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 17, PART 1 OF 4 (Nos. 3085–3111)**

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

HEARING DATE(S) ENTERED IN ODYSSEY

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

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set to be tried to a jury on a **five week stack,** to begin, **May 3, 2021 at 9:30 a.m.**

B. A Pre-Trial/Calendar Call with the designated attorney and/or parties in proper person will be held on **April 22, 2021 at 10:30 a.m.**

C. Parties are to appear on **February 17, 2021 at 9:00a.m.,** for a Status Check re Trial Readiness.

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

D. The Pre-Trial Memorandum must be filed no later than **April 30, 2021**, with a courtesy copy delivered to Department XVI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69. Counsel should include the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

E. All motions in limine to exclude or admit evidence must be in writing and filed no later than **March 15, 2021.** Orders shortening time will not be signed except in **extreme emergencies**.

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

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

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

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

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

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LAS VEGAS NV 89155

prior to the firm trial date given at Calendar Call.. Any objections or counterdesignations (by page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the firm trial date. Counsel shall advise the clerk prior to publication.

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

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

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

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

Counsel is asked to notify the Court Reporter at least two (2) weeks in advance if they are

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

going to require daily copies of the transcripts of this trial or real time court reporting. Failure to do so may result in a delay in the production of the transcripts or the availability of real time court reporting.

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

DATED: August 31, 2020

Timothy C. Williams, District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and/or fax for Case No. A758528.

/s/ Lynn Berkheimer

Lynn Berkheimer, Judicial Executive Assistant

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X, Plaintiff, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **REPLY IN SUPPORT OF PLANTIFF LANDOWNERS' MOTION TO DETERMINE "PROPERTY INTEREST"** Hearing date: September 17, 2020 Hearing time: 9:00 am ***Hearing Requested***

INTRODUCTION

The Landowners motion before this Court requested this Court to confirm two very narrow issues under eminent domain law: 1) that the 35 Acre Property is hard zoned R-PD7 as of the relevant September 14, 2017, date of valuation; and, 2) that this zoning confers the right to use the 35 Acre Property for "single-family and multifamily residential." In response, the City filed a 27-

page opposition, citing irrelevant petition for judicial review standards to obfuscate the issues and distract this Court from the relevant and simple inquiry before it. However, in its response, importantly, the City does not dispute that the property is hard zoned R-PD7. *See* Opp. at 10:17-18 (conceding R-PD7 zoning "is not disputed."). Therefore, the only remaining inquiry before this Court is for the Court to further confirm that the permitted use *by right* under the R-PD7 zoning is "single-family and multi-family residential."

Confirmation of this second issue must be made by this Court[1] and it is absolutely critical that it be made at this time. Just compensation is based on "what the owner has lost"[2] and before what was lost can be determined, the underlying "property interest" must be determined. Then, and only then, can the appraisers value the 35 Acre Property. Furthermore, neither the facts or law in the Landowners motion are in dispute – 1) the City concedes the R-PD7 hard zoning; and, 2) the City Code expressly states those uses that are permitted *by right* under this R-PD7 zoning. Asking the Court to acknowledge and confirm the property interest is necessary at this time to assure the proper appraisal analysis and that there are no further delays in this proceeding.

Because the City cannot refute that the 35 Acre Property is hard zoned R-PD 7 and because R-PD 7 under the City's own code means the Landowner is permitted to build single family and multi-family residential *by right*, the City provides irrelevant arguments that are contrary to the very facts and law it concedes.

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[1] McCarran Int'l. Airport v. Sisolak, 122 Nev. at 661 (2006) (whether a taking has occurred is a question of law and the court must first determine whether the plaintiff possess a valid interest in the property affected by the governmental action); *see also* County of Clark v. Alper, 100 Nev. 382 (1984) (inverse condemnation proceeding are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles applied to formal condemnation proceedings); ASAP Storage v. City of Sparks, 123 Nev. 639 (2008) (holding the term "private property" in Nevada's Just Compensation Clause requires that an individual have a "property interest" to assert a takings claim and then identifying the property interest).

[2] *See* Del Monte Dunes, 526 U.S. at 711 (In determining just compensation, "the question is what has the owner lost, not what has the taker gained.") (citation omitted).

This Court should grant the Landowners' Motion for Determination of Property Interest because: 1) the City's 27-page Opposition is based almost entirely on Petition for Judicial Review standards, a position this Court has repeatedly rejected; 2) under eminent domain law, a residential use is permitted *by right* on property hard zoned R-PD7; 3) zoning takes precedence over the City's General Plan; and 4) the Peccole Ranch Concept Plan (PRMP) has no effect on the 35 Acre Property.

ARGUMENT

1.

NEARLY ALL OF THE CITY'S 27-PAGE OPPOSITON MUST BE DISREGARDED, BECAUSE IT IS BASED ON PETITION FOR JUDICIAL REVIEW LAW AND STANDARDS

A. The Findings of Fact and Conclusions of Law from the Petition for Judicial Review Must Not Be Considered When Deciding the "Property Interest" Issue

The City's first argument in its 27-page Opposition is that this Court's Findings of Fact and Conclusions of Law entered in the Petition for Judicial Review (hereinafter "the PJR FFCL") require a finding that the Landowners have no "property interest" in the 35 Acre Property and that the Landowners' "failure to cite that [PJR FFCL] in this motion, speaks volumes." Opp. at 3:10-11; 9-10. However, this Court has repeatedly rejected the City's position that the PJR FFCL governs this inverse condemnation case, first, severing the inverse condemnation claims from the PJR claims and, second, holding in three orders that the "facts and law" and the "the evidence and burden of proof" are distinct matters and, for this purpose, the PJR law does not apply in this inverse condemnation case. In fact, this Court has explicitly held that it is "improper" to apply the PJR FFCL and PJR legal standards in this inverse condemnation case:

> January 5, 2019, Order - "[T]his Court ***had no intention of making any findings of fact, conclusions of law or orders regarding the Landowners' severed inverse condemnation claims*** as part of the Findings of Fact and Conclusions of Law entered on November 21, 2018 ("FFCL") [PJR FFCL]. Exhibit 17 to this Reply, Appendix of Exhibits to Reply ("App.") at 0002 (January 5, 2019, Order *Nunc Pro Tunc,* 2:14-17).

May 15, 2019, Order - "[B]oth ***the facts and the law are different*** between the petition for judicial review and the inverse condemnation claims. The City itself made this argument when it moved to have the Landowners' inverse condemnation claims dismissed from the petition for judicial review earlier in this litigation. Calling them 'two disparate sets of claims' the City argued that ..." Exhibit 18 to Reply, App. at 0024 (May 15, 2019, Order, 21:15-20).

May 15, 2019, Order - "***The evidence and burden of proof are significantly different*** in a petition for judicial review than in civil litigation. And, as further recognized by the City, there will be additional facts in the inverse condemnation case that must be considered which were not permitted to be considered in the petition for judicial review. . . . As an example, if the Court determined in a petition for judicial review that there was substantial evidence in the record to support the findings of a workers' compensation hearing officer's decision, that would certainly not be grounds to dismiss a civil tort action brought by the alleged injured individual, as there are different facts, different legal standards and different burdens of proof." Id., App. at 0025 / 22:1-11.

May 15, 2019, Order - "[T]he City cites the standard for petitions for judicial review, not inverse condemnation claims. A petition for judicial review is one of legislative grace and limits a court's review to the record before the administrative body, ***unlike an inverse condemnation***, which is of constitutional magnitude and requires all government actions against the property at issue to be considered." Id., App. at 0011-0012 / 8:25 – 9:2.

May 7, 2019, Order - "[T]he Court concludes that its conclusions of law regarding the petition for judicial review ***do not control its consideration of the Developer's [Landowner's] inverse condemnation claims***." Exhibit 19 to Reply, App. at 0038 (May 7, 2019, Order, 11:20-22)

May 15, 2019, Order - "For these reasons, ***it would be improper to apply the Court's ruling from the Landowners' petition for judicial review to the Landowners' inverse condemnation claims.***" Exhibit 18 to Reply, App. at 0026 / 23:7-8.

And, on the specific pending *property interest* topic, this Court held that under eminent domain law "every landowner in the state of the Nevada has the ***vested right*** to possess, use, and enjoy their property," that this eminent domain law applies to determine the *property interest* in this case, and that the petition for judicial review law (cited in the City's 27-page Opposition) is entirely irrelevant when deciding this issue:

May 15, 2019, Order - "Furthermore, ***the law is also very different in an inverse condemnation case than in a petition for judicial review***. Under inverse condemnation law, if the City exercises discretion to render a property valueless or useless, there is a taking. Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007), McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (Nev. 2006), City of Monterey v. Del Monte

Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999), Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). ***In an inverse condemnation case, every landowner in the state of Nevada has the vested right to possess, use, and enjoy their property and if this right is taken, just compensation must be paid***. Sisolak. And, the Court must consider the "aggregate" of all government action and the evidence considered is not limited to the record before the City Council. Merkur v. City of Detroit, 680 N.W.2d 485 (Mich.Ct.App. 2004), State v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015), Arkansas Game & Fish Comm's v. United States, 568 U.S. 23, 133 S.Ct. 511 (2012). ***On the other hand, in petitions for judicial review, the City has discretion to deny a land use application as long as valid zoning laws are applied, there is no vested right to have a land use application granted, and the record is limited to the record before the City Council***. Stratosphere Gaming Corp., v. City of Las Vegas, 120 Nev. 523, 96 P.3d 756 (2004). Exhibit 18 to Reply, App. at 0025 / 22:13-27

May 15, 2019, Order - "Any determination of whether the Landowners have a 'property interest' or the vested right to use the 35 Acre Property ***must be based on eminent domain law, rather than the land use law."*** Exhibit 18 to Reply, App. at 0010 / 7:26-27.

Accordingly, the City's arguments based solely on the PJR FFCL or PJR law must be rejected.

B. Given the Courts Clear Prior Rulings on This Issue, the Landowners Will Not Address the Sections the City Devotes to the PJR FFCL and PJR Law as These Sections are Entirely Irrelevant to the "Property Interest" Inquiry before This Court

The law of this case[3] is that the "property interest . . . must be based on eminent domain law, rather than the land use law [PJR standard]," therefore, the Landowners need not address the following sections of the City's Opposition:[4]

City Sections

II. Arguing that zoning does not create a vested right, Opp. at 10-11 (relying solely on the inapplicable PJR FFCL).

A. Arguing that Nevada law consistently holds that zoning does not create a vested right, Opp. at 11 (relying solely on distortions of inapplicable PJR case law).

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[3] *See* Hsu v. Clark County, 123 Nev. 625 (2007) (courts generally refuse to reopen what has already been decided).

[4] These sections from the City's Opposition encompass 18 out of the City's 27 pages of argument and are based solely on the following PJR cases: Am. W. Deve., Inc. v. City of Henderson, 111 Nev. 804 (1995); Stratosphere Gaming Corp. v. City of Las Vegas, 120 Nev. 523 (2004); City of Reno v. Nev. First Thrift, 100 Nev. 483 (1984); Bd. of Cnty. Comm'rs v. CMC of Nev., Inc., 99 Nev. 739 (1983); Tigh v. von Goerken, 108 Nev. 440 (1992); Nev. Contractors v. Washoe Cnty., 106 Nev. 310 (1990).

B. Arguing that the City's regulations provide the City with discretion to deny development, Opp. at 11-14 (relying solely on distortions of inapplicable PJR case law).

E. Arguing that zoning is irrelevant to defining the Developer's property right or interest or whether the City is liable for a taking, Opp. at 16-19 (relying solely on distortions of inapplicable PJR case law and addressing the taking issue that is not even before the Court).

Before moving on, however, it is worth noting the inescapable fallacies in the City's flawed legal arguments. First, the City asserts that the City has "discretion" to deny any and all development applications under PJR law and, therefore, no landowner in the City of Las Vegas has any *property interest* as long as any development application is subject to consideration by the City Council. This is a wildly unconstitutional position in an eminent domain case as it would allow the City to take property that has not yet received a development application approval ***without paying for the taken land*** as, according to the City, the land has no *property interest* yet. Not only does this defy common sense, it is simply not the law.

Second, the City references the eminent domain cases cited by the Landowners and concludes, "[w]hile these cases show that courts might consider zoning when determining value of a property, they do not support the contention that zoning is relevant to determine a property interest, or that zoning establishes a right to 'use property.'" Opp. at 17, 18-19. This makes no legal or common sense whatsoever. The value of property is inextricably intertwined with the legally permissible use of the property - if there is a right to use property, it has value. Stated another way, if zoning allows the use of a property, it has a value attributed to that use. As a result, by conceding that zoning is relevant to determining the value of property in an eminent domain action, the City admits that zoning establishes the use of the property or the "property interest." *See* f.n. 6, below.

2.

THE ISSUE BEFORE THIS COURT IS WHETHER, UNDER EMINENT DOMAIN LAW, RESIDENTIAL USE IS PERMITED *BY RIGHT* ON PROPERTY HARD ZONED R-PD7

A. Nevada Eminent Domain Law Clearly States that Hard Zoning is Used to Determine the Underlying "Property Interest" in Eminent Domain Actions

The City asserts that zoning "is ***irrelevant*** to determine the 'underlying property interest'" in an inverse condemnation action, but fails to cite to any eminent domain law, or even sound argument, that supports this assertion. Opp. at 16:21-22, 19:17. Emphasis added. If zoning is "irrelevant" to determine a *property interest* in inverse condemnation cases, then what is relevant? According to the City's legal argument (which has already been rejected by this Court in the three orders cited above), no *property interest* exists with respect to zoned property if its General Plan designation is inconsistent with the zoning, meaning all properties in the City of Las Vegas that have inconsistent land use designations are worthless and can be taken without payment of just compensation. Not only is this contrary to the City Code and the law in Nevada, it is contrary to the clear and unwavering position the City has publicly declared at nearly every hearing held before the City.[5]

Eminent domain law unanimously holds that the underlying *property interest* in an eminent domain case is determined ***based on the hard zoning***, unless it can be shown that a higher zoning could be achieved.[6] This is hornbook eminent domain law and has never been challenged in the

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[5] See argument below in section 2. B. and section 3, setting forth this City position.

[6] City of Las Vegas v. C. Bustos, 119 Nev. 360 (2003) (district court properly considered current zoning and potential for higher zoning); Clark County v. Alper, 100 Nev. 382 (1984) (as a restriction on land use, the existing zoning ordinance is proper matter to consider in an eminent domain action), *citing* U.S. v. Edent Memorial Park Ass'n, 350 F.2d 933 (9th Cir. 1965) (taken land must be valued based on existing zoning ordinance). *See also* Vacation Village, Inc. v. Clark County, 497 F.3d 902 (2007) (citing Bustos, supra, for the proposition that district court should consider zoning ordinance existing at time of taking); Township of Manalapan v. Gentile, 2020 WL 2844223 (N.J. 2020) (highest and best use in eminent domain case is "ordinarily evaluated in accordance with current zoning." Id., at 8.); Berry & Co., Inc. v. County of Hennepin, 2017 WL

State of Nevada. Accordingly, the R-PD7 hard zoning on the 35 Acre Property must be used to determine the *property interest* in this eminent domain case for the 35 Acre Property as of the September 14, 2017, date of valuation.

B. The Nevada Supreme Court Established in the 17 Acre Case that the R-PD7 Zoning Governs Development

The City's assertion that the Nevada Supreme Court's 17 Acre Case opinion "did not find that R-PD7 ***governs*** the property" is without any basis. Opp. at 15:27. The exact same arguments the City is presenting to this Court were presented to the Nevada Supreme Court in the 17 Acre Property appeal, namely, that there is a PR-OS over the property on the Peccole Concept Plan [PRMP] and the City's General Plan, that these "plans" govern development, not hard zoning, and that the PR-OS precludes residential uses, as follows:

- "Thus, in approving the Peccole Ranch Master Plan [PRMP], the City expressly designated the Subject Property [17 Acre Property] as open space/golf course/drainage with zero net density [PR-OS]." Exhibit 41 to Reply, App. at 0169 (Respondent's Answering Brief on appeal in 17 Acre Property Case, p. 9).

- "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 again in 1999. [citation omitted] 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)." Id.

- "Both the City's Master Plan [General Plan] and the City's Code preclude residential units on land designed as PR-OS." Id., at 0170 / 10.

The Nevada Supreme Court flatly rejected the argument that the Peccole Concept Plan and the Las Vegas General Plan govern development, instead, finding that the R-PD7 hard zoning

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1148781 (2017) (In an eminent domain case, "[g]enerally, legally permissible uses would conform to the land's current zoning classification." Id., at 6). *See also* S. Bernstein, *Zoning as a Factor in Determination of Damages in Eminent Domain*, 9 A.L.R.3d 291 (2005), citing City of Las Vegas v. C. Bustos, supra. (("it is generally held that, as a restriction on land use, an existing zoning ordinance is a proper matter for consideration in a suit for the condemnation of property, for the purpose of determining the actual market value thereof in measuring damages."); 4 Rathkopf's The Law of Zoning and Planning § 75:6, Evidence of Probability of Zoning Change (4th Ed.) (Where property taken by eminent domain is subject to zoning, the permitted use as it affects value is that use ordinarily authorized by the zoning regulations at the time of the taking.).

governs development, holding "the parcel carries a zoning designation of residential planned development district [R-PD7]" and that, with this R-PD7 zoning, all that was needed to actually build on the property was a "site development plan." Mot. Exhibit 4, at 4. The Court expressly rejected any application of the PRMP, stating a major modification of the PRMP was not required to build residential units. Id.

Accordingly, there is a Nevada Supreme Court opinion directly on point, holding: 1) zoning governs development in the City of Las Vegas; 2) R-PD7 zoned property may be used for residential purposes; and, 3) the PRMP and City General Plan do not govern development.

C. For At Least the Past 45 Years the City Has Applied Zoning to Determine Land Uses / Property Interest, Not the City's General Plan

Contrary to its current argument, the City has repeatedly maintained, consistent with the Nevada Supreme Court 17 Acre Property opinion, that: 1) zoning governs the use of property in the City of Las Vegas (property interest); and, 2) the City's General Plan has no legal effect on the presently existing legally permissible use of property and its development in accordance with that use.

In pleadings submitted under Rule 11 to Judge Crockett the City argued that 1) "[i]n the hierarchy, ***the land use designation is subordinate to the zoning designation;***" and, 2) that "***zoning designations specifically define allowable uses*** and contain the design and development guidelines for those intended uses" and then submitted a "land use hierarchy" chart from the City's own 2020 Master Plan that shows zoning at the top of the hierarchy to prove that existing "zoning defines allowable uses" presently permitted on a property in the City of Las Vegas, not the General Plan, which applies to future allowable uses *in the case of a change in zoning only*. *See* Exhibit 20 to Reply, App. at 0042 (Portion of City Brief to Judge Crockett) and Exhibit 21 to Reply, App. at 0044 (City Land Use Hierarchy Chart). And, in pleadings submitted in an inverse condemnation case under Rule 11 to Judge Sturman the City maintained that "a City's Master Plan [General Plan]

is a ***planning document***" and "that a designation on the General Plan "was a routine planning activity that had ***no legal effect on the use and development***" of affected property. Exhibit 22 to Reply, App. at 0046-0047, 0049 (City Opposition filed in Moccasin & 95, LLC v. City of Las Vegas, portions only, pp. 8:22-23; 8:28-9:1-2**;** 11:16-18). Emphasis added. Moreover, two City Attorneys submitted affidavits under oath to Judge Sturman that "the Office of the City Attorney has ***consistently*** advised the City Council and the City staff that the City's Master Plan [General Plan] is a ***planning document only*** and that placement of a roadway [designation] on the Master Plan [General Plan] ***cannot be used to restrict or impair the development of adjoining parcels***."[7] Exhibit 23 to Reply, App. at 0050-0053 (City Attorney Affidavits). Emphasis added.

Counsel for the Landowners has handled 100s of eminent domain cases in the State of Nevada over the past 45 years and, as confirmed by the City Attorneys in this very case, zoning has always been used to determine the property interest in these cases. Counsel has never had to litigate in a Nevada eminent domain case that zoning is "irrelevant" to the property interest determination because it is axiomatic. Further evidencing that the City clearly understands that zoning governs the use of property is the City's official process to determine the use of property within its jurisdiction requires submitting a "Zoning Verification Letter Form" to the City (Mot., Exhibit 2) after which the City provides a "Zoning Verification Letter" (Mot., Exhibit 3). Moreover, when purchasing a property, title insurance companies issue "zoning" endorsements to insure the allowable use for the property, not "general plan designation" endorsements. Title companies rely on Zoning Confirmation Letters from municipalities prior to issuing the ALTA 3-06 endorsement. The endorsement provides coverage regarding: 1) the zoning classification of the property; and, 2) the types of uses allowed under that classification.

D. The 35 Acre "Property Interest" Must Be Decided Based on Those Legally Permitted Uses For R-PD7 Zoning in the City's Code

Because zoning governs the legally permitted use of property, this Court's "property interest" determination must be decided based upon those uses that can be made of the 35 Acre Property under the R-PD7 zoning. In regards this issue, the City asserts that undersigned counsel makes a "blatant misrepresentation." Opp. 14:22-23. Undersigned counsel has never and will never make any sort of misrepresentation to this court. There are two sections of the City Code that undeniably state that residential use is permitted *by right* on R-PD7 zoned property.

First, the R-PD section of the City Code states that "single-family and multi-family residential" are permitted uses *by right* on R-PD7 zoned properties. Under LVMC UDC 19.10.050 (C)(1), the "Permitted Land Uses" in the R-PD District are "single-family and multi-family residential." *See* mot. Exhibit 5. The City Code then defines "Permitted Uses" as "Any use allowed in a zoning district as a matter ***of right***." *See* Mot. Exhibit 8 (LVMC 19.18.020, "permitted uses" defined). Accordingly, since the 35 Acre Property is zoned R-PD7, single-family and multi-family residential are uses permitted "by right" on the property.

Second, the standard residential zoning district section of the City Code also states that residential use is permitted "by right" on R-PD7 zoned properties. R-PD7 zoning is a designation that means up to 7 residential units per acre may be developed.[8] The "standard residential district" that is listed in the City's Land Use Table and which is most compatible to the R-PD7 zoning is used to determine the development densities allowed on the R-PD7 zoned property. *See* Mot. Exhibit 5, LVMC 19.10.050(A) and (C)(3) ("the types of development permitted within the R-PD District can be more consistently achieved ***using the standard residential districts***, which provide

[8] *See* City Opp. Exhibit S, Vol 2, part 2, p. 340 / CLV210178, section (3) (-C-) stating "The number of dwelling units per gross acre shall be placed after the zoning symbol R-PD; for example, a development for 6 units per gross acre shall be designated as R-PD6."

a more predictable form of development" and "***The 'equivalent standard residential district' means a residential district listed in the Land Use Tables*** which, in the Director's judgment, represents the (or a) district which is most comparable to the R-PD District in question, in terms of density and development type."). The "standard residential district" that is most compatible to the 35 Acre Property's R-PD7 zoning is R-2, because R-2 allows 6-12 units per acre and R-PD7 allows up to 7 units per acre. *See* Mot., Exhibit 7 (LVMC 19.01.100). Therefore, under the City Code, the R-2 "standard residential district" is used to determine the development densities on R-PD7 zoned property. The City's Land Use Table then provides the uses and densities for the R-2 district. "Single family residential" is a "permitted use" in the R-2 district and the City Code defines a "permitted use" on its Land Use Table as a use "***by right***." The following demonstrates this analysis on the City's Land Use Table as follows:

[see Land Use Table on following page]

Table 1 - Interpretation of Land Use Tables 19.12.010(B)	
Symbol	Meaning
P	The use is permitted as a principal use in that zoning district by right.
A	The use is permitted as an accessory use to a main use in the district. This does not exclude other land uses which are generally considered accessory to the primary use.
C	The use is permitted, but only in accordance with the conditions specified in LVMC 19.12.070 for conditional uses.
S	The principal use is permitted in that zoning district only after first obtaining a Special Use Permit (SUP) as set forth in LVMC 19.16.110. Base standards may apply to an SUP approval, as specified in LVMC 19.12.070.
H	The use is permitted by means of a Home Occupation Permit.
T	The use is permitted by means of a Temporary Commercial Permit in accordance with LVMC 19.16.160.
	A blank square shall mean that the use is not allowed in that zoning district.

Secondhand Dealer														C	C	S	C	C
Click Title for additional information	U	R-E	R-D	R-1	R-SL	R-CL	R-TH	R-2	R-3	R-4	R-MH	P-O	O	C-D	C-1	C-2	C-PB	C-M	M
Senior Citizen Apartments									P	P					C				
Sex Offender Counseling Facility															S	S		C	C
Sexually Oriented Business *(Ord. 6593 §2, 08/16/17)*																		C	C
Shopping Center															P	P		P	P
Short-Term Residential Rental *(Ord. 6585 §11, 06/21/17)*	C	C	C	C	C	C	C	C	C	C		C	C		C	C	C		
Single Family, Attached							P	P	P	P									
Single Family, Detached	P	P	P	P	P	P	P	P	P	P	P								

See Mot., Exhibit 6 (LVCM 19.12.010).

This means that residential is a use permitted "by right" for property that is hard zoned R-PD.[9] Accordingly, the second request in the Landowners' Motion should be granted, namely, that

[9] The City asserts that residential is not the only use allowed in the R-PD zoning, because the zoning also allows for residential "supporting uses." City Opp. at 14:12-15. Contrary to the City's disingenuous interpretation, "supporting uses" refers to those uses that "support" the residential development, like a carport, not some use independent of the residential development, like open space which is a separate and defined land use.

the permitted use of the 35 Acre Property "by right" under the R-PD7 zoning is "single-family and multi-family residential."[10]

E. The Clark County Tax Assessor Found that the Lawful use of the 35 Acre Property is Residential

An additional reason to find that a residential use is permitted by right is in September, 2017 the Clark County Tax Assessor and the Landowners entered into a "stipulation" pursuant to NRS Chapter 261 that as of December, 2016, the "lawful" use of the 35 Acre Property is single family residential[11] and the 35 Acre Property has been valued at $17,886,751.00 (as of 2017), requiring that the Landowners pay over $200,000 per year based on this single family residential use and value for which the City of Las Vegas receives a portion of those tax proceeds.[12]

3.

REBUTALL OF THE CITY'S GENERAL PLAN AND PRMP PR-OS ARGUMENTS

The City maintains that all of the above Nevada eminent domain law, the Nevada Supreme Court Order right on point, the City's own position for the past 45 years, the City's own Municipal Code, and the County Assessor finding that the lawful use of the 35 Acre Property is "residential" should be disregarded and, instead, this Court should apply two "plans" to determine the "property interest" issue - the City's General Plan and the Peccole Ranch Concept Plan (PRMP), which allegedly designate the 35 Acre Property "PR-OS." As explained above, the Nevada Supreme Court already rejected this City argument, holding that the R-PD7 zoning governs development.

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[10] Multi-Family is also a permitted use on R-PD7 Property. As explained in the Landowners' Opening Motion, LVMC 19.10.050 (C) establishes the "**permitted** land use" on R-PD7 zoned property as "[s]ingle-family and multi-family residential." *See* Mot. Exhibit 5.

[11] Exhibit 26 to Reply, App. at 0064 ("Stipulation for the State Board of Equalization," dated September 21, 2017).

[12] Exhibit 24 to Reply, App. at 0054-0055 (Assessor Summary Valuation); Exhibit 25 to Reply, App. at 0056-0061 (Assessor Valuation Analysis); Exhibit 25a to Reply, App. at 0062-0063 (Assessor Summary Page).

See Mot. Exhibit 4, at 4. This means that neither the City's General Plan nor the PRMP apply for purposes of determining a "property interest" in this case. Moreover, the following analysis further rebuts this City argument.

A. Rebuttal of the City's Assertion that the City's General Plan Applies and that the General Plan Designates the 35 Acre Property "PR-OS"

The City's argument that the City's General Plan designates the 35 Acre Property PR-OS (parks, recreation, and open space) and this City General Plan designation must be used to determine the property interest issue in this case is both legally and factually wrong.

1. The City's General Plan Does Not Officially Designate the 35 Acre Property PR-OS

To amend the City's General Plan to provide a "new" land use designation for a property within the City jurisdiction, the City must comply with the NRS Chapter 278 statutory requirements and LVMC 19.16.030, which are extensive. Here, contrary to their position during the Landowners' attempts to develop the 35 Acre Property, the City is asserting that a "PR-OS" designation significantly restricts the use of property to only "open space."

Indeed, the City Planning Department, the City Attorney's Office, and the Landowners have conducted extensive and exhaustive searches to determine whether the 35 Acre Property has ever been legally designated "PR-OS" on the City's General Plan under NRS Chapter 278 and LVMC 19.16.030 since its zoning to R-PD7 under Ordinance 5353 on August 15, 2001. The outcome of the research is that the City has never properly or officially designated the 35 Acre Property PR-OS.

- City Planning Department and City Attorney's Office - "If I can jump in too and just say that everything Tom [Tom Perrigo – Director of Planning] said is absolutely accurate. The R-PD7 preceded the change in the General Plan to PR-OS. **There is absolutely no document that we could find that really explains why anybody thought it should be changed to PR-OS**, except maybe somebody looked at a map one day and said, hey look, it's all golf course. It should be PR-OS. I don't know." Exhibit 27 to Reply, App. at 0067 (June 13, 2017 City Planning Commission Meeting Transcript, statement by City Attorney

Brad Jerbic, confirming the research done by Tom Perrigo from the City Planning Department).

- Landowners - "**We've done a lot of research and haven't been able to find any indication of how PR-OS was placed on this property**." Exhibit 28 to Reply, App. at 0074 (June 21, 2017, City Council Transcript, statement by Stephanie Allen, counsel for the Landowners, p. 20:519-520).

Therefore, any map that the City may present to this Court that shows a "green" shade on the 35 Acre Property to be "PR-OS" is meaningless; it is nothing more than a map where a City employee hit a button to color the area over the 35 Acre Property green. It is not a properly adopted NRS Chapter 278 and LVMC 19.16.030 General Plan, instead, it is merely a map that is "for reference only."[13]

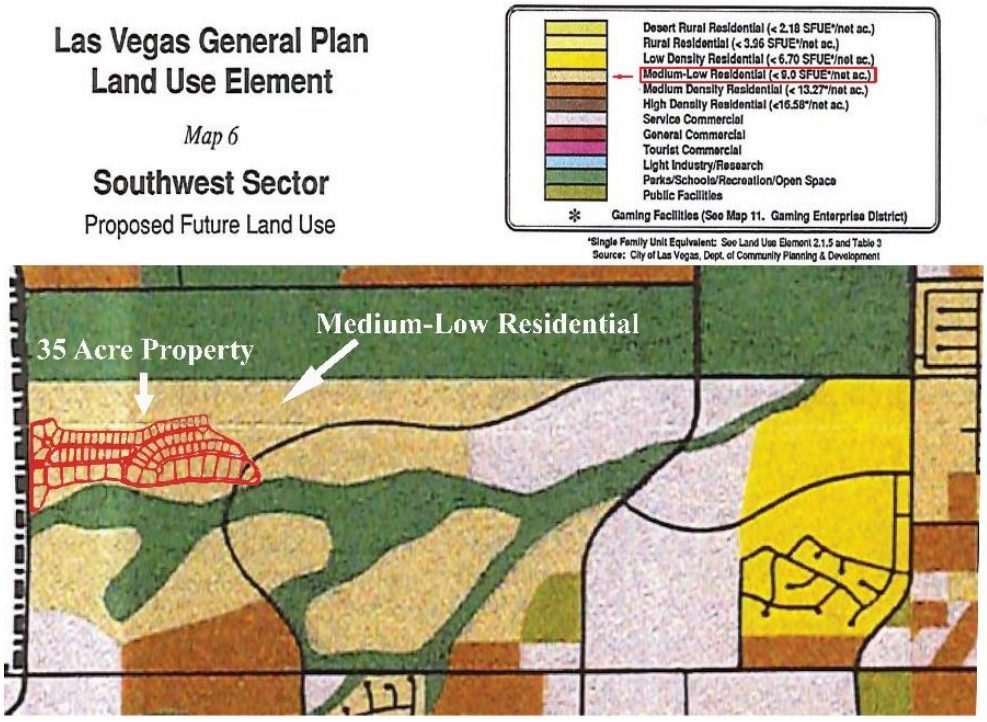
Finally, the City asserts that when the Landowners made their applications to develop the 35 Acre Property in 2016, they filed applications that stated there was a "PR-OS" on the property. City Opp. 8:2-5. The City neglects to inform this Court that it was the City that *required* the landowner to file the applications noting the PR-OS designation. At the time the applications were filed the Landowners vehemently contested the alleged PR-OS designation and the City refused to accept the applications without this PR-OS reference. *See* Exhibit 29 to Reply, App. at 0079-0087 (letter from Landowner attorney to City Attorney Brad Jerbic). At the time of the applications, the Landowner confirmed that the City "told us that you 'could not find' any record of the [PR-OS] designation," confirmed with the City that the PR-OS "is not valid," and demanded that "any such PROS designation must be removed from the Property forthwith." Id. Moreover, the City continually informed the Landowner and the public at the City Council hearings that the PR-OS

[13] The land use maps the City attaches to its Opposition as part of City Exhibits O, P, Q, R, and S, that are dated after 1992 specifically state at the bottom right hand corner that, "GIS maps are normally produced only to meet the needs of the City***"*** and "this map is ***for reference only."*** It appears that a City employee altered the "for reference only" maps to change the 35 Acre Property to a green PR-OS without any NRS Chapter 278 or LVMC 19.16.030 authority, which, as explained above, is not sufficient to legally designate the 35 Acre Property as "PR-OS."

designation was of no consequence and was not even necessary to change if zoning wasn't being changed. *See e.g.* Exhibit 40 to Reply, App. at 0153 (January 1, 2018 City Council transcript).

2. The City's 1992 General Plan Map Designates the 35 Acre Property "Medium – Low Residential" / Up to Nine Residential Units Per Acre

The City's assertion that it has "repeatedly confirmed" the City's 1992 PR-OS designation of the Badlands by duly adopted legislation is also incorrect. City Opp. 21:9-10. First, as explained above, the City fails to provide this Court with the alleged legislation that followed the NRS Chapter 278 and LVMC 19.16.030 requirements, instead, it wants this Court to take its word that this legislation exists. Second, even if the City "confirmed" the 1992 General Plan map, this map identifies the 35 Acre Property shaded in light brown, which is "Medium-Low Residential" or up to nine single family residential units per acre, not PR-OS:



See Opp., Exhibit I, Vol 2, Part 1, p. 256 for full size map.

Finally, the City's 1992 General Plan Amendment was adopted through Ordinance 3636, which states that the Amendment cannot impact already zoned properties: "Section 3: The

adoption of the General Plan referred to in this Ordinance ***shall not be deemed to modify or invalidate any proceeding, zoning designation***, or development approval that occurred before the adoption of the Plan nor shall it be deemed to affect the Zoning Map adopted by and referred to in LVMC 19.02.040." Exhibit 30 to Reply, App. at 0090 (Ordinance 3636, adopted in 1992). Emphasis added. The City has conceded that the entire 250 Acre Residentially Zoned Property has been zoned R-PD7 under a resolution of intent as of 1990. Therefore, even if the green shade (PR-OS) had been on the 35 Acre Property two years later in 1992 (which it is not), it would not impact the use of the property, because it was already zoned R-PD7 under resolution of intent; just as the long time City attorney Brad Jerbic stated, the R-PD7 [zoning] preceded any alleged change in the General Plan of PR-OS. *See* Exhibit 27 to Reply, App. at 0067.

Plainly stated, the City cannot produce to this Court a City Ordinance that: 1) was properly noticed and adopted under NRS Chapter 278 and LVMC 19.16.030; 2) specifically identifies the 35 Acre Property to be changed on the General Plan; and, 3) then changes the designation on the 35 Acre Property from residential to "PR-OS." The reason the City cannot produce this is because its own planning department and City Attorney's office determined it does not exist.

3. A PR-OS Designation on the City's General Plan does not Trump Hard Zoning in an Inverse Condemnation Proceeding

Since there never has been a General Plan "PR-OS" designation on the Landowners' 35 Acre Property, a "PR-OS" could never "trump" the R-PD7 hard zoning on the 35 Acre Property. But, since the City raises this argument completely contrary to the position it has taken until this motion was filed, the Landowners provide the following bullet point summary of facts and law that entirely disprove this City argument in the context of inverse condemnation law:

- The Nevada Supreme Court considered the developability of the adjoining 17 Acre Property and determined that the R-PD7 zoning governs its use; there was no reference whatsoever to a "PR-OS" on the City's General Plan, even though the City's PR-OS argument was presented to the Court. Mot, Exhibit 4 at p. 4.

- Attorney General Opinion 84-6, holding "the Nevada Legislature has always intended local zoning ordinances to control over general statements or provisions of a master plan [General Plan]," citing to NRS 287.349(3)(e) ("if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence."). Exhibit 31 to Reply, App. at 0097 (AGO 84-6, pp. 18-19).

- As referenced above, the City Attorney has contended in pleadings and filings to the Court that, "[i]n the hierarchy, ***the land use designation is subordinate to the zoning designation***" (Exhibit 20 to Reply, App. at 0042) and a designation on the General Plan has "***no legal effect on the use and development***" of affected property (Exhibit 22 to Reply, App. at 0046-0047). Emphasis added.

- City Attorney Brad Jerbic stated that the "rule is hard zoning, in my opinion, does trump the General Plan designation." Mot., Exhibit 13, lines 1788-1789. "The zoning [R-PD7] has been in place here for 27 years. . . . "if you don't even have a general plan amendment that synchronized the General Plan with the zoning, the zoning is in place, and it doesn't change a thing." Exhibit 32 to Reply, App. at 00105 (transcript of August 2, 2017, City Council meeting, p. 95:2648-2654).

- City Planning Director Tom Perrigo stated, "If the land use and the zoning aren't in conformance, then the zoning would be a higher order entitlement." Exhibit 33 to Reply, App. at 0110 (Tom Perrigo Deposition, p. 53:4-6).

Therefore, the City's argument that there is a PR-OS on the City's General Plan that governs the development of the 35 Acre Property is both factually and legally incorrect.

B. Rebuttal of the City's Peccole Ranch Concept Plan (PRMP) Argument

The City's next argument is that a 30 year old concept plan from 1990 that was prepared by William Peccole (PRMP) designates "open space" over the 35 Acre Property and this Court must follow this PRMP. City Opp. at 3-4. As explained above, the Nevada Supreme Court rejected this City argument, holding "the parcel [17 Acre Property] carries a zoning designation of residential planned development district.. . . This process ***does not require Seventy Acres to obtain a major modification of the Peccole Ranch Master Plan*** [PRMP] prior to submitting the at-issue applications." *See* Mot., Exhibit 4 at p. 4. Long time City Attorney, Brad Jerbic, also rejected this City argument, stating, "The Peccole Ranch Phase II plan (PRMP) was a very, very, very general plan. I have read every bit of it. If you look at the original plan and look what's out there today, it's different. . . . So the plan - - the master plan that we talk about, ***the Peccole Phase 2 master***

plan (PRMP) is not a 278A agreement, it never was, never has been, not a word of that language was in it. We never followed it." Exhibit 34 to Reply, App. at 0121 (Badlands Homeowners Meeting Transcript, p. 60, 117). Emphasis added. The City's attempt to get this Court to ignore the Nevada Supreme Court opinion and the City Attorney's analysis should be rejected.

C. The Development of the 35 Acre Property is Not Governed by Any "Plan"

The City's last-ditch effort is to incorrectly assert that the 35 Acre Property is bound by an undefined "cluster zoning" or some undefined "conditions"[14] that are tied to a 2,000 + acre development "plan" for the area. To the contrary, the undisputed facts show that the 35 Acre Property has been zoned R-PD7 since at least 1990 and that Ordinance 5353 passed on August 15, 2001, unconditionally zoned the 35 Acre Property as R-PD7, meaning only the hard R-PD7 zoning governs the development of the 35 Acre Property. *See* Mot. Exhibit 10.

Moreover, the only plan in the area of the 35 Acre Property is the Peccole West/Queensridge development plan[15] and the 35 Acre Property is expressly excluded from this Peccole West/Queensridge plan.[16] As a result, the 35 Acre Property cannot serve as a conditional

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[14] The City's "condition" argument is without merit. It is well established that "land use regulations are in derogation of private property rights and must be construed narrowly in favor of the landowner." In re Champlain Oil Co. Conditional Use Application, 93 A.3d 139, 141 (Vt. 2014). In this connection, not every item discussed at a hearing becomes a "condition" to development, rather the local land use board has a duty to "clearly state" the conditions within the approval ordinance without reference to the minutes of a proceeding. Hoffmann v. Gunther, 666 N.Y.S.2d 685, 687 (S.Ct. App. Div. 2nd Dept. N.Y. 1997). Here, the City fails to provide any evidence that an ordinance adopted by the City "clearly states" a "condition" that the 35 Acre Property remain a "golf course" or "open space." And, according to Clyde Spitze, who assisted Mr. Peccole with his plans in the area in the 1990s, the City of Las Vegas has never imposed a condition that the 35 Acre Property remain a golf course or open space. Exhibit 35 to Reply, App. at 0128-0129 / pp. 178-179, 187.

[15] *See* Exhibit 37 to Reply, App. 0137-0140 (Queensridge CC&Rs and Peccole West Final Map); Exhibit 38 to Reply, App. at 0141-0145 (Clark County Assessor summary reports for properties in the area identifying the subdivision as "Peccole West.").

[16] *See* Exhibit 37 to Reply, App. 0139 ("Final Map for Peccole West" and the Queensridge CC&Rs, stating the 250 Acre Residential Zoned Land are "NOT A PART" of the Peccole West / Queensridge Plan) and Exhibit 39 to Reply, App. at 0146, 0147 (Nevada Supreme Court "Order

"open space" / "golf course" for the Queensridge CIC as alleged by the City. In other words, the 35 Acre Property cannot serve as a "condition" for something that it is not a part of.

Finally, the City's contention that 250 Acre Residential Zoned Land is part of some invented "cluster zoning"[17] is unsupported by any ordinance or City of Las Vegas Special Area Plan. It is undisputed that the separate parcels comprising the 250 Acre Residential Zoned Land are private property, are not municipally owned, not zoned 'CV' – Civic zoning district, and "not a part" of the Queensridge common interest community. Simply stated, the 35 Acre Property is an independent, R-PD7 hard zoned property and this hard R-PD7 zoning governs the use of the 35 Acre Property.

CONCLUSION

As explained, it is critical for this Court to make the "property interest" determination at this stage of these proceedings. The City has already conceded the Landowners first request, that the 35 Acre Property is hard zoned R-PD7 as of the relevant September 14, 2017, date of valuation, leaving only the Landowners' second request, namely, whether the permitted use *by right* under the R-PD7 zoning is "single-family and multi-family residential." As there is no proper factual or legal dispute that zoning governs the use of property and that single-family and multi-family residential are the permitted uses "by right" under this R-PD7 zoning, this Court should grant this second request to establish the "property interest."

Accordingly, it is respectfully requested that this Court enter an order that: 1) the 35 Acre Property is hard zoned R-PD7 as of the relevant September 14, 2017, date of valuation; and, 2)

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of Affirmance, Case No. 72455, at p. 2, holding the 250 Acre Residential Zoned Land "was **not part** of the Queensridge community under the original CC&Rs and public maps and records.").

[17] The City has invented its "cluster zoning" argument. The City has no evidence that "cluster zoning" actually occurred in the constructed Peccole West/Queensridge subdivision development nor has the City produced any evidence that Queensridge received any higher density under the R-PD7 zoning due to the alleged dedication of the 250 Acres as open space.

that the permitted use "by right" under the R-PD7 zoning are "single-family and multi-family residential."

Dated this 9th day of September, 2020.

LAW OFFICES OF KERMITT L. WATERS

BY: /s/ Kermitt L. Waters
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 9th day of September, 2020, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct copy of the Reply in Support of Plaintiff Landowners' Motion to Determine "Property Interest" was served on the below via the Court's electronic filing/service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to, the following:

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