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 **AMENDED JOINT APPENDIX VOLUME 93, PART 4**

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability company, FORE STARS, LTD,, a Nevada limited liability company and SEVENTY ACRES, LLC, a Nevada limited liability company, DOE INDIVIDUALS I-X, DOE CORPORATIONS I-X, and DOE LIMITED LIABILITY COMPANIES I-X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of the State of Nevada; ROE GOVERNMENT ENTITIES I-X; ROE CORPORATIONS I-X; ROE INDIVIDUALS I-X; ROE LIMITED-LIABILITY COMPANIES I-X; ROE QUASI-GOVERNMENTAL ENTITIES I-X,

Defendants.

Case No. A-17-758528-J

DEPT. NO.: XVI

CITY'S SUMMARY OF PRIOR RULINGS RELEVANT TO HEARING ON DISPOSITIVE MOTIONS

Hearing Date: September 23, 2021
Hearing Time: 1:30 PM

INTRODUCTION

At the eleventh hour, on the eve of the Court's hearing on the dispositive motions, the Developer filed an improper "Summary of Prior Rulings" that it claims are relevant to the hearing. This "summary" is unsanctioned, especially given that the parties' motions have been fully briefed. As a result, the City respectfully requests that the Court ignore this improper filing.

However, should the Court consider the Developer's summary, the City requests that the Court also consider several relevant rulings that the Developer omitted. These rulings contradict the Developer's contention that many of the issues that are central to determining liability for a take have been decided and that the issues before the Court are therefore narrow. To the contrary, this Court's order on the Developer's Property Interest Motion should not be construed to resolve many of the central issues that remain open for decision.

I. This Court and others have already decided that zoning does not grant property or vested rights to the approval of a permit and that the PR-OS designation is valid.

A. This Court has found that zoning does not grant property rights.

Contrary to the Developer's contention that this Court has decided that zoning grants the Developer has a right to use its property as it chooses without City discretion, this Court previously determined just the opposite. This Court held in denying the Developer's Petition for Judicial Review ("PJR") that zoning does not grant any rights to property owners, no less a "property" or "vested" right to approval of a permit application, because the state has delegated to cities broad discretion in determining whether to approve building permit applications:

> The decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. . . . A zoning designation does not give the developer a vested right to have its development applications approved. . . *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 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). . . . In that the Developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was well within the Council's discretion to determine that the Developer did not meet the criteria for a General Plan Amendment or Waiver found in the Unified Development Code and to reject the Site Development Plan and Tentative Map application, accordingly, ***no matter the zoning designation***. ¶ The Court rejects the Developer's attempt to distinguish the *Stratosphere* case, which concluded that the very same decision-making process at issue here was squarely within the Council's discretion, no matter that the property was zoned for the proposed use. . . . The Court rejects the Developer's argument that the RPD-7 zoning designation on the Badlands Property somehow required the Council to approve its Applications. ¶ Statements from planning staff or the City Attorney that the Badlands Property has an RPD-7 zoning designation do not alter this conclusion.

Judge Williams FFCL Denying Developer's PJR, Ex. XXX at 1385-86, 1391-92 (emphasis added).

Insofar as the Court rejects the application of the above analysis to the Developer's regulatory taking claims because the Court's conclusions were rendered in the context of a PJR rather than a complaint for a taking, the City respectfully requests that the Court revisit this determination because it is contrary to all law. While PJRs and taking actions provide two different processes and remedies for allegedly excessive government action, they are based on the same underlying Nevada law of property and land use regulation. A PJR is simply a procedure and remedy. *There is no substantive law of PJRs.* Surely, the state cannot maintain two parallel systems of property and land use regulatory law depending on the procedure and remedy chosen by the aggrieved property owner. The Developer thus proposes an absurd rule that the City Council has discretion over development applications if the owner then sues by PJR, but has no discretion if the owner then sues for a taking.

B. Judge Herndon similarly found that landowners do not have the fundamental constitutional right to develop land for a particular purpose.

Judge Herndon found, consistent with this Court, that landowners do not have a fundamental constitutional "right" to use land for a particular purpose. He noted that, "[i]n the United States, planning commissions and city councils have broad authority to limit land uses to protect health, safety, and welfare. Because the right to use land for a particular purpose *is not a fundamental constitutional right*, courts generally defer to the decisions of legislatures and administrative agencies changed with regulating land use." Ex. CCCC at 1496-97.

C. This Court upheld the validity of the PR-OS land use designation.

Furthermore, contrary to the Developer's assertion that the Court has rejected the Developer's "PR-OS Master Plan land use argument," this Court follows the Supreme Court in holding that the PR-OS designation is valid:

> The Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS) and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor. . . . The City's General Plan provides the benchmarks to ensure orderly development. A city's master plan is the "standard that commands deference and presumption of applicability." . . . [T]the City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development.

Judge Williams FFCL Denying Developer's PJR, Ex. XXX at 1392-94.

Moreover, to the extent the Developer contends the PR-OS designation is relevant only to its motion regarding whether it has a property interest, it cites no authority, because there is none. The PR-OS designation directly undercuts the Developer's argument that the City is liable for a take, and therefore it is relevant to the hearing on liability, whatever the Developer may say to the contrary.

II. Judge Sturman upheld the validity of the PR-OS land use designation.

Like this Court and Judge Herndon, Judge Sturman also held in the 133-Acre case that "The open space designation for the Badlands Property sought by the Developer's predecessor and approved by the City in 1990 was subsequently incorporated into the City's General Plan starting in 1992. The Badlands Property is identified in the City's General Plan as Parks, Recreation, and Open Space ("PR-OS")." Findings of Fact and Conclusions of Law Etc. filed 7/29/21 in 133-Acre case No. A-18-775804-J at 3.

III. Judge Herndon[1] has directly contradicted the Developer's contentions.

A. Judge Herndon upheld the validity of the PR-OS designation.

Contrary to the Developer's argument that the PR-OS designation is irrelevant or has been rejected, Judge Herndon also agreed with this Court and Judge Sturman that the City has designated the property PR-OS since 1992:

> Since 1992, the City's General Plan has designated the Badlands for parks, recreation, and open space, a designation that does not permit residential development. . . . Each ordinance of the City Council updating the Land Use Element of the General Plan since 2005 has approved the designation of the Badlands as PR-OS, and the description of the PR-OS land use designation has remained unchanged.

Ex. CCCC at 1485-86.

[1] The Developer wrongly contends that Judge Trujillo "set aside" Judge Herndon's conclusion of law that the Developer's categorical and *Penn Central* claims are unripe. Judge Trujillo has not issued any orders setting aside or modifying Judge Herndon's well-supported and well-reasoned opinion.

B. Jude Herndon's conclusions of law lead to the conclusion that the City could not have taken another part of the Badlands

Judge Herndon also held that the Developer segmented the Badlands and was allowed substantial development of 435 luxury units on the Badlands. Therefore, the City could not have taken the Badlands or any part thereof. It is clear that the Developer segmented the Badlands and cannot now claim that the 35-Acre Property is the parcel as a whole. As Judge Herndon concluded:

> **The Developer's acquisition and segmentation of the Badlands**
>
> . . . At the time the Developer bought the Badlands, the golf course business was in full operation. The Developer operated the golf course for a year and, then, in 2016, voluntarily closed the golf course and recorded parcel maps subdividing the Badlands into nine parcels. The Developer transferred 178.27 acres to 180 Land Co. LLC ("180 Land") and 70.52 acres to Seventy Acres LLC ("Seventy Acres"), leaving Fore Stars with 2.13 acres. . . . Each of these entities is controlled by the Developer's EHB Companies LLC. . . The Developer then segmented the Badlands into 17, 35, 65, and 133-acre parts and began pursuing individual development applications for three of the segments, despite the Developer's intent to develop the entire Badlands.

Ex. CCCC at 1490.

C. Judge Herndon held the Developer's taking claims are not ripe.

Judge Herndon also addressed the ripeness issue raised by Developers. Contrary to the Developer's contention in its "summary" that the taking claims were ripe because the Developer obtained a final decision, Judge Herndon found that the case was not ripe.

Judge Herndon found that before the Developer can sue the City for a taking of the 65-Acre Property, it was incumbent on the Developer to file and have denied at least two applications to develop *the individual 65-Acre Property*. Judge Herndon held: "The Developer has failed to meet its burden to show that its regulatory takings claims are ripe. The Nevada Supreme Court requires that a regulatory takings claimant file at least two applications to develop "the property at issue." *State*, 131 Nev. at 419-20, 351 P.3d." Ex. CCCC at 1506; *id.* at 1505 ("A regulatory takings claim is not ripe unless it is "clear, complete, and unambiguous" that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989). *The property owner* bears a heavy burden to show that a public agency's decision to restrict development of property is final. *Id.*" [emphasis added]). Like the 65-Acre case, the Developer clearly has not met that burden.

In concluding the Developer's taking claims for the 65-Acre Property were not ripe, Judge Herndon also rejected the Developer's arguments of futility. The Developer contends that after the City Council denied the MDA, further application to develop the 35-Acre Property would be futile, citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Judge Herndon rejected the same argument in the 65-Acre case:

> The Developer contends that this case is similar to *Del Monte Dunes* because the Developer conducted detailed and lengthy negotiations over the terms of the MDA with City staff and made many concessions and changes to the MDA requested by the staff before the MDA was presented to the City Council with the staff's recommendation of approval. Concessions and changes to the MDA requested by staff and a staff recommendation of approval, however, do not count for ripeness. The City Council, not the staff, is the decision-maker for purposes of a regulatory taking. An application must be made to the City Council, and if denied, at least a second application to the City Council must be made and denied before a takings claim is ripe.

Ex. CCCC at 1512-13. Judge Herndon further concluded that the City's adoption of Bills 2018-05 and 2018-24 do not show futility:

> [T]he Developer's reliance on Bills 2018-5 and 2018-24 in support of its claim of futility is misplaced. The bills imposed new requirements that a developer discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City and other requirements for the application to develop property. They were designed to increase public participation and did not impose substantive requirements for the development project, and did not prevent the Developer from applying to redevelop the 65-Acre Property. Moreover, the second bill was adopted in the Fall of 2018 after the Developer filed this action for a taking, so could have had no effect on the 65-Acre Property. The bill could not have taken property that was allegedly already taken. Both bills were repealed in January 2020, and are therefore inapplicable to show futility.

Id. at 1513.

CONCLUSION

Not only is the Developer's "summary" inappropriate, unsanctioned, and far too late to be considered before the hearing on the parties' dispositive motions, but it is contradicted by orders of this Court and others, which the Developer failed to raise to the Court's attention. The City therefore respectfully requests that the Court ignore the Developer's "summary," or in the alternative consider the other authorities omitted by the Developer.

DATED: September 23, 2021 By _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the City of Las Vegas, and that on the 23rd day of September, 2021, I caused a true and correct copy of the foregoing **CITY'S SUMMARY OF PRIOR RULINGS RELEVANT TO HEARING ON DISPOSITIVE MOTIONS** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Cindy Kelly
An employee of City of Las Vegas

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