land, as supported by the evidence, is R-PD7. Plaintiffs latest argument suggests the land is

"zoned" as "open space" and that they have some right to prevent any modification of that alleged designation under NRS 278A. But the Master Declaration indicates that Queensridge is a NRS Chapter 116 community, and NRS 116.1201(4) specifically and unambiguously provides, "The provisions of chapters 117 and 278A of NRS do not apply to common-interest communities." The Plaintiffs do not have standing to even make any claim under NRS 278A;

65. There is no evidence of any recordation of any of the GC Land, by deed, lien, or by any other exception to title, that would remotely suggest that the GC Land is within a planned unit development, or is subject to NRS 278A, or that Queensridge is governed by NRS 278A. Rather, Queensridge is governed by NRS 116;

66. NRS 278.349(3)(e) states "The governing body, or planning commission if it is authorized to take final action on a tentative map, shall consider: Conformity with the zoning ordinances and master plan, except that if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence;"

67. The Plaintiffs do not own the land which allegedly contains the drainage pointed out in Exhibits 11 and 12. It is Defendants' responsibility to deal with it with the government. Tivoli Village is an example of where drainage means were changed and drainage challenges were addressed by the developer. Plaintiffs have no standing to enforce the maintenance of a drainage easement to which they are not a party;

68. Plaintiffs' Amended Complaint, itself, recognizes that the Master Declaration does not apply to the land proposed to be developed by the Defendants, as it states on page 2, paragraph 1, that "Larry Miller did not protect the Plaintiffs' or homeowner's vested rights by including a Restrictive Covenant that Badlands must remain a golf course as he and other agents of the developer had represented to homeowners." The Amended Complaint reiterated at page 10, paragraph 42, "The sale was completed in March 2015 and conveniently left out any

restrictions that the golf course must remain a golf course." *Id.* Thus, Plaintiffs proceeded in prosecuting this case and attempting to enjoin development with full knowledge that there were no applicable restrictions, conditions and covenants from the Master Declaration which applied to the GC Land, and there were no restrictive covenants in place relating to the sale which prevented Defendants from doing so;

69. Plaintiffs improperly assert that the Motion to Dismiss relied primarily upon the "ripeness" doctrine and the allegation that the Fraud Cause of Action was not pled with particularity. But this is not true. The Motion to Dismiss was granted because Plaintiffs do not possess the "vested rights" they assert because the GC Land is not part of Queensridge CIC and not subject to its CC&Rs. The Fraud claim failed because Plaintiffs could not state the elements of a Fraud Cause of Action. They never had any conversations with any of the Defendants prior to purchasing their Lot and therefore, no fraud could have been committed by Defendants against Plaintiffs in relation to their home/lot purchase because Defendants never made any knowingly false representations to Plaintiffs upon which Plaintiffs relied to their detriment, nor as stated by Plaintiff to the Court did Defendants ever make any representations to Plaintiffs at all. Plaintiffs' were denied an opportunity to amend their Complaint a second time because doing so would be futile given the fact that they have failed to state claims and cannot state claims for "vested rights" or Fraud;

70. None of Plaintiffs' alleged "changed circumstances"—neither the withdrawal of applications, the abatement of others, or the introduction of new ones, changes the fundamental fact that Plaintiffs have no standing to enforce the Master Declaration against the GC Land, or any other land which was not annexed into the Queensridge CIC. It really is that simple;

71. Likewise, the claim that because applications were withdrawn by Defendants at the City Council Meeting and the rest were held in abeyance, that the *Eagle Thrifty* case no

longer applies and no longer prevents a preliminary injunction to enjoin Defendants from submitting future Applications, fails as a matter of law. Plaintiffs' Motion to Amend remains improper under *Eagle Thrifty* because Plaintiffs are effectively seeking to restrain the City of Las Vegas by requesting an injunction against the Applicant, and they are improperly seeking to restrain the City from hearing future zoning and development applications from Defendants. *Eagle Thrifty* neither allows such advance restraint, nor does it condone such advance restraint by directing a preliminary injunction against the Applicant;

72. Amending the Complaint based on the theories argued by Plaintiffs would be futile, and Plaintiffs continue to fail to state a claim upon which relief can be granted;

73. Leave to amend should be freely granted "when justice so requires," but in this case, justice requires the Motion for Leave to Amend be denied. It would be futile. Additionally, Plaintiffs have noticeably failed to submit any proposed second amended Complaint at any time. *See* EDCR 2.30. The Court is compelled to deny Plaintiffs' Motion to Amend;

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Plaintiffs' Motion for Evidentiary Hearing and Stay of Order for Rule 11 Fees and Costs

74. Plaintiffs are not entitled to an Evidentiary Hearing on the Motion for Attorneys' Fees and Costs. NRS 18.010(3) states "in awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence."

75. Plaintiffs' seek an Evidentiary Hearing on the "Order for Rule 11 Fees and Costs," but the request for sanctions and additional attorneys' fees pursuant to NRCP 11 was denied by this Court. Plaintiffs do not seek reconsideration of that denial, and no Evidentiary Hearing is warranted;

76. The Motion itself if procedurally defective. It contains only bare citations to statues and rules, and it contains no Affidavit as required by EDCR 2.21 and NRCP 56(e);

77. NRCP 60(b) does not allow for Evidentiary Hearing to give Plaintiffs "opportunity to present evidence as to why they filed a Motion for Preliminary Injunction against Fore Stars and why that was appropriate." It allows the setting aside of a default judgment due to mistakes, inadvertence, excusable neglect, newly discovered evidence or fraud. With respect to the Motion for Attorneys' Fees and Costs and Order granting the same, this is not even alleged;

78. Plaintiffs must establish "adequate cause" for an Evidentiary Hearing. *Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 123, 124–25 (1993). Adequate cause "requires something more than allegations which, if proven, might permit inferences sufficient to establish grounds....." "The moving party must present a prima facie case...showing that (1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching." *Id.*

79. Plaintiffs have failed to establish adequate cause for an Evidentiary Hearing. Plaintiffs have not even submitted a supporting Affidavit alleging any facts whatsoever;

80. "Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (76). "Rehearings are not granted as a matter of right, and are not allowed for the purpose of reargument." *Geller v. McCown*, 64 Nev. 102, 108, 178 P.2d 380, 381 (1947) (citation omitted). Points or contentions available before but not raised in the original hearing cannot be maintained or considered on rehearing. See *Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996);

81. There is no basis for an Evidentiary Hearing under NRCP 59(a). There were no irregularities in the proceedings of the court, or any order of the court, or abuse of discretion whereby either party was prevented from having a fair trial. There was no misconduct of the court or of the prevailing party. There was no accident or surprise which ordinary prudence could not have guarded against. There was no newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered or produced at trial. There were no excessive damages being given under the influence of passion of prejudice, and there were no errors in law occurring at the trial and objected to by the party making the motion. If anything, the fact that Defendants were awarded 56% of their incurred attorneys' fees and costs relating to the preliminary injunction issues, and denied additional sanctions pursuant to NRCP 11, demonstrates this Court's evenhandedness and fairness to the Plaintiffs;

82. Plaintiffs are not automatically entitled to an Evidentiary Hearing on the issue of attorneys' fees and costs, and the decision to forego an evidentiary hearing does not deprive a party of due process rights if the party has notice and an opportunity to be heard. *Lim v. Willick Law Grp.*, No. 61253, 2014 WL 1006728, at *1 (Nev. Mar. 13, 2014). *See, also, Jones v. Jones, 22016 WL 3856487, Case No. 66632 (2016)*;

83. In this case, Plaintiffs had notice and the opportunity to be heard, and already presented to the Court the evidence they would seek to present about why they filed a Motion for a Preliminary Injunction against these Defendants, having argued at the September 27, 2016 Hearing, the October 11, 2016 Hearing, the November 1, 2016 Hearing and the January 10, 2017 hearing that they had "vested rights to enforce "restrictive covenants" against Defendants under the *Gladstone v. Gregory* case. Those arguments fail;

84. The Court also gave Plaintiffs the opportunity to submit any further evidence they wanted, with a deadline of November 15, 2016. The Court considered all evidence timely submitted;

85. Plaintiffs filed on November 8, 2016 Supplemental Exhibits with their argument regarding the "Amended Master Declaration" and on November 18, 2016 "Additional Information" including description of the City Council Meeting. Plaintiffs also filed on November 17, 2016, their Response to the Motion for Attorneys' Fees and Costs;

86. On its face, the facts claimed in Plaintiffs' Motion, unsupported by Affidavit, regarding why he had to file the first Motion for Preliminary Injunction, second Motion for Preliminary Injunction on September 28, 2016, the Motion for Stay Pending Appeal and the Motion for Rehearing, which Motions were the basis of the award of attorneys' fees and costs, are unbelievable. Plaintiffs claim that the City was dismissed as a Defendant and the "only remedy" was to file directly against the Defendants. But Plaintiffs filed their Motion for Preliminary Injunction against Fore Stars the day after the hearing on their first Motion for Preliminary Injunction—even before the decision on their first Motion was issued detailing the denial of the Motion and the analysis of the *Eagle Thrifty* case. The Court had not even *heard*, let alone granted, City's Motion to Dismiss at that time;

87. Plaintiffs' justification that the administrative process came to an end when four applications were withdrawn without prejudice, three were held in abeyance, and "a contemplated additional violation of the CC&R's appeared on the record" is also without merit. Aside from the fact that Plaintiffs are not permitted to restrain, in advance, the filing of applications or the City's consideration of them, factually, as of September 28, 2016, the Planning Commission Meeting had not even occurred yet (let alone the City Council Meeting). The administrative process was still ongoing;

88. The claim that the *Gladstone case* was applicable directly against restrictive covenant violators after the administrative process ended and Defendants were "no longer protected by Eagle Thrifty" is, again, belied by the fact that the CC&R's do not apply to, and cannot be enforced against, land that was not annexed into the Queensridge CIC. *Gladstone* does not apply. Plaintiffs' argument is not convincing;

89. Plaintiffs' arguments regarding how "frivolous" is defined by NRCP 11 is irrelevant because those additional sanctions against Plaintiffs' counsel were denied as moot, in light of the Court awarding Defendants attorneys' fees and costs under NRS 18.010(2)(b) and EDCR 7.60;

90. Defendants' Motion sought an award of $147,216.85 in attorneys' fees and costs, dollar for dollar, incurred in having to defeat Plaintiffs' repeated efforts to obtain a preliminary injunction against Defendants, which multiplied the proceedings unnecessarily. After considering Defendants' Motion and Supplement and Plaintiffs' Response, the Court awarded Defendants $82,718.50. The attorneys' fees and costs awarded related only to those efforts to obtain a preliminary injunction through the end of October, 2016, and did not include or consider the additional attorneys' fees, or the additional costs, which were incurred by Defendants relating to the Motions to Dismiss, or the new filings after October, 2016;

91. NRS 18.010, EDCR 7.60 and NRCP 11 are distinct rules and statues, and the Court can apply any of the rules and statues which are applicable;

92. NRS § 18.010 makes allowance for attorney's fees when the Court finds that the claim of the opposing party was brought without reasonable ground or to harass the prevailing party, and/or in bad faith. *NRS 18.010(2)(b)*. A frivolous claim is one that is, "both baseless and made without a reasonable competent inquiry." *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993). Sanctions or attorneys' fees may be awarded where the pleading fails to be well

grounded in fact and warranted by existing law and where the attorney fails to make a reasonable competent inquiry. *Id.* The decision to award attorney fees against a party for pursuing a claim without reasonable ground is within the district court's sound discretion and will not be overturned absent a manifest abuse of discretion. *Edwards v. Emperor's Garden Restaurant*, 130 P.3d 1280 (Nev. 2006).

93. NRS 18.010 (2) provides that: "The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public."

94. EDCR 7.60(b) provides, in pertinent part, for the award of fees when a party without just cause: (1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted, (3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously, and (4) Fails or refuses to comply with these rules;

95. An award of attorney's fees and costs in this case was appropriate, as Plaintiffs' claims were baseless and Plaintiffs' counsel did not make a reasonable and competent inquiry before proceeding with their first Motion for Preliminary Injunction after receipt of the Opposition, and in filing their second Preliminary Injunction Motion, their Motion for Rehearing or their Motion for Stay Pending Appeal, particularly in light of the hearing the day prior.

Plaintiffs' Motions were the epitome of a pleading that "fails to be well grounded in fact and warranted by existing law and where the attorney fails to make a reasonable competent inquiry;"

96. There was absolutely no competent evidence to support the contentions in Plaintiffs' Motions--neither the purported "facts" they asserted, nor the "irreparable harm" that they alleged would occur if their Motions were denied. There was no Affidavit or Declaration filed supporting those alleged facts, and Plaintiffs even changed the facts of this case to suit their needs by transferring title to their property mid-litigation after the Opposition to Motion for Preliminary Injunction had been filed by Defendants. Plaintiffs were blindly asserting "vested rights" which they had no right to assert against Defendants;

97. Plaintiffs certainly did not, and cannot present any set of circumstances under which they would have had a good faith basis in law or fact to assert their Motion for Preliminary Injunction against the non-Applicant Defendants whose names do not appear on the Applications. The non-Applicant Defendants had nothing to do with the Applications, and Plaintiffs maintenance of the Motion against the non-Applicant Defendants, named personally, served no purpose but to harass and annoy and cause them to incur unnecessary fees and costs;

98. On October 21, 2016, Defendants filed their Motion for Attorneys' Fees and Costs, seeking an award of attorneys' fees and costs pursuant to EDCR 7.60 and NRS 18.070, which was set to be heard in Chambers on November 21, 2016. Plaintiffs filed a response on November 17, 2016, which was considered by the Court;

99. Defendants have been forced to incur significant attorneys' fees and costs to respond to the repetitive filings of Plaintiffs. Plaintiffs' Motions are without merit and unnecessarily duplicative, and made a repetitive advancement of arguments that were without merit, even after the Court expressly warned Plaintiffs that they were "too close" to the dispute;

100. Plaintiff, Robert N. Peccole, Esq., by being so personally close to the case, is so blinded by his personal feelings that he is ignoring the key issues central to the causes of action and failing to recognize that continuing to pursue flawed claims for relief, and rehashing the arguments again and again, following the date of the Defendants' September 2, 2016 Opposition, is improper and unnecessarily harms Defendants;

101. In making an award of attorneys' fees and costs, the Court shall consider the quality of the advocate, the character of the work to be done, the work actually performed, and the result. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). Defendants submitted, pursuant to the *Brunzell* case, affidavits regarding attorney's fees and costs they requested. The Court, in its separate Order of January 20, 2017, has analyzed and found, and now reaffirms, that counsel meets the *Brunzell* factors, that the costs incurred were reasonable and actually incurred pursuant to *Cadle Co. v. Woods & Erickson LLP*, 131 Nev. Adv. Op. 15 (Mar. 26, 2015), and outlined the reasonableness and necessity of the attorneys' fees and costs incurred, to which there has been no challenge by Plaintiffs;

102. Plaintiffs were on notice that their position was maintained without reasonable ground after the September 2, 2016 filing of Defendants' Opposition to the first Motion for Preliminary Injunction. The voluminous documentation attached thereto made clear that the Master Declaration does not apply to Defendants' land which was not annexed into the Queensridge CIC. Thus, relating to the preliminary injunction issues, the sums incurred after September 2, 2016 were reasonable and necessary, as Plaintiffs continued to maintain their frivolous position and filed multiple, repetitive documents which required response;

103. Defendants are the prevailing party when it comes to Defendants' Motions for Preliminary Injunction, Motion for Stay Pending Appeal and Motion for Rehearing filed in

September and October, and Plaintiffs' position was maintained without reasonable ground or to harass the prevailing party. *NRS 18.010;*

104. Plaintiffs presented to the court motions which were, or became, frivolous, unnecessary or unwarranted, in bad faith, and which so multiplied the proceedings in a case as to increase costs unreasonably and vexatiously, and failed to follow the rules of the Court. *EDCR 7.60;*

105. Given these facts, there is no basis to hold an Evidentiary Hearing with respect to the Order granting Defendants' attorneys' fees and costs, and the Order should stand;

Plaintiffs' Opposition to Countermotion for Fees and Costs

106. This Opposition to "Countermotion," substantively, does not address the pending Countermotions for attorneys' fees and costs, but rather the Motion for Attorneys' Fees and Costs which was filed October 21, 2016 and granted November 21, 2016;

107. The Opposition to that Motion was required to be filed on or before November 10, 2016. It was not filed until January 7, 2017;

108. Separately, Plaintiffs filed a "response" to the Motion for Attorneys' Fees and Costs, and Supplement thereto, on November 17, 2016. As indicated in the Court's November 21, 2016 Minute Order, as confirmed by and incorporated into the Fee Order filed January 20, 2017, that Response was reviewed and considered;

109. Plaintiffs did not attach any Affidavit as required by EDCR 2.21 to attack the reasonableness or the attorneys' fees and costs incurred, the necessity of the attorneys' fees and costs, or the accuracy of the attorneys' fees and costs incurred;

110. There is sufficient basis to strike this untimely Opposition pursuant to EDCR 2.21 and NRCP 56(e) and the same can be construed as an admission that the Motion was meritorious and should be granted;

111. On the merits, Plaintiffs' "assumptions" that "attorneys' fees and costs are being requested based upon the Motion to Dismiss" and that "sanctions under Rule 11 for filing a Motion for Preliminary Injunction against Fore Stars Defendants" is incorrect. As made clear by the itemized billing statements submitted by Defendants, none of the attorneys' fees and costs requested within that Motion related to the Motion to Dismiss. Further, this is also clear because at the time the Motion for Attorneys' Fees and Costs was filed, the hearings on the City's Motion to Dismiss, or the remaining Defendants' Motion to Dismiss, had not even occurred;

112. Plaintiffs erroneously claim that Defendants cited "no statutes or written contracts that would allow for attorneys' fees and costs." Defendants clearly cited to NRS 18.010 and EDCR 7.60;

113. The argument that if this Court declines to sanction Plaintiffs' counsel pursuant to NRCP 11, they cannot grant attorneys' fees and costs pursuant to NRS 18.010 and EDCR 7.60 is nonsensical. These are district statutes with distinct bases for awarding fees;

114. This Court was gracious to Plaintiffs' counsel in exercising its sound discretion in denying the Rule 11 request, and had solid ground for awarding EDCR 7.60 sanctions and attorneys' fees under NRS 18.010 under the facts;

115. Since Motion for Attorneys' Fees and Costs, and Supplement, was not relating to the Motion to Dismiss, the arguments regarding the frivolousness of the Amended Complaint need not be addressed within this section;

116. The argument that Plaintiffs are entitled to fees because they "are the prevailing party under the Rule 11 Motion" fails. Defendants prevailed on every Motion. That the Court declined to impose additional sanctions against Plaintiffs' counsel does not make Plaintiffs the "prevailing party," as the Motion for Attorneys' Fees and Costs was granted. Moreover, Plaintiffs have not properly sought Rule 11 sanctions against Defendants;

117. There is no statute or rule that allows for the filing of an Opposition after a Motion has been granted. The Opposition was improper and should not have been belatedly filed. It compelled Defendants to further respond, causing Defendants to incur further unnecessary attorneys' fees and costs;

Plaintiffs' Motion for Court to Reconsider Order of Dismissal

118. Plaintiffs seek reconsideration pursuant to NRCP 60(b) based on the alleged "misrepresentation" of the Defendants regarding the Amended Master Declaration at the November 1, 2016 Hearing;

119. No such "misrepresentation" occurred. The record reflects that Mr. Jimmerson was reading correctly from the first page of the Amended Master Declaration, which states it was "effective October, 2000." The Court understood that to be the effective date and not necessarily the date it was signed or recorded. Defendants also provided the Supplemental Exhibit R which evidenced that the Amended Master Declaration was recorded on August 16, 2002, and reiterated it was "effective October, 2000," as Defendants' counsel accurately stated. This exhibit also negated Plaintiffs' earlier contention that the Amended Master Declaration had not been recorded at all. Therefore, not only was there no misrepresentation, there was transparency by the Defendants in open Court;

120. The Amended Master Declaration did not "take out" the 27-hole golf course from the definition of "Property," as Plaintiffs erroneously now allege. More accurately, it excluded the entire 27-hole golf course from the possible Annexable Property. This means that not only was it never annexed, and therefore never made part of the Queensridge CIC, but it was no longer even *eligible* to be annexed in the future, and thus could never become part of the Queensridge CIC;

121. It is significant, however, that there are two (2) recorded documents, the Master Declaration and the Amended Master Declaration, which both make clear in Recital A that the GC Land, since it was not annexed, is not a part of the Queensridge CIC;

122. Whether the Amended Master Declaration, effective October, 2000, was recorded in October, 2000, March, 2001 or August, 2002, does not matter, because, as Defendants pointed out at the hearing, Mr. Peccole's July 2000 Deed indicated it was "subject to the CC&Rs that were recorded at the time and as may be amended in the future" and that the "CC&Rs which he knew were going to be amended and subject to being amended, were amended;"

123. The only effect of the Amended Master Declaration's language that the "entire 27-hole golf course is not a part of the Property or the Annexable Property" instead of just the "18 holes," is that the 9 holes which were never annexed were no longer even annexable. Effectively, William and Wanda Peccole and their entities took that lot off the table and made clear that this lot would not and could not later become part of the Queensridge CIC;

124. None of that means that the 9-holes was a part of the "Property" before—as this Court clearly found, it was not. The 1996 Master Declaration makes clear that the 9-holes was only Annexable Property, and it could only become "Property" by recording a Declaration of Annexation. This never occurred;

125. The real relevance of the fact that the Amended Master Declaration was recorded, in the context of the Motion to Dismiss, is that, pursuant to *Brelint v. Preferred Equities*, 109 Nev. 842, the Court is permitted to take judicial notice of, and take into consideration, recorded documents in granting or denying a motion to dismiss;

126. Plaintiffs ignore the fact that notwithstanding the fact that the Amended Master Declaration, effective October, 2000, was not recorded until August, 2002, Plaintiffs transferred Deed to their lot twice, once in 2013 into their Trust, and again in September, 2016, both times

after the Amended Master Declaration (which they were, under their Deeds, subject to) was recorded and both times with notice of the development rights and zoning rights associated with the adjacent GC Land;

127. Plaintiffs' argument that the Amended Master Declaration is "invalid" because it "did not contain the certification and signatures of the Association President and Secretary" is irrelevant, since the frivolousness of Plaintiffs' position is based on the original Master Declaration and not the amendment. But this Court notes that the Declarations of Annexation which are recorded do not contain such signatures of the Association President and Secretary either. Hypothetically, if that renders such Declarations of Annexation "invalid," then Parcel 19, where Plaintiffs' home sits, was never properly "annexed" into the Queensridge CIC, and thus Plaintiffs would have no standing to assert the terms of the Master Declaration against anyone, even other members of the Queensridge CIC. This last minute argument is without basis in fact or law;

128. A Motion for reconsideration under EDCR 2.24 is only appropriate when "substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). And so motions for reconsideration that present no new evidence or intervening case law are "superfluous," and it is an "abuse of discretion" for a trial court to consider such motions. *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (76).

129. Plaintiffs' request that the Order be reconsidered because it does not consider issues subsequent to the City Council Meeting of November 16, 2016 is also without merit. The Motion to Dismiss was heard on November 1, 2016 and the Court allowed the parties until November 15, 2016 to supplement their filings. Although late filed, Plaintiffs did file "Additional Information to Brief," and their "Renewed Motion for Preliminary Injunction," on

November 18, 2016—before issuance of the *Findings of Fact, Conclusions of Law, Order and Judgment* on November 30th --putting the Court on notice of what occurred at the City Council Meeting. However, as found hereinabove, the withdrawal and abeyance of City Council Applications does not matter in relation to the Motion to Dismiss. Plaintiffs did not possess "vested rights" over Defendants' GC Land before the meeting and they do not possess "vested rights" over it now;

130. Plaintiffs' objection to the Findings relating NRS 116, NRS 278, NRS 278A and R-PD7 zoning is also without merit, because those Findings are supported by the Supplements timely filed by Defendants, and those statutes and the zoning issue are all relevant to this case with respect to Defendants' right to develop their land. This was raised and discussed in the Motion to Dismiss and Opposition to the first Motion for Preliminary Injunction, and properly and timely supplemented. Defendants did specifically and timely submit multiple documents, including the Declaration of City Clerk Luann Holmes to attest to the fact that NRS 278A does not apply to this controversy, and thus it is clear that the GC Land is not part of or within a planned unit development. Plaintiffs do not even possess standing to assert a claim under NRS 278A, as they are governed by NRS 116. Further, Defendants' deeds contain no title exception or reference to NRS 278A, as would be required were NRS 278A to apply, which it does not;

131. Recital B of the Master Declaration states that Queensridge is a "common interest community pursuant to Chapter 116 of the Nevada Revised Statutes." Plaintiffs raised issues concerning NRS 278A. While Plaintiffs may not have specifically cited NRS 278A in their Amended Complaint, in paragraph 67, they did claim that "The City of Las Vegas with respect to the Queensridge Master Planned Development required 'open space' and 'flood drainage' upon the acreage designated as golf course (The Badlands Golf Course)." NRS 278A, entitled "Planned Unit Development," contains a framework of law on Planned Unit Developments, as

defined therein, and their 'common open space.' NRS 116.1201(4) states that the provisions of NRS 278A do not apply to NRS 116 common-interest communities like Queensridge. Thus, while Plaintiffs may not have directly mentioned NRS 278A, they did make an allegation invoking its applicability;

132. Zoning on the subject GC Land is appropriately referenced in the November 30, 2016 *Findings of Fact, Conclusions of Law, Order and Judgment*, because Plaintiffs contended that the Badlands Golf Course was open space and drainage, but the Court rejected that argument, finding that the subject GC Land was zoned R-PD7;

133. Plaintiffs now allege that alter-ego claims against the individual Defendants (Lowie, DeHart and Pankratz) should not have been dismissed without giving them a chance to investigate and flush out their allegations through discovery. But no alter ego claims were made, and alter ego is a remedy, not a cause of action. The only Cause of Action in the Amended Complaint that could possibly support individual liability by piercing the corporate veil is the Fraud Cause of Action. The Court has rejected Plaintiffs' Fraud Cause of Action, not solely on the basis that it was not plead with particularity, but, more importantly, on the basis that Plaintiffs failed to state a claim for Fraud because Plaintiffs have never alleged that Lowie, DeHart or Pankratz made any false representations to them prior to their purchase of their lot. The Court further notes that in Plaintiffs' lengthy oral argument before the Court, the Plaintiffs did not even mention its claim for, or a basis for, its fraud claim. The Plaintiffs have offered insufficient basis for the allegations of fraud in the first place, and any attempt to re-plead the same, on this record, is futile;

134. Fraud requires a false representation, or, alternatively an intentional omission when an affirmative duty to represent exists. See *Lubbe v. Barba*, 91 Nev. 596, 541 P.2d 115 (1975). Plaintiffs alleged Fraud against Lowie, DeHart and Pankratz, while admitting they never

spoke with any of the prior to the purchase of their lot and have never spoken to them prior to this litigation. Plaintiffs' Fraud Cause of Action was dismissed because they cannot state facts that would support the elements of Fraud. No amount of additional time will cure this fundamental defect of their Fraud claim;

135. Plaintiffs claim that the GC Land that later became the additional nine holes was "Property" subject to the CC&Rs of the Master Declaration at the time they purchased their lot, because Plaintiffs purchased their lot between execution of the Master Declaration (which contains an exclusion that "The existing 18-hole golf course commonly known as the 'Badlands Golf Course' is not a part of the Property or the Annexable Property") and the Amended and Restated Master Declaration (which provides that "The existing 27-hole golf course commonly known as the 'Badlands Golf Course' is not a part of the Property or the Annexable Property"), is meritless, since it ignores the clear and unequivocal language of Recital A (of both documents) that "In no event shall the term "Property" include any portion of the Annexable Property for which a Declaration of Annexation has not been Recorded..."

136. All three of Plaintiffs' claims for relief in the Amended Complaint are based on the concept of Plaintiffs' alleged vested rights, which do not exist against Defendants;

137. There was no "misrepresentation," and there is no basis to set aside the Order of Dismissal;

138. In order for a complaint to be dismissed for failure to state a claim, it must appear beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (emphasis added);

139. It must draw every fair inference in favor of the non-moving party. *Id.* (emphasis added);

140. Generally, the Court is to accept the factual allegations of a Complaint as true on a Motion to Dismiss, but the allegations must be legally sufficient to constitute the elements of the claim asserted. *Carpenter v. Shalev*, 126 Nev. 698, 367 P.3d 755 (2010);

141. Plaintiffs have failed to state a claim upon which relief can be granted, even with every fair inference in favor of Plaintiffs. It appears beyond a doubt that Plaintiffs can prove no set of facts which would entitle them to relief. The Court has grave concerns about Plaintiffs' motives in suing these Defendants for fraud in the first instance;

Defendants' Memorandum of Costs and Disbursements

142. Defendants' Memorandum of Costs and Disbursements was timely filed and served on December 7, 2016;

143. Pursuant to NRS 18.110, Plaintiffs were entitled to file, within three (3) days of service of the Memorandum of Costs, a Motion to Retax Costs. Such a Motion should have been filed on or before December 15, 2016

144. Plaintiffs failed to file any Motion to Retax Costs, or any objection to the costs whatsoever. Plaintiffs have therefore waived any objection to the Memorandum of Costs, and the same is now final;

145. Defendants have provided evidence to the Court along with their Verified Memorandum of Costs and Disbursements, demonstrating that the costs incurred were reasonable, necessary and actually incurred. *Cadle Co. v. Woods & Erickson LLP*, 131 Nev. Adv. Op. 15 (Mar. 26, 2015);

Defendants' Countermotions for Attorneys' Fees and Costs

146. The Court has allowed Plaintiffs to enter thirteen (13) exhibits, only three (3) of which had been previously produced to opposing counsel, by attaching them to Plaintiffs' "*Additional Information to Renewed Motion for Preliminary Injunction*," filed November 28,

2016. The Exhibits should have been submitted and filed on or before November 15, 2016, in advance of the hearing, and shown to counsel before being marked. The Court has allowed Plaintiffs to make a record and to enter never before disclosed Exhibits at this post-judgment hearing, including one document dated January 6, 2017, over Defendants' objection that there has been no Affidavit or competent evidence to support the genuineness and authenticity of these documents, as well as because of their untimely disclosure. The Court notes that Plaintiffs should have been prepared for their presentation and these Exhibits should have been prepared, marked and disclosed in advance, but Plaintiffs failed to do so. *EDCR 7.60(b)(2);*

147. The efforts of Plaintiffs throughout these proceedings to repeatedly, vexatiously attempt to obtain a Preliminary Injunction against Defendants has indeed resulted in prejudice and substantial harm to Defendants. That harm is not only due to being forced to incur attorneys' fees, but harm to their reputation and to their ability to obtain financing or refinancing, just by the pendency of this litigation;

148. Plaintiffs are so close to this matter that even with counsel's experience, he fails to follow the rules in this litigation. Plaintiffs' accusation that the Court was "sleeping" during his oral argument, when the Court was listening intently to all of Plaintiffs' arguments, is objectionable and insulting to the Court. It was extremely unprofessional conduct by Plaintiff;

149. Plaintiffs' claim of an alleged representation that the golf course would never be changed, if true, was alleged to have occurred sixteen (16) years prior to Defendants acquiring the membership interests in Fore Stars, Ltd. Of the nineteen (19) Defendants, twelve (12) were relatives of Plaintiffs or entities of relatives, all of whom were voluntarily dismissed by Plaintiffs. The original Complaint faulted the Peccole Defendants for not "insisting on a restrictive covenant" on the golf course limiting its use, which would not have been necessary if

the Master Declaration applied. This was a confession of the frivolousness of Plaintiffs' position. *NRS 18.010(2)(b); EDCR 7.60(b)(1);*

150. Between September 1, 2016 and the date of this hearing, there were approximately ninety (90) filings. This multiplication of the proceedings vexatiously is in violation of EDCR 7.60. *EDCR 7.60(b)(3);*

151. Three (3) Defendants, Lowie, DeHart and Pankratz, were sued individually for fraud, without one sentence alleging any fraud with particularity against these individuals. The maintenance of this action against these individuals is a violation itself of NRS 18.010, as bad faith and without reasonable ground, based on personal animus;

152. Additionally, EDCR 2.30 requires that any Motion to amend a complaint be accompanied by a proposed amended Complaint. Plaintiffs' failure to do so is a violation of EDCR 2.30. EDCR 7.60(b)(4);

153. Plaintiffs violated EDCR 2.20 and EDCR 2.21 by failing to submit their Motions upon sworn Affidavits or Declarations under penalty of perjury, which cannot be cured at the hearing absent a stipulation. *Id.;*

154. Plaintiffs did not file any post-judgment Motions under NRCP 52 or 59, and two of their Motions, namely the *Motion to Reconsider Order of Dismissal* and the *Motion for Evidentiary Hearing and Stay of Order for Rule 11 Fees and Costs*, were untimely filed after the 10 day time limit contained within those rules, or within EDCR 2.24.

155. Plaintiffs also failed to seek leave of the Court prior to filing its Renewed Motion for Preliminary Injunction or its Motion to Reconsider Order of Dismissal. *Id.;*

156. Plaintiffs' Opposition to Countermotion for Attorneys' Fees and Costs, filed January 5, 2017, was an extremely untimely Opposition to the October 21, 2016 Motion for

Attorneys' Fees and Costs, which was due on or before November 10, 2016. All of these are failures or refusals to comply with the Rules. *EDCR 7.60(b)(4)*;

157. While it does not believe Plaintiffs are intentionally doing anything nefarious, they are too close to this matter and they have refused to heed the Court's Orders, Findings and rules and their actions have severely harmed the Defendants;

158. While Plaintiffs claim to have researched the *Eagle Thrifty* case prior to filing the initial Complaint, admitting they were familiar with the requirement to exhaust the administrative remedies, they filed the first Motion for Preliminary Injunction anyway, in which they failed to even cite to the *Eagle Thrifty* case, let alone attempt to exhaust their administrative remedies;

159. Plaintiffs' motivation in filing these baseless "preliminary injunction" motions was to interfere with, and delay, Defendants' development of their land, particularly the land adjoining Plaintiffs' lot. But while the facts, law and evidence are overwhelming that Plaintiffs ultimately could not deny Defendants' development of their land, Plaintiffs have continued to maintain this action and forced Defendants to incur substantial attorneys' fees to respond to the unsupported positions taken by Plaintiffs, and their frivolous attempt to bypass City Ordinances and circumvent the legislative process. These actions continue with the current four (4) Motions and the Opposition;

160. Plaintiffs' Renewed Motion for Preliminary Injunction (a sixth attempt), Plaintiffs' untimely Motion to Amend Amended Complaint (with no proposed amendment attached), Plaintiffs' untimely Motion to Reconsider Order of Dismissal, Plaintiffs' Motion for Evidentiary Hearing and Stay of Rule 11 Fees and Costs (which had been denied) and Plaintiffs' untimely Opposition were patently frivolous, unnecessary, and unsupported, and so multiplied the proceedings in this case so as to increase costs unreasonably and vexatiously;

161. Plaintiffs proceed in making "scurrilous allegations" which have no merit, and to asset "vested rights" which they do not possess against Defendants;

162. Considering the length of time that the Plaintiffs have maintained their action, and the fact that they filed four (4) new Motions after dismissal of this action, and ignored the prior rulings of the Court in doing so, and ignored the rules, and continued to name individual Defendants personally with no basis whatsoever, the Court finds that Plaintiffs are seeking to harm the Defendants, their project and their land, improperly and without justification. Plaintiffs' emotional approach and lack of clear analysis or care in the drafting and submission of their pleadings and Motions warrant the award of reasonable attorney's fees and costs in favor of the Defendants and against the Plaintiffs. *See EDCR 7.60 and NRS 18.010(b)(2)*;

163. Pursuant to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), Defendants have submitted affidavits regarding attorney's fees and costs they requested, in the sum of $7,500 per Motion. Considering the number of Motions filed by Plaintiffs on an Order Shortening Time, including two not filed or served until December 22, 2016, and an Opposition and Replies to two Motions filed by Plaintiffs on January 5, 2017, which required response in two (2) business days, the requested sum of $7,500 in attorneys' fees per each of the four (4) motions is most reasonable and necessarily incurred. Given the detail within the filings and the timeframe in which they were prepared, the Court finds these sums , totaling $30,000 ($7,500 x 4) to have been reasonably and necessarily incurred;

Plaintiffs' Oral Motion for Stay Pending Appeal.

164. Plaintiffs failed to satisfy the requirements of NRAP 8 and NRCP 62(c). Plaintiffs failed to show that the object of their potential appeal will be defeated if their stay is denied, they failed to show that they would suffer irreparable harm or serious injury if the stay is not issued, and they failed to show a likelihood of success on the merits.

ORDER AND JUDGMENT

NOW, THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that *Plaintiffs' Renewed Motion for Preliminary Injunction* is hereby denied, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' *Motion For Leave To Amend Amended Complaint*, is hereby denied, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that *Plaintiffs' Motion For Evidentiary Hearing And Stay Of Order For Rule 11 Fees And Costs*, is hereby denied, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that *Plaintiffs' Motion For Court To Reconsider Order Of Dismissal*, is hereby denied, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Countermotion to Strike *Plaintiffs' Rogue and Untimely Opposition Filed 1/5/17 (titled Opposition to "Countermotion" but substantively an Opposition to the 10/21/16 Motion for Attorney's Fees And Costs, granted November 21, 2016)*, is hereby granted, and such Opposition is hereby stricken;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' request for $20,818.72 in costs, including the $5,406 already awarded on November 21, 2016, and the balance of $15,412.72 in costs through October 20, 2016, pursuant to their timely *Memorandum of Costs and Disbursements*, is hereby granted and confirmed to Defendants, no Motion to Retax having been filed by Plaintiffs. Said costs are hereby reduced to Judgment, collectible by any lawful means;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Judgment entered in favor of Defendants and against Plaintiffs in the sum of $82,718.50, comprised of $77,312.50

in attorneys' fees and $5,406 in costs relating only to the preliminary injunction issues after the September 2, 2016 filing of Defendants' first Opposition through the end of the October, 2016 billing cycle, is hereby confirmed and collectible by any lawful means;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants Countermotion for Attorneys' Fees relating to their responses to Plaintiffs four (4) motions and one (1) opposition, and the time for appearance at this hearing, is hereby GRANTED. Defendants are hereby awarded additional attorneys' fees in the sum of $30,000 relating to those matters pending for this hearing;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, therefore, Defendants are awarded a total sum of $128,131.22 ($20,818.72 in attorneys' fees and costs, including the $5,406 in the November 21, 2016 Minute Order and confirmed by the Fee Order filed January 20, 2017, $77,312.50 in attorneys' fees pursuant to the November 21, 2016 Minute Order, as incorporated within and confirmed by Fee Order filed January 20, 2017, and $30,000 in additional attorneys' fees relating to the instant Motions, Oppositions and Countermotions addressed in this Order), which is reduced to judgment in favor of Defendants and against Plaintiffs, collectible by any lawful means, plus legal interest;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' oral Motion for Stay pending appeal is hereby denied;

DATED this 31 day of January, 2017.

DISTRICT COURT JUDGE
A-16-735654-C

BH

Exhibit 28

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT N. PECCOLE; AND NANCY A. PECCOLE, Appellants, vs. FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY; EHB COMPANIES, LLC, A NEVADA LIMITED LIABILITY COMPANY; YOHAN LOWIE, AN INDIVIDUAL; VICKIE DEHART, AN INDIVIDUAL; AND FRANK PANKRATZ, AN INDIVIDUAL, Respondents.	No. 72410
ROBERT N. PECCOLE; AND NANCY A. PECCOLE, INDIVIDUALS, Appellants, vs. FORE STARS, LTD., A NEVADA LIMITED LIABILITY COMPANY; 180 LAND CO., LLC, A NEVADA LIMITED LIABILITY COMPANY; SEVENTY ACRES, LLC, A NEVADA LIMITED LIABILITY COMPANY; EHB COMPANIES, LLC, A NEVADA LIMITED LIABILITY COMPANY; YOHAN LOWIE, AN INDIVIDUAL; VICKIE DEHART, AN INDIVIDUAL; AND FRANK PANKRATZ, AN INDIVIDUAL, Respondents.	No. 72455

FILED

OCT 17 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

These consolidated appeals are from district court orders awarding attorney fees and costs and denying NRCP 60(b) relief from a

dismissal order in a real property dispute.[1] Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

This case arises out of a dispute appellants have with respondents, who are planning to develop property on which a golf course is presently located, and which appellants argue is subject to development restrictions under the Master Declaration of Covenants, Conditions, Restrictions and Easements (CC&Rs) for the Queensridge community in Las Vegas where appellants reside. Appellants sued respondents for injunctive relief and damages based on theories of impaired property rights and fraud. The district court dismissed appellants' complaint and then denied appellants' motion for NRCP 60(b) relief. Additionally, the district court awarded respondents a total of $128,131.22 in attorney fees and costs. These appeals followed.

First, appellants argue that the district court abused its discretion in denying NRCP 60(b) relief by relying on an invalid amendment to the CC&Rs in concluding that the golf course property was not subject to the CC&Rs. Because the record supports the district court's determination that the golf course land was not part of the Queensridge community under the original CC&Rs and public maps and records, regardless of the amendment, we conclude the district court did not abuse its discretion in denying appellants' motion for NRCP 60(b) relief. *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996) (providing that the district court has

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

broad discretion in deciding whether to grant or deny an NRCP 60(b) motion to set aside a judgment, and this court will not disturb that decision absent an abuse of discretion).

Second, appellants contend that the district court violated their procedural due process rights by awarding respondents attorney fees and costs without first holding an evidentiary hearing. We disagree. An evidentiary hearing is not required before an award of attorney fees and costs. *See Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) (providing that the requirement of "an opportunity to be heard" before sanctions may issue "does not require [the court to hold] an oral or evidentiary hearing on the issue"). Appellants had notice of respondents' motions for attorney fees and costs and took advantage of the opportunity to respond to those requests in writing and orally. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (recognizing that due process requires notice and opportunity to be heard). Thus, we conclude the district court did not violate appellants' due process rights by failing to hold an evidentiary hearing before awarding respondents attorney fees and costs.

Lastly, appellants assert that appellant Robert Peccole's preparation, research, and 55-year legal career demonstrate that the attorney fees and costs award as a sanction was improper. NRS 18.010(2)(b) permits the district court to award attorney fees to a prevailing party when the court finds that the claim "was brought or maintained without reasonable ground or to harass the prevailing party." Additionally, EDCR 7.60(b) allows the district court to impose a sanction including attorney fees

and costs when an attorney or party "without just cause. . . [p]resents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted. . . [or] multiplies the proceedings in a case as to increase costs unreasonably and vexatiously."

Appellants filed a complaint alleging the golf course land was subject to the CC&Rs when the CC&Rs and public maps of the property demonstrated that the golf course land was not. Further, after the district court denied appellants' first motion for a preliminary injunction and explained its reasoning, appellants filed a second almost identical motion, a motion for rehearing of the denial of one of those motions, and a renewed motion for preliminary injunction, all of which included the same facts or argument. Additionally, the district court repeatedly warned appellants that they were too close to the issue to see it clearly or accept any of the court's decisions and despite this warning, they continued to file repetitive and meritless motions. The district court limited the award to fees and costs incurred in defending the repetitive motions and issued specific findings regarding each of the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), and the record supports the amount awarded. *See Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (requiring the district court to consider the *Brunzell* factors when awarding attorney fees). Further, Robert's extensive experience as an attorney is not a factor under *Brunzell* and because the district court was within its discretion to award attorney fees and costs for the repetitive and frivolous parts of the litigation, it is unclear how Robert's extensive legal career would make the award improper. Thus, we conclude the district court did not abuse its discretion in awarding respondents attorney fees and costs. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280,

1288 (2006) (explaining that this court will not overturn a district court's decision to award attorney fees and costs as a sanction absent a manifest abuse of discretion). Accordingly, we

ORDER the judgments of the district court AFFIRMED.

Douglas, C.J.

Gibbons, J.

Stiglich, J.

cc: Hon. Douglas Smith, District Judge
Ara H. Shirinian, Settlement Judge
Peccole & Peccole, Ltd.
The Jimmerson Law Firm, P.C
Sklar Williams LLP
EHB Companies, LLC
Eighth District Court Clerk

Exhibit 29

Exhibit 30

CERTIFIED TRANSCRIPT

BADLANDS HOMEOWNERS MEETING

NOVEMBER 1, 2016

6 p.m.

One Queensridge Place

Retreat Room

planning commission; what's scheduled for consideration at the council meeting on November 16th; and then we'll take any questions from you.

And if you have any questions as I'm speaking, feel free to interrupt me because sometimes people forget to ask them at the end. So I don't mind it when somebody puts their hand up and says I got a question right now.

A couple of years ago, we were approached the EHB Development which is owned by Yohan Lowie who purchased the golf course known as Badlands Country Club with the question of what is the zoning for that property.

Almost all the property in the City of Las Vegas has got some sort of zoning or open space zoning, and so that lent -- that request went to the planning department.

The planning department delivered a letter which is a standard letter, I think, of any developer who asks what's the zoning of this property we're about

to buy. And in researching this property, the first thing that we found was that it's zoned P -- R-PD7.

R-PD7 is a type of zoning that doesn't exist anymore. It used to exist, because it stands for residential plan development, and what residential plan development does is it gives you the right to ask for -- to ask for, not to get, to ask for up to 7.49 units per acre. So about seven-and-a-half homes per acre. That's when you have the right to ask for it.

Does that mean you get it? No. And even EHB knows that; Mr. Lowie knows that as well. What it gives you the right to do -- assuming there aren't other obstacles that would stop you from developing, it gives you the right to come in and say I would like to do something with this land other than a golf course, assuming there aren't other obstacles, and those other things you do have to be harmonious and compatible with surrounding land uses.

advice on this and what Mr. Yohan -- what Mr. Lowie is entitled to ask for.

The second thing to look at, even if the golf course had zoning, is there something else that prevents it from being converted from a golf course to something else? That would CC&Rs. That would be other deed restrictions. Those would be things that would over (indiscernible).

We have looked for a very long time, and we can find no restrictions that require that this stay a golf course. Having said that, I have seen some brochures and people who bought custom lots who are (indiscernible) forgiven who bought a block of lots and it talks about this great golf course community.

I have talked to people who have paid a premium for a golf course view. All of those things I recognize are very, very compelling arguments for why this is a golf course, but they're not legal arguments, and they're not binding on the order (indiscernible). So that is, quite

harmonious and compatible.

Could he come in, though, and say I want to do seven-and-a-half units next to this, we don't (indiscernible) that is the case and we won't (indiscernible).

There's also been some argument that if he doesn't get all of this, there's an inverse condemnation case involved. I do not believe that is legally true. I believe that the fact is if he were to come in and ask for what he's asked for right now and (indiscernible) tonight, it's perfectly permissible to deny this project.

However, if he came in with another project that were just what I said before, harmonious and compatible in surrounding land uses and have all the impact studies that would be a different story. And to tell him that he couldn't develop anything out there would be to deprive him of his right to develop his property, which he owns, and that could well result in an inverse condemnation case. So I wanted to break that down so

MR. PERRIGO: Correct. Right. Okay. So to separate the two, right, the Peccole Ranch plan is not being modified for this project.

MALE SPEAKER: In six times the seven units (indiscernible), so by just getting zoning for twenty-four units an acre --

MR. PERRIGO: Um-hum.

MALE SPEAKER: -- it's just a zone change. So that in itself allows that (indiscernible)?

MR. JERBIC: Maybe I need to get a (indiscernible) a little bit, because this isn't by accident.

The Peccole Ranch Phase II plan was a very, very, very general plan. I have read every bit of it.

If you look at that original plan and look what's out here today, it's different. It's different because it said in very general terms here's what your density will be for your high-density, and here's what your total unit count will be, and here's what your

density will be maximum for your -- or your single family, and here's what your total unit cap will be, and it said golf course -- (indiscernible) golf course (indiscernible) was in the original plan. So they did not look at this plan back then as a development agreement would be looked at today under (indiscernible) statutes.

We looked at it under our local zoning law -- this preceded me, whoever made those decisions this is the way they did master planning back then.

They did a very general plan, and then they came up with zoning and somebody say you know something, Tudor Park; we're going to put that over here because we think that that fits well over here; and over here, we're going to put some low-density because we thing custom estates look pretty good over there; and down here, we're going to hire -- we're going to do a deal with a developer and have him do these homes. That's all -- they did it piecemeal. They came in

B and adopted in 1973, the City of Las Vegas started doing our own plan development. And we did it with our zoning code. That's where we came up with these zoning categories that resulted in R-PD7 and R-PD this or R-PD that. So we were doing plan development a year before the State of Nevada even thought of plan development.

And they said in their law that you could do it if you follow the law, the state law, you have these requirements. But we never followed the state requirements. We always believed the state did not usurp our local authority, and so we do not believe we were preempted, and continued to do it our way. And we have from the beginning of time.

So the plan -- the master plan that we talk about, the Peccole phase 2 master plan is not a 278A agreement, it never was, never has been, not a word of that language was in it. We never followed it. And so the argument today that's

C E R T I F I C A T I O N

I, Ellen S. Kolman, hereby certify that the foregoing is a true and correct transcription, to the best of my ability, of the sound recorded proceedings submitted for transcription.

I further certify that I am not employed by nor related to any party to this action.

In witness whereof, I hereby sign this date:
November 9, 2016.

Ellen S. Kolman
AAERT Certified Electronic Transcriber
(CET**D-568)

Exhibit 31

ITEM 82 – DIRECTOR'S BUSINESS – NOTE: NOT TO BE HEARD BEFORE 9:00PM - DIR-70539 - DIRECTOR'S BUSINESS - PUBLIC HEARING - APPLICANT/OWNER: 180 LAND CO, LLC, ET AL - For possible action on a request for a Development Agreement between 180 Land Co, LLC, et al. and the City of Las Vegas on 250.92 acres at the southwest corner of Alta Drive and Rampart Boulevard (APNs 138-31-201-005; 138-31-601-008; 138-31-702-003 and 004; 138-31-801-002 and 003; 138-32-202-001; and 138-32-301-005 and 007), Ward 2 (Beers) [PRJ-70542]. Staff recommends APPROVAL.

Appearance List:

TRINITY HAVEN SCHLOTTMAN, Planning Commission Chair
PETER LOWENSTEIN, Planning Section Manager, City of Las Vegas
TODD L. MOODY, Planning Commissioner
BRAD JERBIC, City Attorney, City of Las Vegas
CHRIS KAEMPFER, Legal Counsel for the Applicant
STEPHANIE ALLEN, Legal Counsel for the Applicant
SHAUNA HUGHES, Legal Counsel for Queensridge Homeowners Association
UNIDENTIFIED SPEAKER
TODD BICE, Legal Counsel for the Queensridge Homeowners
GEORGE GARCIA, GC Garcia, Inc., 1055 Whitney Ranch Drive, Henderson
DOUG RANKIN, GC Garcia, Inc., 1055 Whitney Ranch Drive, Henderson
MICHAEL BUCKLEY, Representative for the Frank and Jill Fertitta Family Trust
FRANK SCHRECK, Queensridge Resident
RON IVERSEN, Board Treasurer, Queensridge Homeowners Association
ANNE SMITH, Queensridge Resident
EVAN THOMAS, Queensridge Resident

CERTIFIED AS A TRUE COPY
LuAnn D. Holmes, City Clerk
City of Las Vegas 7/19/17
83 pgs.

Appearance List continued:

DEBRA KANER, Queensridge Resident
JERRY ENGEL, Queensridge Resident
JOHNNY (last name not provided), Queensridge Resident
LARRY SADOFF, Queensridge Resident
TERRY HOLDEN, Queensridge Resident
HERMAN AHLERS, Queensridge Resident
FRANK PANKRATZ, Applicant/Owner
JAMES JIMMERSON, Legal Counsel for the Applicant
VICKI QUINN, Planning Commissioner
GLENN TROWBRIDGE, Planning Commissioner
SAM CHERRY, Planning Commissioner
MARK FAKLER, GCW Inc., 1555 South Rainbow Boulevard
YOHAN LOWIE, Applicant/Owner
BART ANDERSON, Engineering Project Manager, Public Works, City of Las Vegas
DONNA TOUSSAINT, Planning Commissioner
CEDRIC CREAR, Planning Commissioner
TOM PERRIGO, Director of Planning, City of Las Vegas

(2 hours, 42.5 minutes) [5:06:24 – 7:48:53]
Typed by: Speechpad.com
Proofed by: Arlene Coleman

TOM PERRIGO

The zoning for this property, R-PD7 was in existence prior to the change in the General Plan. The General Plan was a staff-initiated change that I believe came in about 2005. The applicant has a right to that zoning. And there is a requirement that the land use will be amended at some future date in order to make it consistent. But even if that action didn't come forward, it doesn't take away the rights that the applicant has to the zoning. The previous, the application for the project across the street that requires a GPA, or is it a major mod? I forget now.

COMMISSIONER CREAR

Well, there's a major mod. It was the –

TOM PERRIGO

It's major mod because that did substantially change what was planned for that site. Previously, when this application came forward and it was significantly more units, we did feel that it was significantly outside of the, that original plan. This proposal is within the existing density of the zoning and is not completely outside of the unit count for the plan. So, at this time, we felt that the development agreement could be the mechanism to exercise the R-PD zoning.

BRAD JERBIC

If I can jump in too and just say that everything Tom said is absolutely accurate. The R-PD7 preceded the change in the General Plan to PR-OS. There is absolutely no document that we could find that really explains why anybody thought it should be changed to PR-OS, except maybe somebody looked at a map one day and said, hey look, it's all golf course. It should be PR-OS. I don't know.

But either way, there will be an attempt in the future, because we don't do general plan amendments monthly or weekly. We do them quarterly. And at that appropriate time, you will be able to consider a general plan amendment. If you vote for it, great, they're synchronized. If you don't vote for it, it doesn't change a darn thing. The zoning is still hard and in place.

PETER LOWENSTEIN

Mr. Chairman, Item 82 will be heard at City Council on June 21st, 2017.

STEPHANIE ALLEN

Thank you very, very much.

CHRIS KAEMPFER

Thank you very much.

STEPHANIE ALLEN

We appreciate all your time and lots of deliberation.

CHRIS KAEMPFER

And a good morning.

STEPHANIE ALLEN

And thank you very much. Appreciate it.

CHRIS KAEMPFER

Thank you all, and thank the neighbors for coming as well. Thank you.

(END OF DISCUSSION)

/ac