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

Electronically Filed
Sep 30 2022 10:05 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 119, PART 2

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Electronically Filed
12/24/2021 12:16 AM
Steven D. Grierson
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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 OPPOSITION TO DEVELOPER'S MOTION FOR ATTORNEY'S FEES**

The City of Las Vegas, by and through the undersigned counsel, hereby opposes the Motion for Attorney's Fees ("Motion") filed by Plaintiffs 180 Land Co LLC and Fore Stars Ltd. (collectively, the "Developer"). This opposition is based upon the following memorandum of points and authorities, the exhibits attached hereto, the existing record in this action, and any argument the Court may entertain at any hearing on the Motion.

. . .

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Developer's Motion for $3,410,755.00 in attorney's fees should be summarily denied in its entirety. The Nevada Supreme Court rejected all of the same arguments the Developer is making in the Motion in *Buzz Stew, LLC v. City of N. Las Vegas*, 131 Nev. 1, 4, 341 P.3d 646, 648 (2015). *See* Excerpt of Petition for Rehearing filed 10/28/2014 by the Law Offices of Kermitt L. Waters attached as **Ex. A** (claiming that district court's failure to apply eminent domain statutes and Nev. Const. Art. 1, § 22 in non-eminent domain case was "plain error"); *see also* Excerpt of Appellant's Opening Brief filed 4/12/2011 by the Law Offices of Kermitt L. Waters attached as **Ex. B** (accusing city of unethical conduct for correctly arguing that the Uniform Relocation Assistance and Real Property Acquisition Policies Act does not apply); *see also* Excerpt of Appellant's Reply Brief filed October 5, 2011 by the Law Offices of Kermitt L. Waters attached as **Ex. C** (claiming that non-existent violation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act was "prima facie evidence of improper conduct" requiring a new trial).[1]

Even if the Court finds some basis to award the Developer any attorney's fees in this matter, the Developer has failed to comply with the requirements of NRCP 54 and relevant case law to establish the reasonableness of the requested fees, which exceed the amount of fees the Developer claims to have actually incurred by more than $1.3 million. This request for unreasonable fees is based upon the Developer's outrageous claim that it is entitled to "enhanced fees" at rates ranging from $800/hour to $1,500/per hour. Such rates are 3-4 times higher than the prevailing market rates in Las Vegas, Nevada and clearly unreasonable. *See* Excerpt of Walter Kluwer's Real Rate Report attached as **Ex. D**. The Developer submitted no documentation to justify the rates the Developer's

[1] The *Buzz Stew* court dismissed the landowner's arguments regarding the Uniform Relocation Assistance and Real Property Acquisition Policies Act because the landowner failed to show that federal funds were used for the project. 131 Nev. at 8–9, 341 P.3d at 651. Additionally, the court held that Nev. Const. Art. 1, § 22 applied only to eminent domain actions and did not prevent an award of costs to the government. *Id.* (citing *Locklin v. City of Lafayette*, 7 Cal.4th 327, 27 Cal.Rptr.2d 613, 867 P.2d 724, 756 (1994) [holding that an inverse condemnation plaintiff who did not prevail on a takings claim was not shielded by the law against awarding costs in eminent domain actions]).

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attorneys claimed to have billed, let alone these "enhanced fees" that are $1.3 million greater than the fees the Developer actually incurred.

II. LEGAL ARGUMENT

A. Nevada follows the American Rule and there is no statute, contract, or rule that authorizing an award of attorney's fees in this case

"Nevada follows the American rule that attorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). The Developer claims there are three grounds for recovering the excessive fees requested: (i) the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601 to 4655; (ii) Article 1, § 22(4) of the Nevada Constitution; and (iii) NRS 18.010(2)(b). None of these laws apply to this case.

1. The Uniform Relocation Assistance and Real Property Acquisition Policies Act does not apply because this case does not involve a federally assisted project or program

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601 et seq. (the "Relocation Act") is intended to ensure consistent treatment for all owners affected by *federal* land acquisition practices. 42 U.S.C. § 4651. It prohibits federal agencies from approving any program, project, or grant to a state agency under which federal funds are available to pay all or part of the cost of any program or project which will result in the acquisition of real property *unless* the acquiring state agency provides satisfactory assurances that (1) in acquiring real property, it will be guided, to the greatest extent practicable under state law, by the land acquisition policies of the Relocation Act; and (2) property owners will be paid or reimbursed for expenses incidental to transfer of title or litigation as specified by statute. 42 U.S.C. § 4655(a); 49 C.F.R. § 24.4(a)(1).

Section 4654(a) of the Relocation Act allows for recovery of attorney's fees in two very narrow situations: "(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or (2) the proceeding is abandoned by the United States." Numerous courts across the country have found that Congress clearly intended to create only a narrow exception to the general rule of nonrecovery of litigation expenses in condemnation actions. *United States v. 243.538 Acres of Land, More or Less, In Maui County, State of Hawaii*, 509 F. Supp. 981, 985 (D. Haw. 1981); *see*

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also United States v. 4.18 Acres of Land, More or Less, in Idaho County, State of Idaho, 542 F.2d 786, 788 (9th Cir. 1976); *United States v. 410.69 Acres of Land, More or Less in Escambia County, State of Fla.*, 608 F.2d 1073, 1076 (5th Cir. 1979).[2]

The Developer claims that because the plaintiffs in *Sisolak* and *Hsu* were awarded attorney's fees under the Relocation Act, the City is required to pay the Developer's attorneys fees. This argument ignores the fact that both *Sisolak* and *Hsu* involved air space takings caused by the airport transition zone height restrictions that the County was required to establish in order to obtain funding for airport projects. As the *Sisolak* court explained, "the Relocation Act entitles Sisolak to an award of attorney fees because the County received federal funding for numerous improvements at McCarran Airport, including runway reconstruction and land acquisition." 122 Nev. 645, 674, 137 P.3d 1110, 1129 (2006). In fact, to demonstrate that the Relocation Act applied to Sisolak's takings claim, Sisolak filed copies of the grant agreements between the County and the FAA in which the County agreed to be bound by the Relocation Act's provisions. *See* Sisolak's Supplemental Exhibit Concerning Application of URA Requirements attached as **Ex. E**; *see also* Sisolak's Second Supplemental Exhibit Concerning Application of URA Requirements attached as **Ex. F**.

Nevertheless, the Developer claims that all governmental agencies that receive federal funds are required to pay attorney's fees in inverse condemnation actions, citing 49 C.F.R. § 24.107(c). Section 24.107(c) lacks the limiting language of 42 U.S.C. § 4654, but that cannot somehow expand the remedies available under the Relocation Act. An enabling regulation cannot provide greater rights or remedies than authorized by its implementing statute. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 96, 122 S. Ct. 1155 (2002). In any event, the Developer's reliance on § 24.107(c) is clearly misplaced because § 24.101 expressly limits § 24.107(c) to acquisitions of real property for "a direct Federal program or project" and acquisitions of real property "where there is Federal

[2] The report of the Public Works Committee of the House of Representatives makes it clear that the attorney's fees provision in the Relocation is not to be construed broadly. After paraphrasing the section, the report states: "Ordinarily the Government should not be required to pay expenses incurred by property owners in connection with condemnation proceedings. The invitation to increased litigation is evident." H.R. Rep. No. 91-1656, 91st Cong., 2d Sess., contained in 3 U.S.Code Cong. & Admin. News 5875 (1970).

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financial assistance in any part of project costs." 49 CFR §24.101(a), (b).

The Developer's interpretation of the Relocation Act and the regulations thereunder cannot be squared with our Supreme Court's decisions in *Buzz Stew* and *County of Clark v. Alper,* 100 Nev. 382, 396, 685 P.2d 943, 952 (1984). In *Alper*, the Supreme Court reversed an award of attorney fees to the owner of property taken by the county to widen a public street because the owner failed to show that the county received federal financial assistance to pay for all or any part of the project, implying that some nexus is required. *Id.* And, as previously noted, in *Buzz Stew* the Court rejected arguments that the Relocation Act applied, holding that "the district court did not err in excluding [expert testimony regarding the Relocation Act], as Buzz Stew failed to show that federal funds were used for the project." 131 Nev. 1, 8–9, 341 P.3d 646, 651 (2015).

The Developer suggests that *Sisolak* potentially overruled or distinguished *Alper* in holding a "specific nexus" is not required. *See* Motion at 3:20-22. Indeed, the *Sisolak* court rejected Clark County's argument that, "in order for the Relocation Act to apply, there must be a specific nexus between the federal funding and the taking at issue as well as landowner displacement." 122 Nev. at 674, 137 P.3d at 1129. However, if a specific nexus is not required, it does not necessarily follow that no nexus is required. The Developer's arguments fail to appreciate the nuance created by the *Sisolak* court's use of the term "specific."

The district court's decision regarding Sisolak's request for attorneys fees explains that Sisolak and the County had taken diametrically opposite positions with respect to the nexus issue, as Judge Denton explained in his order granting Sisolak's motion for attorney's fees:

> In a nutshell, the positions of the parties can be condensed to that of Plaintiff, which is that there is a broad swath of applicability to federally funded projects with no displacement requirement in inverse condemnation cases, versus that of Defendants, which is that there is a requirement of a specific nexus between the federal funding and the taking at issue, with a displacement requirement.

See Order granting Sisolak's motion for attorney's fees attached as **Ex. G**. Judge Denton went on to explain "[t]he Court is persuaded that the record demonstrates that Defendants are "subject to" the URA and that <u>a</u> nexus exists to the extent necessary." *Id.* at p. 3, ln 9-10 (emphasized added). Furthermore, Judge Denton explained that this conclusion was not inconsistent with *Alper*'s holding

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that the plaintiff was not entitled to recover fees under the Relocation Act because it failed to show any nexus. *Id.* at ln. 14-20.

Thus, in order for the Developer to claim the benefits of the Relocation Act, it must demonstrate at least *some* nexus between the taking at issue and a federally assisted project or program. The Developer, like the landowners in *Alper* and *Buzz Stew*, failed to establish a threshold connection between the taking at issue and any program or project "where there is Federal financial assistance in any part of project costs."[3]

2. Article I, Section 22 of the Nevada Constitution does not authorize fee awards in inverse condemnation cases

It is well-established that "a landowner has no constitutional right to recover attorney fees as a part of the just compensation for land taken by eminent domain." *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673, 137 P.3d 1110, 1128 (2006); *see Dohany v. Rogers*, 281 U.S. 362, 386, 50 S.Ct. 299, 302 (1930) ("Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain."). The reason being is that for purposes of the Fifth Amendment, "just compensation is for the property, and not the owner." *U. S. v. Bodcaw Co*., 440 U.S. 202, 99 S. Ct. 1066, 1066 (1979) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 13 S.Ct. 622, 626, (1893).

Compensation to a landowner for indirect costs incurred in a condemnation action "is a matter of legislative grace." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 9, 106 P.3d 1198, 1199 (2005) (quoting *United States v. Bodcaw Co.*, 440 U.S. 202, 204, 99 S.Ct. 1066 (1979)). And absent an authorizing statute, courts may not grant a judgment against the government for costs or expenses. *United States v. Worley*, 281 U.S. 339, 344, 50 S.Ct. 291 (1930); *Citizens Committee v. Callaway*, 494 F.2d 124, 126 (9th Cir. 1974).

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[3] Although a moot issue because there is no federally assisted program or project with any nexus to the alleged taking at issue, it is worth noting that other states have determined that the Relocation Act does not, by itself, authorize attorney's fees in state law inverse condemnation proceedings. *See* 8A Patrick J. Rohan & Melvan A. Reskin, Nichols on Eminent Domain § G.20.05[3] (3d ed. 2015) ("[T]he provisions of 42 U.S. C. 4654, entitling successful plaintiffs to litigation expenses, apply only to takings by a federal agency, not to an inverse condemnation action by a city redevelopment authority, nor to an award under a state condemnation.").

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The Developer claims that the constitutional amendments brought about by the voter's imitative "People's Initiative to Stop the Taking of Our Land" (PISTOL) created an exception to the American Rule allowing attorney's fees in inverse condemnation actions. *See* Motion 5:1-7. Several of the PISTOL amendments, however, were stricken from the initiative before it was approved and ratified by the voters because they violated the single subject rule. *See Nevadans for the Prot. of Prop. Rts., Inc. v. Heller*, 122 Nev. 894, 141 P.3d 1235 (2006). As approved in 2008, the PISTOL amendments became Section 22 of Article I of the Nevada Constitution, which states as follows:

> Sec. 22. **Eminent domain proceedings: Restrictions and requirements**. Notwithstanding any other provision of this Constitution to the contrary:
>
> 1. Public use shall not include the direct or indirect transfer of any interest in property taken in **an eminent domain proceeding** from one private party to another private party. In all **eminent domain actions**, the government shall have the burden to prove public use.
>
> 2. In all ***eminent domain actions***, prior to the government's occupancy, a property owner shall be given copies of all appraisals by the government and shall be entitled, at the property owner's election, to a separate and distinct determination by a district court jury, as to whether the taking is actually for a public use.
>
> 3. If a public use is determined, the taken or damaged property shall be valued at its highest and best use without considering any future dedication requirements imposed by the government. If private property is taken for any proprietary governmental purpose, then the property shall be valued at the use to which the government intends to put the property, if such use results in a higher value for the land taken.
>
> 4. In all ***eminent domain actions***, just compensation shall be defined as that sum of money, necessary to place the property owner back in the same position, monetarily, without any governmental offsets, as if the property had never been taken. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred.
>
> 5. In all ***eminent domain actions*** where fair market value is applied, it shall be defined as the highest price the property would bring on the open market.
>
> 6. Property taken in ***eminent domain*** shall automatically revert back to the original property owner upon repayment of the original purchase price, if the property is not used within five years for the original purpose stated by the government. The five years shall begin running from the date of the entry of the final order of condemnation.
>
> 7. A property owner shall not be liable to the government for attorney fees or costs in any ***eminent domain action***.

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> 8. For all provisions contained in this section, government shall be defined as the State of Nevada, its political subdivisions, agencies, any public or private agent acting on their behalf, and any public or private entity that has the power of eminent domain.
>
> 9. Any provision contained in this section shall be deemed a separate and freestanding right and shall remain in full force and effect should any other provision contained in this section be stricken for any reason.

The PISTOL amendments only describe eminent domain actions. They never mention inverse condemnation actions. Moreover, the PISTOL amendments refer to procedural matters unique to eminent domain actions.[4] Thus, on its face, the PISTOL amendments do not apply to inverse condemnation actions, which is significant because many states have similar provisions that protect property owners in eminent domain actions but not inverse condemnation actions. See, e.g., *Buzz* Stew, 131 Nev. at 8–9, 341 P.3d at 651 (citing *Locklin v. City of Lafayette*, 7 Cal.4th 327, 27 Cal.Rptr.2d 613, 867 P.2d 724, 756 (1994), which held that an inverse condemnation plaintiff who did not prevail on a takings claim was not shielded by the law against awarding costs in eminent domain actions.)

The provision that supposedly requires the government to pay attorney's fees in inverse condemnation actions is expressly limited by the prefatory clause "in all eminent domain actions." *See* Nev. Const. Art. I, § 22(4). More importantly, it does not mention attorney's fees. One could argue that the omission was intentional, given that another PISTOL amendment states: "A property owner shall not be liable to the government for ***attorney fees*** or costs in any eminent domain action." Nev. Const. Art. I, § 22(7). This provision protects property owners from having to pay attorney's fees, but nothing in the PISTOL amendments mandates or authorizes an award of attorney's fees against the government.

Next the Developer argues that the drafters of the argument opposing the PISTOL amendments that was put on the ballot were "so certain that the government would have to pay for the landowners attorney fees in an eminent domain action under Article 1, Section 22, that they even added an exclamation point "!" at the end of that sentence to denote its major significance to all

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[4] See e.g. Nev. Const. Art. I, § 22(1) (government's burden to prove public use), Nev. Const. Art. I, § 22(2) (requiring delivery of appraisals prior to filing motion for immediate occupancy)

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Nevada voters." Motion at 6:3-5. However, the Nevada Supreme Court has explained that ballot initiative descriptions should not be interpreted like laws adopted by the legislature. *Educ. Init. v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 48, 293 P.3d 874, 883 (2013) ("Given the limited function ascribed to an initiative's description of effect and the fact that these descriptions are relevant only at the early stages of the initiative process, we conclude that it is inappropriate to parse the meanings of the words and phrases used in a description of effect as closely as we would statutory text.")

Finally, the Developer suggests that because NRS 37.120 excepts inverse condemnation actions from the blanket prohibition on attorney fee awards in eminent domain cases, that somehow means that the government must pay attorney's fees in inverse condemnation actions. However, a law prohibiting fee awards in eminent domain cases is not the same as a law authorizing fee awards in inverse condemnation cases.

3. A fee award pursuant to NRS 18.010(2)(b) is not justified

The last group upon which the Developer seeks to recover fees is NRS 18.010(2)(b), which provides that the court may make an allowance of attorney's fees to a prevailing party if the court finds that a claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. This rule is intended to punish 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.

The Developer's arguments lack citations to authority, are replete with assertions that have no factual basis, contain blatant misrepresentations. Nevertheless, none of the accusations that the Developer makes about the City's defense of this matter, even if true, would rise to the level of sanctionable conduct. The Developer claims that the City reargued issues that had already been decided, argued contrary to long standing Nevada eminent domain law, and repeatedly argued "petition for judicial review law." While the Developer may disagree with the City's legal arguments, that does not make them irrelevant. And, although this Court may disagree with the City's position, the developer cannot claim that the City's positions did not have a basis in fact or law. The fact that a sitting Nevada Supreme Court justice agreed with the City's arguments demonstrates that they are

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more than substantially justified.

B. Even if the Developer is entitled to attorney's fees, the Developer failed to satisfy the requirements of NRCP 54(d) or establish the reasonableness of the requested fees.

An award of attorney's fees and costs lies within the district court's discretion. *RTTC Communications, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 40, 110 P.3d 24, 28 (2005). The determination of what is reasonable is within the discretion of the trial court. *Parodi v. Budetti*, 115 Nev. 236, 240, 984 P.2d 172, 174 (1999). In evaluating the reasonableness of a request for attorney's fees, the district court is required to consider the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 354, 349-50, 455 P.2d 31, 33 (1969). Thus, regardless of the method chosen as the starting point for evaluating fees (i.e. lodestar method, contingency fee arrangement, etc.), the trial court must continue its analysis by considering the requested amount in light of the factors enumerated in *Brunzell*. *Schuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (internal citations omitted). Those factors are as follows:

> (1) the advocate's qualities, including ability, training, education, experience, professional standing, and skill;
>
> (2) the character of the work, including its difficulty, intricacy, importance, as well as the time and skill required, the responsibility imposed, and the prominence and character of the parties when affecting the importance of the litigation;
>
> (3) the work performed, including the skill, time, and attention given to the work; and
>
> (4) the result – whether the attorney was successful and what benefits were derived.

Brunzell, 85 Nev. at 349-50, 455 P.2d at 33.

The Developer has the burden to establish that the requested fees "'were actually and necessarily incurred and were reasonable.'" *Stefonich v. Bautista*, 487 P.3d 389, 2021 WL 2178577, at *1 (Nev. May 27, 2021). That showing must be "supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266–67, 350 P.3d 1139, 1143 (2015).

1. The Court cannot determine reasonableness of the requested fees based on the documentation submitted

The developer provided no documentation to support the reasonableness of the fees it claims

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it actually incurred. Although billing records are not necessarily required to establish the reasonableness of a fee award where the attorney is hired under a contingency fee arrangement, according to the affidavits submitted by the Developer's four attorneys, this is the first and only case in which such attorney's have billed their time on an hourly basis.

The lack of supporting documentation such as billing records is particularly concerning in this case as the Developer is claiming that its attorneys took detailed records of the number of hours worked but the number hours they claim to have worked in this case is rounded to the nearest hundredth, which indicates that they did not use a professional time-keeper system. Any professional time-keeping system would round the time spent to the nearest billing increment.

2. The fees claimed are excessive and unreasonable

When determining whether an hourly rate is reasonable, this tribunal must consider "the prevailing market rate ***in the relevant community***." *Blum v. Stenson*, 465 U.S. 886, 895(1984) (emphasis added). The relevant community here is Las Vegas, Nevada. The prevailing market rate in Las Vegas, Nevada, is roughly $450/hour for a partner and $250-$300/hour for an associate. See *Topolewski v. Blyschak*, 2018 WL 1245504, at *4 (D. Nev. Mar. 8, 2018) (explaining that "rate determinations in other cases in the District of Nevada have found hourly rates as much as $450 for a partner and $250 for an experienced associate to be the prevailing market rate in this forum"). These rates are confirmed by the 2020 Real Rate Report published by Wolters Kluwers, which identifies the average rates for partners and associates in Las Vegas over the previous three years. *See* Ex. D, Rate Report.

In 2017, when this case began, the average rate charged by partners in the Las Vegas market was $410 per hour while the average rate for associates was $264 per hour. The following year, in 2018, the average rate for partners in the Las Vegas market was $444 and the average rate for associates was $279. In 2019, the average rate for partners actually dropped slightly to $438 while the average rates for associates rose slightly to $281.

In its Motion, the Developer claims that all four of the Developer's attorneys billed at the same rate of $450/hour from August 2017 through June 2019. During that same period, $450 was above market. Then, from June of 2019 to October 2021, the Developer's counsel apparently raised

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the blended rate to $675/hour. This is also well above the average rates charged in the Las Vegas market.

Now, the Developer is requesting an enhanced fee which is higher than the average rate for partners in New York. This isn't just unreasonable, its unsupportable. In attempt to make its fees request seem legitimate, the Developer compares itself to the attorney who represented Governor Sisolak in the airport case, who the court awarded substantial fees under a contingency fee agreement. While an increased fee might be justifiable if the Developer's counsel had taken this case on a contingency fee, none of the factors that justify such an enhanced fee are present in an hourly structure. The Developer's counsel did not assume the great financial risk that typically justifies larger contingency awards. The Developer's attorneys are not waiting an extended period of time without payment. The requested fees are unreasonable and unsupportable, even if the Developer had grounds to recover the.

III. CONCLUSION

For the foregoing reasons, the Developer's Motion for Attorney's Fees should be denied in its entirety.

DATED this 23rd day of December, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 23rd day of December, 2021, I caused a true and correct copy of the foregoing **CITY'S OPPOSITION TO DEVELOPER'S MOTION FOR ATTORNEY'S FEES** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

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EXHIBIT “A”

IV. Facts and Law Overlooked in Regards to Application of Chapter 37

A. Facts

The district court refused to allow and/or apply eminent domain rules and principles in this action. (Order p.2)(see also 13 JA 3019). In fact, the district court even charged Buzz Stew with the City's costs, a clear violation of Nev. Const. Art. 1, § 22(7). In this Court's Order it finds that costs may be levied against a landowner in an "unsuccessful action for precondemnation damages wherein the City prevailed on its defenses." (Order p. 8). As will be discussed below, this position is irreconcilable with this Court's opinion in 5th and Centennial.

B. Law

In 5th and Centennial this Court applied eminent domain case law and statutes. For example, this Court ruled that NRS 37.175, an eminent domain statute, was more appropriate than a general statute. "Furthermore, we conclude that NRS 37.175(4) is more appropriate than NRS 17.130(2), the general prejudgment interest statute, for calculating precondemnation damages because NRS 37.175 is **specific to eminent domain cases**." 5th and Centennial at 899 (emphasis added). If eminent domain case law and statutes apply in 5th and Centennial (a precondemnation damages case), then they must also apply here.

It is difficult to rationalize how eminent domain statues and principles apply to one precondemnation damages case, but not another. The same would violate stare decisis and the equal protection clause. Accordingly, it was plain error for the district court to "decline" to apply eminent domain principles in this case. It can simply not stand that in 5th and Centennial it was an abuse of discretion for the district court to fail to apply chapter 37, while the district court's failure to apply NRS 37 and Nev. Const. Art 1, § 22(7) here was not an abuse of discretion. Either applying eminent domain rules and principles in a precondemnation damages case is an abuse of discretion or it is not. The rule can not be changed depending upon the parties. This inconsistent position will cause a legal quagmire in the future if not corrected. Furthermore, it is important to note that Buzz Stew's property is one parcel to the east

of 5th and Centennial. As can be seen from Exhibit 1, these are neighboring parcels.

The time frames for the City's conduct is nearly identical for 5th and Centennial and Buzz Stew. The City's behavior did not change between 5th and Centennial and Buzz Stew, however in 5th and Centennial the conduct was deemed improper and in Buzz Stew it was not. The only difference between these two cases is that 5th and Centennial received a fair trial from Judge Denton, while Buzz Stew did not receive even a semblance of a fair trial from the Judge it was assigned. It would be a gross injustice to allow such vastly different results simply due to the department the parties happen to land.

Moreover, this Court entirely overlooked or misapprehended one of the principle purposes behind the 5th & Centennial holding that a precondemnation damage claims is an "eminent domain" claim, which is to assure that all landowners receive the protections afforded in eminent domain cases, most importantly, that the government will not be permitted to "threaten" Nevada landowners that, if they seek their constitutional right to protect their property, then the government will force them to pay attorney fees and costs. This Court's Order has already prompted these threats from the City in its motion to publish wherein it states it wants the Order published so it can impose a "risk" (payment of costs) and "consequences" on Nevada landowners to "deter" them from bringing claims to protect their property. (City mot to publish 3-4). The ink had not even dried on this Court's Order and the threats from the government have already been made.

Accordingly, a rehearing is necessary to ensure equal application and protection of the law.

V. Facts and Law Overlooked in Regards to "Benefits"

A. Facts

This Court states that "[b]ecause the jury did not reach the issue of precondemnation damages and because the question before the jury was whether Buzz Stew was entitled to precondemnation damages we reject Buzz Stew's argument that the district court abused its discretion (1) in admitting evidence ***that the project***

EXHIBIT “B”

(26 JA 6190:19-21), even though there was an order excluding this same information (source of funds). (15 JA 2516). The City had Ms. Walker testify that "[e]verybody benefits from it [the Project], because as that water is channeled off and out of the area, it gives an opportunity for the whole area to start developing"(26 JA 6190:25-6191:1-2), even though there was an order excluding all general benefits. (15 JA 2516). This kind of conduct is not uncommon for the City and its counsel. In fact, in another eminent domain action, the City itself had requested and obtained a pretrial order excluding any reference to offers to purchase property as being legally inadmissible (26 JA 6082:7-16; 6085:15-16) and then, during trial, the City had its appraiser, Gary Kent, blurt out an offer (26 JA 6072:1-3). After trial, it was then discovered that the testimony was completely false. (26 JA 6076-6080). This unacceptable conduct by the City violates the rules of professional conduct and its duty in eminent domain proceedings.

5. The City Violated the Requirement of Candor to the Court by Arguing that it is Not Bound by the Uniform Relocation Assistance and Real Property Acquisition Policies Act.

The City also incorrectly represented to the lower court that the City is not subjected to the Uniform Relocation Assistance and Real Property Acquisition Policies Act,[125] adopted by the state per statute, including NRS 342.105 ("Relocation Act"). (30 JA 7093-70098, 7102-7108). Even JoMar Alwes, the City's right-of-way agent, admitted that he follows the Relocation Act as an employee of the City. (31 JA 7381:18-24). To counter this the City argued that "[t]he fact that Mr. Alwes likes to abide by the laws in his personal business doesn't mean as a matter of law that Title 23 applies to the city." (27 JA 6261:5-7). Mr. Alwes is an employee of the City. Clearly, Mr. Alwes would not claim to follow these rules, if the City were not bound by the same. The City's representations to the lower court regarding the Relocation Act violate the duties imposed by NRPC 3.3.

6. The City Further Violated the Requirement of Candor to the Court by Arguing that this Court Did Not find that the Landowner was Entitled to Pursue Just Compensation.

The City represented to the lower court that this Court did not hold that the Landowner was entitled to pursue "just compensation" and that even using the words "just compensation" in this

[125] 42 U.S.C. § 4651.

EXHIBIT “C”

provided at trial. (AOB 52-56). In fact, the Landowner even informed the City during Mr. Cagle's deposition that if there was additional information Mr. Cagle was going to testify to that the Landowner had a right to receive the same before trial. The City clearly had no intention of complying with the rules of discovery.[89]

Preventing the Landowner from utilizing admitted exhibits used by the City, because it deals with inevitable but recurring flooding, when the Landowner's Property is suffering from inevitable but recurring flooding caused specifically by the City is beyond logic.[90] Furthermore, preventing the Landowner from utilizing an admitted exhibit because it deals with inverse condemnation, in an inverse condemnation action, is unheard of, unconstitutional, and deprived the Landowner of a fair trial.

F. The City's Violation of the Relocation Act Was Prima Facia Evidence of Its Improper Conduct, and The Lower Court's Exclusion of the Same was Reversible Legal Error and an Abuse of Discretion.

The City's violation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act adopted by Nevada under NRS 342.105 [91] ("Relocation Act") was prima facie evidence of its improper conduct and the lower court's exclusion of the same was reversible legal error and an abuse of the lower court's discretion. "The provisions of the Relocation Act apply to all Nevada

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[89] **Q**: "I want to make sure that during this deposition we get all of the facts and circumstances at issue in this case that you may have knowledge or information regarding, okay?
A: That I can recall today
Mr. Titus [City counsel]: And that you're asked
Mr. Leavitt [landowner's counsel]: Well, that you're asked, understood that. But what I don't want to happen he's –I believe discovery requires you guys to disclose, I mean the City of North Las Vegas to disclose any and all information that he may be asked to testify to at trial. If we don't get that during this deposition, I think you guys, the City of North Las Vegas has a duty to disclose what his testimony may be.
Mr. Titus: I think you know the issues in the case as outlined in the pleadings. You have an obligation to ask whatever questions you want to. If you neglect to ask a question, I don't think we have to volunteer what our trial strategy is."(22 JA 5032-5033)(emphasis added)

[90] This was the same exhibit the City used to solicit legal opinions from an unqualified lay witness regarding the constitutionality of exactions. (32 JA 7407-8409).

[91] 42 U.S.C. §§ 4601-4655.

political subdivisions and agencies."[92] The City is a municipal corporation of the State of Nevada and is, therefore, bound by the Relocation Act. (1 JA 0114:24-25). The Relocation Act provides that the City shall in no event defer "condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property."[93] However, that is exactly what the City did here. The City deferred condemnation of the Landowner's Easement in order to force him to take the City's unconstitutionally low value.

The City has made the strange legal argument that the Relocation Act only applies if the Project itself received federal funding.[94](RAB 38:26). For this strange legal position the City's only legal authority is Sisolak. However, any plain reading of the language the City selected from Sisolak disproves the City's position. Specifically, the Relocation Act applies if "[***t]he public body administering the programs or projects [is] funded in whole or in part by the federal government.***'"(RAB 38). For the City's legal position to be accepted "***the public body***" has to be eliminated from this quote and the remainder must be mangled to read *if the public project is funded in whole or in part*, clearly this is not what Sisolak says and the City's efforts to argue the same is simply bewildering.

What is clear here is that "the public body administering" the Project, here the City, was "funded in whole or in part by the federal government." In fact, the Landowner even did an offer of proof to establish that the City, the public body administering the Project, was funded by the federal government. (15 JA 3559-16 JA 3543). Clearly, the City is funded in part by the federal government and as such it is bound by the Relocation Act. The City has unsuccessfully attempted to argue that it is the "project' not the "public body" that is to be analyzed, but that is simply not how the law reads and to accept the City's position one must distort the clear language of the law.

The City additionally argues that the Relocation Act does not apply because the City did not

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[92] Sisolak at 674.

[93] 42 U.S.C. § 4651(7).

[94] It is inconceivable that the City actually believes this argument, it appears to simply be an avenue around the fact that it violated NRPC 3.3, when it represented to the lower court that it was not bound by the Relocation Act. (30 JA 7093-70098, 7102-7108).

relocate anyone.(RAB 38:18). Again, this is a very strange position as it completely distorts the plain language of the law. Specifically, NRS 342.105 reads as follows:

> "***Any*** department, agency, instrumentality or ***political subdivision of this State,*** or any other public or private entity, which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, 42 U.S. C §§ 4601-4655, and the regulations adopted pursuant thereto, and ***which undertakes any project that results in the acquisition of real property*** or in a person being displaced from his or her home, business, or farm, shall provide relocation assistance and make relocation payments to each displaced person and ***perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements***." (emphasis added)

To adopt the City's reading of this law this Court would have to eliminate all the above highlighted language. The City argues that it would need to remove people from their homes or businesses for the Relocation Act to apply. There is simply no support for the City's argument in the law and in fact the plain language of the law provides the exact opposite. The Relocation Act applied to this matter and the City's violation of the same was prima facia evidence of its improper conduct.

The Landowner retained the former head of the Nevada Department of Transportation ("NDOT"), Garth Dull P.E., to discuss the Relocation Act, how it is followed by the State of Nevada and its political subdivisions, and whether the City's action in this matter violated the Relocation Act. Mr. Dull, concluded that the City's conduct violated the Relocation Act, an issue well within his area of expertise. (15 JA 3508). In fact, NRS 342.105 (2) specifically provides that "[t]he Director of the Department of Transportation shall review the federal act and all amendments and regulations adopted pursuant thereto and adopt such regulations as the Director finds are necessary to enable the State of Nevada to comply with those federal requirements." Therefore, not only was the City's compliance or lack thereof within Mr. Dull's area of expertise, when he was the head of NDOT it was a requirement that he make sure Nevada and accordingly its political subdivisions (municipal corporations) were in compliance with the Relocation Act.

However, the lower court precluded Mr. Dull from testifying that the City violated the Relocation Act[95] and ordered that the Relocation Act did not apply to the City, despite the strenuous

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[95] The lower court also precluded Mr. Dull from testifying that the City's conduct was unreasonable and oppressive. As will be discussed below, the lower court excluded all of the Landowner's expert testimony regarding unreasonable delay and oppressive conduct.

objections by the Landowner. (30 JA 7087-7106, 7113. 7119; 27 JA 6261-6262). The City's failure to comply with its own statutory requirements is prima facia evidence of its improper conduct and excluding this evidence was legal error and an abuse of the lower court's discretion requiring reversal of the verdict and a remand for a new trial.

G. The Lower Court Erred as a Matter of Law and Abused its Discretion by Excluding all Evidence of the City's Improper Conduct - A Required Element of Precondemnation Damages.

In Buzz Stew-I, this Court provided the elements required for a precondemnation damages claim. One of the required elements is that the Landowner must establish that the City engaged in "improper conduct" following the announcement of intent to condemn.[96] The Landowner had significant expert testimony and facts to support a finding of improper conduct by the City and the lower court excluded all of the expert testimony and nearly all of the facts showing improper conduct, which precluded the Landowner from establishing one of the required elements in this case.

The Landowner retained four experts, two appraisers, a real estate broker and the former head of NDOT, who all investigated the facts in this case and formulated opinions regarding the City's improper conduct, unreasonable delay, and oppressive conduct. The lower court excluded all of this expert testimony. (14 JA 3324-3326, 31 JA 7247-7252). The lower court additionally ordered that the Landowner's experts could not even state the words unreasonable delay or oppressive conduct. (14 JA 3204, 3324; 31 JA 7247-7252).

This was gross and reversible error. In Nevada, an expert is permitted to testify if "the expert's specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute."[97] Each and every expert offered by the Landowner had specialized knowledge that would have assisted the trier of fact in understanding the issues in this matter. For example, as the former head of an agency with the power of eminent domain (NDOT), Mr. Dull has specialized knowledge of the rules and guidelines the City must follow when in the "precondemnation" phase of a public

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[96] Buzz Stew-I, 124 Nev. 224, 181 P.3d 670 at 673, the lower court however required a showing of unreasonable delay or oppressive conduct (even though this Court only provided those as examples of improper conduct). (11 JA 2467:11-12).

[97] Yamaha Motor Company v. Arnoult, 114 Nev. 233, 243, 955 P.2d 611, 667 (1998).

EXHIBIT “D”

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Section I: High-Level Data Cuts

Cities

2019 -- Real Rates for Partners and Associates						Trend Analysis (Mean)		
City	Role	n	First Quartile	Median	Third Quartile	2019	2018	2017
Knoxville TN	Partner	15	$230	$250	$335	$318	$256	$263
	Associate	12	$185	$200	$224	$204	$210	$210
Lafayette LA	Partner	14	$150	$150	$205	$184	$195	$217
Las Vegas NV	Partner	42	$300	$400	$575	$438	$444	$410
	Associate	45	$250	$278	$324	$281	$279	$264
Lexington KY	Partner	15	$295	$325	$371	$333	$319	$313
Little Rock AR	Partner	24	$215	$238	$261	$261	$281	$263
Los Angeles CA	Partner	902	$482	$740	$1,015	$767	$730	$704
	Associate	1311	$395	$576	$770	$591	$559	$540
Louisville KY	Partner	21	$322	$350	$418	$369	$331	$356
	Associate	22	$190	$210	$245	$214	$215	$207
Madison WI	Partner	23	$374	$418	$525	$432	$394	$383
Memphis TN	Partner	36	$275	$330	$414	$340	$342	$347
	Associate	23	$212	$225	$245	$226	$232	$225
Miami FL	Partner	240	$325	$500	$684	$514	$489	$443
	Associate	171	$255	$330	$473	$373	$335	$304
Milwaukee WI	Partner	77	$304	$386	$470	$416	$390	$371
	Associate	54	$238	$277	$314	$282	$265	$264
Minneapolis MN	Partner	268	$380	$529	$675	$530	$490	$446
	Associate	224	$295	$370	$439	$374	$362	$328
Nashville TN	Partner	90	$360	$430	$473	$419	$405	$408
	Associate	91	$225	$257	$288	$262	$244	$247
New Haven CT	Partner	23	$385	$450	$519	$445	$396	$390
	Associate	24	$230	$290	$335	$290	$276	$282
New Orleans LA	Partner	105	$285	$347	$425	$358	$347	$296
	Associate	103	$220	$238	$315	$268	$246	$210
New York NY	Partner	2384	$602	$975	$1,284	$962	$931	$887
	Associate	3382	$425	$615	$847	$638	$613	$585
Oklahoma City OK	Partner	31	$200	$340	$360	$316	$292	$283
	Associate	18	$165	$203	$239	$221	$209	$196
Omaha NE	Partner	44	$310	$375	$404	$355	$355	$330
	Associate	20	$186	$249	$255	$236	$215	$208
Orlando FL	Partner	99	$385	$450	$513	$461	$466	$454
	Associate	90	$230	$276	$335	$284	$270	$282